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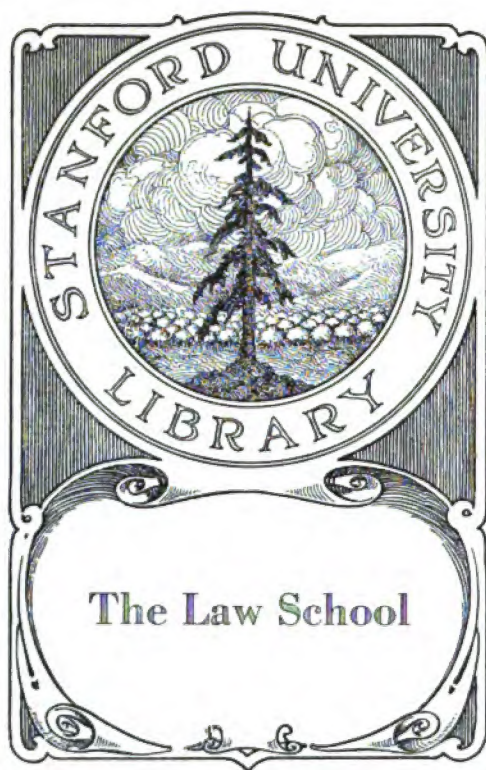
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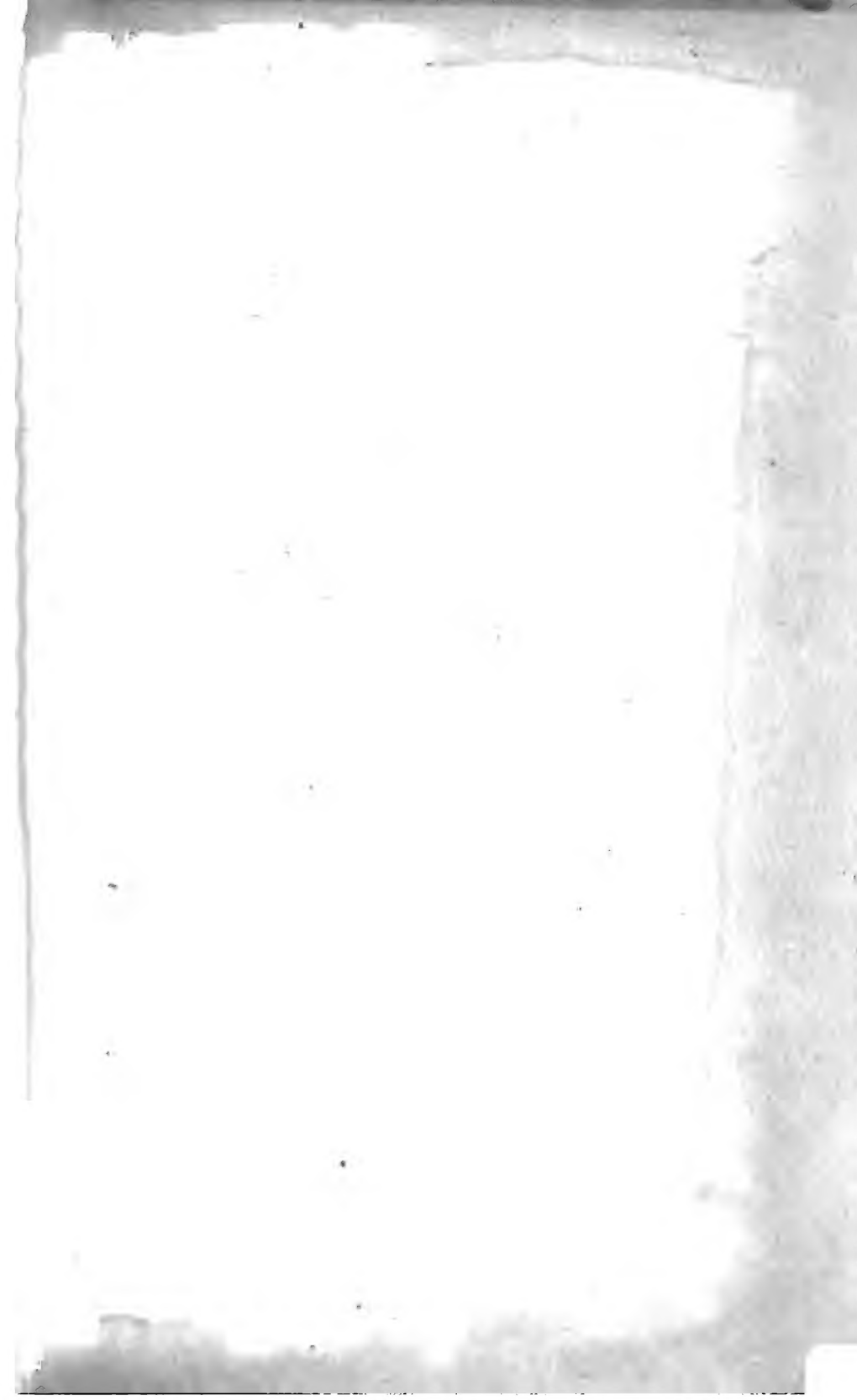
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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

*Gillaspie*

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQs.,

Now Reprinted in Full.

VOL. XXXVIII.

CONTAINING

CASES IN THE QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER, AND ON  
THE CIRCUITS, AND IN THE CENTRAL CRIMINAL COURT, FROM EAS-  
TER TERM, 2 VICTORIA, 1839, TO EASTER TERM, 4 VICTORIA, 1841.

AND ALSO,

CASES IN BANKRUPTCY,

IN THE COURT OF REVIEW, AND BEFORE THE LORD CHANCELLOR,  
FROM MAY, 1835, TO JUNE, 1836.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1865.

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PAVALI GEOMETE

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**AND ON**  
***The Circuits.***

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**By F. A. CARRINGTON AND JOSEPH PAYNE, Esqrs.,**  
**OF LINCOLN'S INN, BARRISTERS AT LAW.**


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 THE folios annexed to references "E. C. L. R.," in this volume, apply  
to the condensed edition of these Reports.

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CASES

AT

NISI PRIUS

*Millar*

COURT OF COMMON PLEAS.

*Sittings at Westminster in Easter Term, 1839.*

BEFORE MR. JUSTICE BOSANQUET.

WOODING v. OXLEY.—p. 1.

Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statements, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shown that what was done amounted to a breach of the peace.

TRESPASS for assaulting the plaintiff, and causing him to be imprisoned without reasonable or probable cause, and to find bail to answer a false and unfounded charge.

Pleas—first, Not guilty; and second, that *the defendant was lawfully possessed* of and was in a certain room, or apartment, situate in Mare Street, Hackney, and being so possessed, and being in the said room, the plaintiff shortly before the time when, &c., entered and came into the said room or apartment, and then made *a great noise, disturbance, and affray*, and abused, insulted, and ill-treated the defendant and others, his friends, then also lawfully being in the said room, or apartment; and the plaintiff then *greatly disturbed and disquieted* them in the peaceable and quiet possession of the said room, &c., *in breach of the peace*, &c.; whereupon the defendant then requested him to cease his said noise and disturbance, and depart from the said room, &c., which he wholly refused to do, but continued there making the disturbance, &c., whereupon the defendant, in defence of the said lawful possession, &c., and to restore good order and tranquillity, gave the plaintiff in charge to one John Gulliver, a constable, for the said refusal to depart and *for the said breach of the peace*, and required the said J. G. to remove him from the room and take him into custody, to be dealt with according to law. It then averred that the said J. G. took the

plaintiff to the station-house, and because it was late at night and an unreasonable hour to convey him before a justice, the constable necessarily detained him till he found bail to answer the said charge, and the defendant afterwards appeared before one William Grove, Esq., a justice, and charged the plaintiff with the breach of the peace, and disturbance aforesaid.—*Replicatio, de injuriâ.*

It appeared that the plaintiff, who was a master carpenter, on the evening of the 2d of April, had been attending a meeting of a benefit society, which he left about nine o'clock, and went to a meeting of a temperance society, at which the defendant was chairman. About two hundred persons were present. There was contradictory evidence as to what part the plaintiff took in the proceedings. According to the testimony of his own witnesses, when a man, who was addressing the meeting, said, that if a person drank water, his nerves would be as hard as iron, and he would be as strong as an elephant, the plaintiff merely said, "Yes, as a dead elephant," which created some laughter, and also made other observations, which had had the effect of interrupting the speaker, and diverting the attention of the meeting from his speech. These witnesses (who were, like the plaintiff, members of the benefit society, and came from it) stated, that the meeting was a public meeting, and that notice had been given of it by the circulation of handbills; and they denied that the plaintiff assaulted any one, or created any disturbance, or committed any breach of the peace. One of them said there was no noise but the questions and answers, and any unpleasantness that arose was attributable to the intemperance of Mr. Oxley, in leaving the chair, and going to the plaintiff, and saying that no person should put a question. One of the questions was, "What is to be done with the barley?" and the answer returned, "Give it to the pigs; they fatten pigs with it in America." On the cross-examination of this witness, he was asked by *Bompas*, Serjeant, for the defendant, "Were you not at the temperance society a week before; and was there not then a disturbance?"

*Storks*, Serjt., for the plaintiff, objected to the question, as the plaintiff was not shown to have been there at the time.

*Bompas*, Serjt.—It goes to the damages. I mean to contend that a number of persons went together from the benefit society to disturb the temperance meeting, and I think it important to show, that the witness had been there a week before when there was a disturbance.

*Bosanquet*, J.—My opinion is, that it is not evidence. I will take a note of it, if you please. I think you must show that the plaintiff was there.

A policeman stated, that he was fetched by Mr. Hunt, the secretary of the society, and that there was no disturbance when he got to the room; that the defendant met him in the yard, and asked why he was not there sooner? he replied, that he came as soon as he was sent for; that the defendant desired him to follow him into the room, which he did; that, when they got into the middle, the defendant pointed out the plaintiff and another person, and said, "These two gentlemen have been creating a disturbance the whole of the evening, and I give them in charge;" that he replied, "I have not heard or seen any thing which would justify me in taking them;" that the defendant said, "I insist on your taking them in custody;" that, after some further conversation, the defendant still insisting on their being taken, he (the witness) asked

them to go to the station, and they consented; and when there, the defendant gave charge of them, and signed the sheet containing the charge, which was "making a disturbance at the temperance meeting room, Mare Street, Hackney." The witness further stated, that the case was heard by Mr. Grove, the magistrate at Worship Street, on the following day, and was dismissed by him.

The witnesses on the part of the defendant stated, that the meeting was not a public meeting, but only a meeting of the members and friends; that the plaintiff and another person, who was taken into custody with him, when a person was speaking, cried out, "It's a lie;" that they pushed the secretary about from one to the other several times, and created so much confusion that the speakers could not be heard.

*Bompas*, Serjt., for the purpose of proving that the room was the defendant's, proposed to ask a witness who it was that took it.

*BOSANQUET*, J.—Is it not admitted on the pleadings? The replication of *de injuriâ* admits the title.

*W. H. Watson*.—It is only alleged that the defendant was lawfully possessed, and *de injuriâ* puts that in issue. There is no seisin in fee alleged.

The witness stated, that Mr. Oxley had possession of the room, as the Temperance Society occupied under his sanction.

*Storks*, Serjt., for the plaintiff, contended that the conduct of the defendant was an unwarrantable interference with the liberty of the subject, and a serious annoyance and inconvenience to the plaintiff, which entitled him to damages. If it was not a public meeting, why were hand-bills circulated, and why were not inquiries made at the door previous to admission? The object of the meeting was evidently publicity, and the aim of the speakers applause; and the defendant had no right to give the plaintiff into custody because he differed in opinion with the speakers, and therefore contradicted some of their statements.

*Bompas*, Serjt., for the defendant.—The defendant was chairman, and what motive could he have for interfering, if there was no disturbance? It is a curious fact, that so many of the benefit society's members should have gone to the temperance meeting. They do not affect to say that they were friends of the cause. If a chairman of a meeting sees a set of men coming from a public-house to disturb the meeting, is he not justified in interfering to put down the disturbance? It is evident, from there being several of the club there, that there was an intention to put down the meeting. It appears, that the expression, "it's a lie," was used, and, under those circumstances, whether the plea of justification is proved or not, you will say, I am sure, that no man who uses such language, ought to have more than a farthing damages. It appears, also, that the secretary was hustled and assaulted. If a chairman is not to interfere under such circumstances, no meeting of any society could be conducted at all.

*BOSANQUET*, J., in summing up, after reading the words of the special plea, told the jury that, in his opinion, proof of annoyance and disturbance, such as crying "*hear, hear,*" and putting questions to the speaker, and making observations on his statements, would not be a sufficient justification of the defendant's conduct; but, in order to find a verdict



for the defendant, they must be satisfied that what was done by the plaintiff amounted to a breach of the peace.

Verdict for the plaintiff—Damages, 5*l*.

*Storks*, Serjt., and *W. H. Watson*, for the plaintiff.

*Bompas*, Serjt., *R. Gurney*, and *Henry*, for the defendant.

*Sittings in London after Michaelmas Term, 1837.—Q. B. (a).*

BEFORE LORD DENMAN, C. J.

GREEN v. THE LONDON CEMETERY COMPANY.—p. 6.

A., himself a leaseholder of a house, entered into an agreement with B., to grant him an underlease of the house for twenty years and a fraction, from Midsummer, 1836. B. entered into possession, and paid rent to A., and underlet a portion of the house to C., from Michaelmas, 1836, and received from C. the first quarter's rent, due at Christmas, 1836. On the 11th of January, 1837, B., wishing to part with his interest before the execution of the lease, wrote to A., requesting him to insert the name of D. instead of his. D., a few days after, sent to A. a written consent to become his tenant, on the same terms as B. had agreed to; and, in consequence, the lease was, on the 15th of March, 1837, granted by A. to D., instead of to B. D. brought an action for use and occupation against C., to whom B. had underlet a part of the house, and claimed the quarter's rent due at Lady-day, 1837:—*Held*, that he was entitled to recover.

THE declaration stated, that the defendants were indebted to the plaintiff for the use and occupation of certain apartments. The plea was the general issue.

The action was brought to recover the sum of 25*l*., being a quarter's rent due at Lady-day, 1837, from the defendants, for apartments in a house No. 64, in Cornhill, which were occupied for the purposes of the Company. The case was tried chiefly upon admissions, from which it appeared that in the month of June, 1836, a person named Steed entered into a written agreement with a person named Lyon, who was the leaseholder under the Merchant Taylors' Company, of the house No. 64 Cornhill, by which agreement Lyon agreed to let the house to Steed for twenty years and three-quarters, wanting six days, from Midsummer, 1836, at 300*l*. a year, and Lyon undertook to execute a lease to Steed according to the terms of the agreement. Under this agreement Steed entered into possession and paid rent to Lyon, and underlet a part of the house to the London Cemetery Company, from Michaelmas, 1836, at the rent of 100*l*. a year, and received the first quarter's rent due at Christmas, 1836. On the 11th of January, 1837, Steed, being desirous of parting with his interest in the premises before the lease was executed to him, wrote to Lyon, stating that he had succeeded in obtaining a tenant for the premises in his stead. The letter was to this effect: "The gentleman is Richard Green, Esq., the ship-owner, of Blackwall, whose name you will be pleased to cause to be substituted for mine in the lease." On the 18th of January, Mr. Green wrote to Mr. Lyon, and consented to become tenant to him of the house on the same terms as

Mr. Steed had agreed to; and in consequence of this arrangement, the lease which was intended to have been granted to Mr. Steed, was granted by Mr. Lyon to Mr. Green. It was executed on the 15th of March, 1837.

*Platt*, for the plaintiff, contended, in his opening, that the plaintiff was entitled to recover the quarter's rent from the defendants, because they took under Steed, and were therefore estopped from disputing his interest in the reversion, and because Green acquired that interest from Steed before the rent became due which was sought to be recovered in the action.

In addition to the facts admitted as above, Steed was called as a witness for the plaintiff, and stated that he gave the Cemetery Company notice that he had agreed to part with his interest to Mr. Green. His evidence on the subject was as follows:—"I gave a written notice some time in January, 1837, I think to the clerk, Mr. Buxton, in the back room in Cornhill, at their place of business; I cannot say whether I gave the notice before or after I wrote the letter to Lyon about Green; I gave it while the negotiation was going on between Lyon, Green, and myself, and before the transaction was complete; I might have given the notice to the managing director; I know it was received, because it was commented upon to me at the board by the chairman; I think this was in the month of January; it was when I applied for my rent up to Christmas; he said, 'We have a letter of yours; how are we to know whether you are the landlord or not? we have a letter stating that we are to consider Mr. Green as landlord;' they objected to pay the Christmas rent, and did not pay till I threatened to distrain for it."

Lord DENMAN, C. J.—I think you may give evidence of the contents of the notice.

Witness.—I told them in the notice that I had negotiated the letting of the house to Mr. Green. On his cross-examination by *Kelly*, he said—"I think the notice was given while it was matter of negotiation, and before it was completed."

*Kelly*.—"Have you not since given notice to the company not to pay rent to Mr. Green?"

*Platt* objected.—The witness cannot get out of the written paper.

*Kelly*.—That is assuming the whole question. The other side rely on a notice; surely I am at liberty to show that it was countermanded.

*Platt*.—If the written documents before your lordship operate as a surrender, then he cannot alter it by any thing that he subsequently did or said.

Lord DENMAN, C. J.—I think it may possibly be material. It is but a notice. I think the question may be asked.

Witness.—I communicated to them that Mr. Green had not paid me the consideration for the transfer, but I never told them not to pay the rent to Mr. Green, nor not to consider themselves as Mr. Green's tenants.

*Kelly*, for the defendants.—Several questions of law arise in this case. It is said the defendants are estopped from denying Steed's title. I concur in that observation; but the question is, whether Steed's title has been vested in Green, the present plaintiff? I apprehend it has not. Steed came in under an agreement containing words of present demise. He was therefore the lessee of Lyon, a termor, and was himself a termor under Lyon, and entered into possession, and had a reversion to commence on the determination of the defendant's tenancy. The first

question will be, was there any surrender by Steed to Lyon of the term or any part of it? I submit that there was not. If there was, then will come the question whether he could surrender that which he had granted to the defendant? Steed says in his letter that he has obtained a tenant—that may be a good license to Lyon to grant the lease to Green; but the question is, whether it is a surrender of Steed's interest? A surrender must take place *eo instanti* and cannot commence in futuro. Now, this could only operate when the lease was granted, and therefore was not any surrender at all. At the time when the lease was granted nothing was done by Steed, but all was between Lyon and the present plaintiff. It appears that Steed had made the defendants his tenants, and had the reversion to commence on the determination of their tenancy—he had no present interest in the premises. He might, by a sufficient instrument, have surrendered what interest he had, if it was to operate immediately. There is a further difficulty which is insuperable against this plaintiff's recovering. Supposing Steed did surrender at the time, the only effect would be to put Lyon in the same situation as Steed, and that was only a reversion—and as a reversioner, he would be entitled to the rent, but a lease subsequently granted would not pass the reversion.

Lord DENMAN, C. J., (to *Kelly*.)—I think the question about the notice may be very material to your case; otherwise I should view the matter thus:—Lyon grants a lease to commence from Christmas, and the defendants become tenants to the plaintiff as the person to whom the lease was granted. I shall direct the jury to find for the plaintiff, and I will give you leave to move to enter a nonsuit or to have a special case.

*Platt*.—I do not understand your lordship to recommend any particular course?

Lord DENMAN, C. J.—No; I do not feel much doubt about it. I do not know what the effect may be.

*Platt* then called the clerk of the company, who swore that he had not received the notice spoken of by Mr. Steed, nor had he heard any thing of it.

Lord DENMAN, C. J.—There really is no question about the notice, unless the witness is perjured. He says he mentioned it to the board, and the chairman commented upon his letter. [His lordship then said to the jury]—In my opinion the plaintiff is entitled to recover. I think the defendants are tenants to him. You will therefore find your verdict for him, and Mr. *Kelly* will bring it before the court.

Verdict for the plaintiff—Damages, 25*l.*, subject, &c.

*Platt* and *James* for the plaintiff.

*Kelly* for the defendants.

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A rule nisi was granted in the ensuing term, pursuant to the leave given, which was called on for argument in Trinity Term, 1839, when, not being supported, it was without argument,

Discharged.

CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1839.

BEFORE MR. JUSTICE BOSANQUET, MR. JUSTICE PATTESON, AND MR.  
BARON GURNEY.

REGINA v. HANNON.—p. 11.

The 18th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 66, applies to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada.

THE first count of the indictment stated, that the prisoner, on the 14th September, in the 2d year, &c., at, &c., feloniously, knowingly, and without lawful excuse, had in his custody and possession a certain copper plate, upon which was engraved a part of a certain promissory note for the payment of money, purporting to be a part of a promissory note of a certain company of persons carrying on the business of bankers in a certain country under the dominion of Her Majesty; that is to say, in the province of Upper Canada, in North America, under the name and style of the President, Directors, and Company of the Bank of Upper Canada, the said company of persons being other than the Bank of England, which said part of a promissory note is as follows:—

TEN  
10 X N

TEN  
X C Ten

Chartered by an act of Parliament. The President, Directors & Co. of the Bank of Upper Canada, promise to pay ten dollars on demand to the bearer for value received.—Toronto 18

Cashier

President

TEN

X  
TEN

against the statute, and against the peace, &c.

The second and third counts were in the same terms, except that in the former, the instrument was described as a promissory note for the payment of money "*of a certain body corporate*;" and in the latter, as a promissory note for the payment of money "*of William Proudfoot and others*."

From the evidence, it appeared that the prisoner within the jurisdiction of the court, procured a copper plate to be engraved with the words and figures set out in the indictment, which are part of the form of the promissory notes used and circulated by the Bank of Upper Canada; that the plate so engraved was received by the prisoner, and taken into his possession under circumstances pregnant with suspicion; that it was obtained by him for a fraudulent purpose; that W. Proudfoot was the president, and J. G. Ridout the cashier of the Upper Canada Bank, the notes of which are usually signed by those persons; and that the prisoner had endeavoured to obtain from another engraver a facsimile of their signatures, which he had cut off from the Toronto note produced by him to the first engraver.

*Prendergast*, for the prisoner, contended, that the offence committed by the prisoner was not within the true intent and meaning of the 18th section of the 1 Will. 4, c. 66, upon which act only, he submitted, could the indictment, if sustainable at all, be supported. He argued, that that section does not extend to the notes of companies carrying on business within Her Majesty's dominions out of England, although the act done by the party indicted was clearly done within the jurisdiction of the Central Criminal Court. For the purpose of showing that it could not be construed to extend to all notes wherever issued, he referred to section 19 of the same statute, which makes express provision respecting the possession of plates engraved with notes, or parts of notes, of persons resident in places not within her Majesty's dominions. He also adverted to section 3 and section 30 for the purpose of showing that the general words of the former were deemed by the legislature insufficient to provide for the forging and uttering in England of notes made or purporting to be made out of England, since it was found necessary to introduce an express provision for that purpose in the latter.

BOSANQUET, J., who tried the case, left the questions of fact to the jury, who found the prisoner Guilty.

His Lordship, with the assent of PATTESON, J., and GURNEY, B., who were present, respited the judgment, in order to take the opinion of all the Judges upon the objection raised.

*Bodkin and Doane*, for the prosecution.

*Prendergast*, for the prisoner.

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### *Hilary Term, 1839.*

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; and eleven of the other Judges.

PRENDERGAST, in support of the objection. This is not a question on the form of the indictment; the sole question is, whether the offence which the prisoner is charged with is an offence punishable under the statute 11 Geo. 4 & 1 Will. 4, c. 66. The 3d section, as to forging and uttering, mentions East India Bonds and Bank notes, &c.; that section appears to punish the forging of bills, notes, &c., without saying whether they are to be made in this country or elsewhere. In the 16th section it is made an offence to engrave, &c., any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the Governor and Company of the Bank of England. In the 17th section there is a provision with respect to the making of paper with the name or firm of any persons, body corporate, or bankers, other than the Bank of England. In the 18th section provision is made respecting the engraving or making of bills of exchange and promissory notes, purporting to be the bills or notes of any person or persons, body corporate, or company, carrying on the business of bankers (*other than and except the Bank of England*). That is the particular section upon which the prisoner was indicted and has been convicted. The question is, whether the offence charged is the offence mentioned in this section. It seems to punish the possession of such bills, &c., generally, without saying whether they are to be made in or out of England, in the same way as the 3d section provides for cases of forgery and uttering. Then, the 19th section refers to cases of notes of foreign princes or states. Now, the fair inference seems to

be that the words of the 18th section must be limited to notes, &c., made in England; otherwise, if it were general, it would not have been necessary to introduce the 19th section at all. But the 30th section is more material; for it provides for the uttering in England of documents forged abroad, and uses the words, "*in whatever place or country out of England, whether under the dominion of his Majesty or not, such writing or matter may purport to be made, or may have been made.*" It is quite clear, therefore, that the legislature has given its own meaning to its own act, and intended to confine the words of the 3d section to instruments made and payable in England; and yet the words are quite as general in the 3d as they are in the 18th. The 30th section is introduced for the purpose of putting a construction on the 3d, which it would not be necessary to put if the words of that section had extended to instruments made and payable out of England: and that is consistent with the construction of all acts of parliament. It is generally considered that general words apply to England only.

ALDERSON, B.—May it not have been that the 30th section was introduced to prevent the 3d from being affected by the argument to be derived from the separation of the two classes of offences in the 18th and 19th sections?

Lord ABINGER, C. B.—The 29th section limits the act to England, excluding Scotland and Ireland; and the 30th might be intended to get rid of any difficulty that might arise from the limitation, so far as the offence was concerned.

*Prendergast.*—It seems to me that the legislature dealt with a particular matter as they found it out, like the Athenian gladiators, who found a guard for every part of the body which had been struck.

Lord DENMAN, C. J.—As soon as it was struck, they invented a guard for it.

*Prendergast.*—The stamp acts would not be held to apply to places out of England. The rule of law is, that no statute shall extend to the colonies, unless they are expressly mentioned in it.

Lord DENMAN, C. J.—Yes—not to give jurisdiction. But there is no reason why there should not be a general description of instruments in circulation there as well as in England.

Lord ABINGER, C. B.—Has it ever been doubted that the general words of former forgery acts included foreign notes forged or uttered in England?

*Prendergast.*—The statute 2 Geo. 2, c. 25, is general in its terms. And nearly fifty years after that, comes the 43 Geo. 3, c. 139, which was passed expressly for the prevention of the forgery, &c., of foreign notes.

Lord ABINGER, C. B.—I will tell you how that arose. There had been, during the French war, some manufactories in England for the purpose of forging assignats; and it was a prevalent opinion that this was an offence not punishable, and, in consequence, that act was passed, the intention being, not to protect English, but foreign states.

BOSANQUET, J.—You see in that statute no provision is made for places not in England, but within the King's dominions. It cannot be supposed that they were left unprotected.

*Prendergast.*—In the case of *Rex v. Dick*,<sup>(a)</sup> which was the case of

(a) 1 Leach's Cases in Crown Law, 3d edit. p. 79; 4th edit. p. 68. The prisoner was convicted at Newcastle-upon-Tyne of knowingly uttering a forged and counterfeited

a Scotch bank note, the judges were divided; and, though the prisoner was pardoned, yet the case seems somewhat doubtful. But the subsequent decision, in *Rex v. McKay*, R. & R., C. C. R. p. 71, (a) in the year 1804, settles the law on the subject. That case seems quite decisive of the present in this point of view.

Lord DENMAN, C. J.—There is no positive enactment here that the act shall not extend to the Colonies. There is strong reason to think that the Colonies were not in view at the time of the passing of the act, but there is no express exclusion of them.

PATTESON, J.—The provision is that the act shall not extend to offences committed in Scotland.

*Prendergast*.—I apprehend that unless specially mentioned, instruments circulated in the Colonies are as much foreign instruments as any other instruments can be. They cannot be put in suit in England, and are in coins not known to England. The 43 Geo. 3, c. 139, s. 2, seems to have been passed almost immediately after the decision in *Rex v. McKay*, to protect foreign securities. The 41 Geo. 3, c. 57, was passed to protect bankers' notes in Great Britain or Ireland.

*Bodkin*, for the Crown.—I confess that the objection when first taken seemed rather formidable; but on a careful consideration of the statutes which were in force at the time this statute was passed, it will appear that the construction which my learned friend contends for is not correct. As to the two cases cited, the ground of decision seems to be at best doubtful. But they proceeded on the statute 2 Geo. 2, c. 25, the 4th section of which contains an express provision that the act shall not extend to Scotland. If this objection can now prevail, it is no offence in England to engrave or to have possession in England of plates intended for Scotch or Irish notes. It is remarkable that among the number of cases decided, there is not one to be found in which this point has arisen. The statute 41 Geo. 3, c. 57, is important in considering the effect of the 18th section of the present act. In the 43 Geo. 3, c. 139, there is no mention of persons carrying on business as bankers. My argument therefore is, that the 41 Geo. 3, c. 57, was intended specifically to protect bankers. *Rex v. Catapodi*, decided in the year 1803, (b) is not pre-

writing obligatory, commonly called a Scotch bank-note. The note was made payable at Aberdeen. The question submitted to the Judges was, whether the note was within the meaning of the stat. 2 Geo. 2, c. 25, and if so, whether the uttering it in England was felony. "The Judges," says the report, "were divided in their opinion upon both these questions, the 2 Geo. 2, c. 25, negatively excluding *Scotland*, and the note being payable *locally* where it was drawn." The prisoner lay in gaol for some time, and at length received the King's pardon.

(a) The prisoner was tried before Mr. Justice HEATH, at the September Old Bailey Sessions, in 1803, on an indictment which, among other counts, had one for uttering a certain promissory note for the payment of 5*l.*, and on this count he was convicted. The note was a note of the British Linen Company, which was incorporated by royal charter. Reference was made to the stat. 2 Geo. 2, c. 25, which provides that nothing contained in it shall extend to Scotland. An objection was taken that the instrument purporting to be an undertaking for the payment of money by a chartered Scotch Company, only entitled the party to demand payment in Scotland, and could not be put in suit in this country, and therefore was not within the statute: *Rex v. Dick*, *supra* note (a), and *Robinson v. Bland*, 2 Burr. 1078, were referred to. On the 4th February, 1804, the case was argued by *Gurney* for the prisoner, and *Knapp* for the prosecution, and all the Judges held the conviction wrong; but they did not come to their decision till Trinity Term.

(b) R. & R. P. C. 66.—The prisoner was tried before Mr. Justice HEATH, for knowingly and without authority having in his custody a certain plate, upon which said plate was engraved part of a promissory note, purporting to be the promissory note of a body corporate called The British Linen Company. Two objections were made by the prisoner's counsel at the trial: first, that the Company not being incorporated for the purpose of carrying on the

cisely in point, but bears upon the case. It is on the statute 41 Geo. 3, c. 57, and related to a plate of part of a promissory note of The British Linen Company in Scotland. I call your Lordship's attention to this case to show that there was great attention paid to it, and an adjournment of the consideration; and it must have been taken for granted that the possession in England of a plate for a note in Scotland, was an offence under the 41 Geo. 3, c. 57. Neither from the Bench nor at the bar was there any doubt expressed on that subject. My friend does not deny that forging and uttering is provided for, but only contends that there is an accidental omission as to the offence charged in this indictment. The second section of the 41 Geo. 3, c. 57, is the original from which the 18th section of this act was taken, and the difference is that the words "dispose of, put off," &c., are left out in the latter. My friend's first argument is, that the 18th section cannot extend to all notes whatever, because in the 19th there is an express provision as to foreign notes. Now I will concede that, for I do not contend that the 18th section applies to all persons whatever, but only to all bankers. The 18th section would be inapplicable to a large class of persons, and therefore the 19th was passed; as, for instance, in the case of the Polish notes, which were notes of a bank of which the Emperor of Russia, as King of Poland, was the sole owner.<sup>(a)</sup> It would be sufficient for me to show that the 18th section applies to notes of bankers within her Majesty's dominions, but I contend that it applies to bankers everywhere. Then my friend adverts to the 3d section, and argues that though the 3d is equally general with the 18th, yet the legislature thought it necessary to extend it by the 30th. But I submit that the 3d is not so general as the 18th. As to the 3d section, *securities avowedly English* are mentioned in the early part, and I apprehend that, according to the usual rules of construction, the instruments which follow must be taken to be instruments ejusdem generis, viz. English instruments, and therefore it became necessary to pass the 30th section, and not, as my friend says, because the words were too general. But it may be said, that the 30th section applies to the 18th. If it did, my friend's argument would be very strong, and it would be exceedingly difficult for me to get over it, because it would be said that the legislature omitted one part intentionally. On a careful view, however, your Lordships will find that the 30th section has no reference at all to the 18th. The words are, that where the forging or altering any writing or matter whatever, or the offering, uttering, disposing of, or putting off, any writing or matter whatever, knowing the same to be forged or altered, is in that act expressed to be an offence, if any person shall in that part of the United Kingdom, called England, forge, &c., or offer, utter, &c., any such writing or matter in whatsoever place or country out of England, whether under the dominion of his Majesty or not, such writing or matter may purport to have been made, &c., he shall be deemed to be an offender within the meaning of the act

banking business, did not exist as a corporation, but were mere *nonentities* as to that purpose; that they could not issue any promissory notes nor authorize any person to have plates from whence impressions might be taken, and therefore were not within the statute. The second objection was, that the indictment was bad for not containing an averment that the Company "carried on the business of bankers," which are the words of the act. The Judges, after an adjournment of the case from the first day of Michaelmas Term, 1803, to the 21st January, 1804, were all of opinion that the indictment was bad for want of the averment mentioned in the second objection. "And it seemed," say the Reporters, "to be the general opinion that the other objection was also fatal."

(a) See Vol. 7 of these Reports, pp. 416 to 431 inclusive.



That obviously refers to instruments which are perfected—it does not touch the making any plate, or having any such plate in possession. But I am aware that, in the 18th section, your Lordships will find the words, “knowingly offer, utter, dispose of, or put off *any paper upon which any part of such bill or note shall be made or printed.*” That is levelled against the fabricators.

PARKE, B.—What is to satisfy the word *matter* in the 30th section, if it does not apply to a part of a note?

*Bodkin.*—The 18th and 19th sections stand alone, and refer to the manufacturers, and the 3d and 30th refer to the uttering. As to the word *matter*, it would be somewhat hard to find a meaning for every redundant and superfluous word in an act—but there is forging the great seal, and there is uttering it—to which the word *matter* might apply.

PARKE, B.—Those are matters, it is true. But the piece of paper with the incomplete writing would be a matter also.

COLERIDGE, J.—It would be somewhat difficult to apply the word *matter* to the things in the 2d section, as they are high treason, and it would be difficult to apply to them the words, “whether within or without his Majesty’s dominions.”

*Prendergast*, in reply.—The argument of my friend was good, in favour of the suggested application of the 30th to the 18th section, but his attempted answer to that argument has not been successful. As to the 3d section, the words are as general as can be. Every description of instrument is included which is mentioned in the 18th.

Their Lordships then considered the case.

*Feb. 12.* At the following session Mr. Justice VAUGHAN gave judgment; after stating the indictment he said:—The real question was, whether or no the offence charged in the indictment was shown to be within the provisions of the 11 Geo. 4 and 1 Will. 4, c. 66, s. 18, it being contended that that section did not apply to the case. The Judges were of opinion that the conviction was right, there being out of a large number (fifteen, I believe) about three, who did not express a contrary opinion; but who had some doubt. I have not had the opportunity of communicating with the Judges who tried the case, and, therefore, I do not know what sentence it was intended to pass upon you. I shall communicate with them, and afterwards with the RECORDER, and he will intimate to you what the sentence is. All that I say now is, that you will understand that the conviction is upheld.

The prisoner was sentenced to transportation.

## FEBRUARY SESSION, 1839.

BEFORE MR. JUSTICE VAUGHAN AND MR. JUSTICE WILLIAMS.

## REGINA v. JOHN BULL.—p. 22.

The killing of a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the party must be such as to render it *necessary*, on the part of the party killing, to do the act in self-defence. In criminal cases, though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet, *semble*, that it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth.

THE prisoner was indicted for the manslaughter of William Rushbrooke.

*Payne*, for the prosecution, in stating the case to the jury, said, that there was one witness examined before the grand jury, whom, on account of information he had since received, it was not his intention to use as a witness for the prosecution.

*C. Phillips*, for the prisoner, objected to any witness being kept back, as it would be unfair towards the prisoner not to examine all those whose names were on the back of the bill.

*Payne* replied, that of course he should put the witness into the box; but it was not his intention to rely upon him as a witness for the prosecution.

*C. Phillips* said, that on the last Oxford circuit, in a case before Mr. Justice PATTESON, *Watson*, who was counsel for the prosecution, observed, that there were four surgeons who had given evidence before the grand jury, but he should only call three of them: upon which the learned judge said, "Then I shall call the fourth;" and upon the evidence of that fourth surgeon the prisoner was acquitted.

*Payne*, in reply, stated, that in a case of manslaughter, tried a few sessions ago at the Central Criminal Court before the same learned judge, the counsel for the prosecution were allowed to abstain from putting questions to two of the witnesses whose names were on the back of the bill; and he further stated, that in the present case he should call the witness, and put him into the box, but did not intend to examine him.

VAUGHAN, J., said—It is the proper course to put the witness into the box. I think that every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness, because his evidence may weaken the case for the prosecution. Our only object here is to discover the truth.

The witness alluded to was put into the box after all the other witnesses had been examined, and a few questions were put to him on the part of the prosecution, but he was not examined as to the facts gene-

rally, as the other witnesses were. He was cross-examined at some length on the part of the prisoner. From the evidence it appeared that the deceased was one of a party of six persons who had been drinking together at several public-houses, and were proceeding home along a road, between twelve and one o'clock, on the night of the 18th January, when they met the prisoner, who stabbed the deceased with a knife in the arm-pit. There was some discrepancy in the testimony of the witnesses as to the conduct of the deceased and his friends, previous to the infliction of the wound by the prisoner.

*C. Phillips* addressed the jury on the part of the prisoner, and contended that he was entitled to an acquittal, on the ground that what he did was in self-defence, and amounted in law to justifiable homicide.

VAUGHAN, J. (WILLIAMS, J., being present), in his summing up, *inter alia*, said, that it was not justifiable homicide unless there was an intention on the part of the deceased and his companions to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared that he might be assaulted, or indeed if he were actually assaulted. His lordship told the jury, that the question for their consideration was, whether the conduct of the party made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.(a)

The jury found the prisoner guilty, but recommended him strongly to mercy, believing that he committed the act under the apprehension of personal danger. Sentence, three years' imprisonment, with hard labour, and three months' solitary confinement in the course of the imprisonment.

*Payne and Ball*, for the prosecution.

*C. Phillips, Clarkson, and Bodkin*, for the prisoner.

(a) The law upon the subject of justifiable homicide is thus stated in Archbold's Criminal Law, p. 221, title, *Murder, Killing in Defence of Property, &c.*:—"If any person attempt to rob or murder another in or near the highway, or in a dwelling-house, or attempt to break any dwelling-house in the night time, and be killed in the attempt, the slayer shall be acquitted and discharged. 24 Hen. 8, c. 5. And the same where a man is killed in attempting to burn a house, 1 Hale, 488; or where a woman kills a man who attempts to ravish her, Bac. Elem. 341, Hawk. c. 28, s. 22; or where a man is killed in attempting to break open a house in the daytime with intent to rob, 1 Hale, 488, or to commit any other forcible and atrocious crime, Bract. 165; Fost. 273; Kel. 128, 129; 1 Hale, 484. See *R. v. Levett*, Cro. Car. 538, and see Fost. 299; *R. v. Ford*, Kel. 51. And not only the party whose person or property is thus attacked, but his servants and other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 Hale, 481, 484; Fost. 274. The above rule, however, does not extend to felonies without force, such as picking pockets, 1 Hale, 488, nor to misdemeanors of any kind; and even in cases within the rule it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 Hale, 484, otherwise the homicide will be manslaughter at least, if not murder. But, in cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he find himself and his property out of danger. Fost. 273."

BEFORE MR. JUSTICE VAUGHAN, AND MR. RECORDER LAW.

REGINA *v.* REEVES.—p. 25.

If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder.

THE prisoner was indicted for the wilful murder of her own infant child, by striking it on the head, and by beating its head against the wall of a room.

*Bodkin*, in stating the case for the prosecution, said that he had been informed there was a case before Mr. Baron PARKE, in which it had been decided, that the child must have a separate independent existence from that of the mother, in order to make the killing of it amount to murder.

*Clarkson*, who was for the prisoner, stated, that, as it was on his information that *Bodkin* had acted, he felt it his duty, having since read the case referred to, to say that it did not go to so great an extent as his learned friend had supposed. (a)

VAUGHAN, J.—I should have been very much surprised if it had; because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder.

Verdict—Not guilty of murder; but guilty of concealing the birth—Sentence, two years' imprisonment.

*Bodkin*, for the prosecution.

*Clarkson*, for the prisoner.

(a) The case referred to is *Regina v. Crutchley*, reported in Vol. 7 of these reports, p. 814. In that case Mr. Baron Parke said to the jury, after referring to the indictment, which used the words, "did bring forth of her body the said child alive"—"If you think that the child was not killed after it had come forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally while it was connected with the umbilical cord to the mother, and after it was wholly produced, in that case, I should put the matter into a course of further inquiry, directing you to convict the prisoner, and reserving the point for a higher tribunal, my present impression being that it would be murder if those were the facts of the case."

## APRIL SESSIONS, 1839.

## BEFORE MR. RECORDER LAW.

## THE QUEEN v. EDMUND L. WILSON and MICHAEL WILSON.—p. 27.

A. was indicted for embezzlement as clerk and servant to the prosecutor, and B. was charged as accessory. It appeared that A. was only employed as a town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A., he entered only one in the order-book; but B., who was the prosecutor's carman, delivered both articles to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6s. 6d., and B. entered the second article at the bottom as 4s. 6d. A. afterwards received of the customer the whole of the 11s., but only accounted to the prosecutor for the 6s. 6d.:—Held, that the offence committed was not embezzlement, but larceny.

THE first count of the indictment stated, that Edmund Lewell Wilson, being employed in the capacity of clerk and servant to William Phillipps, did, by virtue of his said employment, and whilst he was so employed, receive and take into his possession, for and in the name, and on account of the said W. Phillipps, his master, the sum of 11s., and the sum of 4s. 6d., parcel of the said money, fraudulently and feloniously did embezzle and steal.

The second count charged the prisoner, Michael Wilson, as an accessory after the fact.

It appeared from the evidence, that the prisoner, Edmund L. Wilson, had been for some time a town traveller and collector to Mr. Phillipps, the prosecutor, who was an oilman in Strutton Ground, Westminster; and that Michael Wilson was carman to the prosecutor. The prosecutor stated, that it was the duty of Edmund L. Wilson to go round and take orders from customers, and to enter them, on his return to the shop in the evening, in the day or order book, and also to receive moneys in payment of such orders; but that he had no authority whatever to take, or direct the delivery of any goods from the shop. On the 20th of March, Mr. William Crachnell, one of Mr. Phillipps's customers, gave the prisoner, Edmund L. Wilson, an order for two gallons of mixed pickles, and 14 lbs. of treacle, which order was entered by him in the order book as for the pickles only. An invoice for the pickles, pursuant to the entry, was made out by Mr. Phillipps's brother, and given to the prisoner Michael; but he delivered Mr. Crachnell the pickles, and 14 lb. of treacle. The sum charged for the pickles was 6s. 6d.; and Michael entered the treacle at the foot of the invoice at 4s. 6d. The prisoner, Edmund, afterwards received the whole amount, viz. 11s.; but paid over to Mr. Phillipps 6s. 6d. only.

LAW, (Recorder,) on the statement made by the prosecutor on cross-examination, relative to the duty and authority of the prisoner Edmund, intimated an opinion, that the offence was not embezzlement, but larceny; but added, that as Mr. Justice PATERSON was then sitting in the other court, he would consult him on the point. He accordingly went to the adjoining court for that purpose, and, on his return, said: "I have con-

ferred with Mr. Justice PATTESON, who concurs with me in the opinion I was inclined to entertain of this question; and, on his suggestion, I may put the case in this form,—that the prisoner, Edmund Wilson, does not receive the 4s. 6d. for or on account of his master, but contrary to, and in breach of his duty towards that master. I may also liken the case to that of two servants—one of whom has authority to sell, and the other not, but merely to receive money; if the one who has no authority to sell introduces himself behind the counter, and sells his master's goods, putting the money into his own pocket, that is clearly a stealing, for he sells and receives the money contrary to his authority; and he cannot be said to have been employed and intrusted as clerk and servant, and to have received the money by virtue of such employment, where the act is done contrary to that employment. In this case, the servant having authority to send out goods to the amount of 6s. 6d., puts up goods to the amount of 11s., his intention being to put 4s. 6d. into his own pocket. The time never arrives when he receives that on account of his master, for all that he does is adverse to, and in fraud of the interest of his master.

Verdict—Not guilty.

*Clarkson*, for the prosecution.

*Montagu Chambers*, for the prisoner.

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### MAY SESSION, 1839.

BEFORE MR. BARON PARKE.

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### REGINA v. MADGE.—p. 29.

A person who steals goods in France, cannot be tried in England for the offence, though he be found in possession of the stolen property there.

THE prisoner was indicted for stealing, within the jurisdiction of the Central Criminal Court, various articles of household furniture, &c., belonging to one Colonel Latour.

*Clarkson*, for the prosecution, stated to his lordship that the property in question had been deposited by the prosecutor in a house at Boulogne, in France, and that the prisoner had stolen it at Boulogne, but being found in possession of it at the Custom-house in London, he had been taken before the lord mayor, who had committed him for trial.

PARKE, B.—There is a case precisely in point on the subject.

*Clarkson*.—Your lordship alludes to the case of *Rex v. Prowes*.<sup>(a)</sup> That case even goes further than the present, for there the property was taken at Jersey, which is under the dominion of the British crown, and yet it was held that the courts here had not jurisdiction. I recollect also

(a) Ry. & Moo. C. C. R. p. 349. The prisoner was charged with stealing at Dorchester a quantity of wearing apparel, the property of Thomas Cundy. The things had been taken by the prisoner from a box of the prosecutor's at St. Heliers, in the Island of Jersey, and were afterwards found in his possession in Dorsetshire, where he had been apprehended on another charge. The case was considered by all the judges except Lord Lyndhurst, C. B., and Taunton, J., in Easter term, 1832, and they held unanimously that the conviction was wrong, and that the case was not within the stat. 7 & 8 Geo. 4, c. 29, s. 76. See the case of *Rex v. Anderson and Others*, as to goods stolen in Scotland, 2 East, P. C. 772, c. 16, s. 156.

a case before Mr. Serjeant *Arabin*, in which I, not being aware of the decision of the judges, thought that the bringing of the property into England was a larceny, and Mr. Serjt. *Arabin* thought so too, and the prisoner was convicted; but I am bound to say that a pardon was afterwards granted, on the ground that the decision of the learned judge was incorrect.

PARKE, B.—There is no doubt upon the point on the authority of *Rex v. Prowes*. That case is precisely in point, though rather stronger than the present.

His lordship afterwards said, that it had been intimated to him that some of the judges had expressed a wish to have the case of *Rex v. Prowes* reconsidered, and that in consequence of this the lord mayor had committed the prisoner; but if it was not so, he should act upon the authority of the decision in that case. His lordship having caused a communication to be made to the lord mayor upon the subject, and having received his answer, directed the prisoner to be brought up and the jury to be charged with the indictment. The prisoner was accordingly put to the bar and the jury charged.

PARKE, B., upon this, said that the lord mayor had not committed the prisoner for trial in consequence of any intimation from the judges, that it was desirable to reconsider the case of *Rex v. Prowes*, but it was thought right that the prisoner should be publicly tried and acquitted, in order that the attention of the legislature might be drawn to the state of the law, in case they should think it right to interfere by any legislative provision on the subject. His lordship then told the jury that they had no jurisdiction so as to convict the prisoner, and therefore they must pronounce a verdict of acquittal.

Verdict—Not guilty.

*Clarkson*, for the prosecution.

*C. Phillips*, for the prisoner.

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## JUNE SESSION, 1839.

BEFORE LORD CHIEF JUSTICE TINDAL.

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### REGINA v. HENRY ALLEN.—p. 31.

In a case of rape, since the passing of the statute 9 Geo. 4, c. 31, s. 18, the *only* question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c., discussed before judges and juries. Therefore, though it appear from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape.

THE prisoner was indicted for a rape upon Ann Rose, on the 29th of May, at Feltham, in Middlesex.

From the evidence of the prosecutrix, it appeared that on the day mentioned in the indictment, at nine o'clock in the evening, she was on

her way home from Twickenham to Feltham, where she resided; and on passing a public-house called the Hope, she heard a man in that house say, "here comes your woman." The prisoner immediately came out of the house and followed her, and endeavoured to induce her to enter into conversation with him. She resisted his advances; but notwithstanding her refusal to listen to him, he persisted in pursuing her; and when they reached a lonely part of the road, he suddenly attacked and threw her down. There was no doubt that there was penetration; but it appeared quite clear from the admissions of the prosecutrix, that the person who attacked her did not in fact complete his purpose; for on her cross-examination she stated that she succeeded in extricating herself from him very soon; and added, that she had no reason to believe that she was the worse for his attack on her. The prisoner all through denied that he was the man, alleging that the prosecutrix in her agitation and confusion, had mistaken him for some other person.

*Payne*, for the prisoner.—The evidence clearly shows that the offence of rape was not completed. The words of the indictment are, "*did ravish and carnally know*," and that must mean, did have his will of her, and satisfy his lust while within her person. Anything short of this is only on a parallel with intent to ravish. The words of the statute 9 Geo. 4, c. 31, s. 18, that the carnal knowledge shall be deemed complete "*upon proof of penetration only*," I read as meaning, "when *the only proof shall be of penetration*." (a) This cannot mean that it shall be deemed that a man had carnal knowledge, when the evidence shows that he had it not. The object was only to render it unnecessary to prove more than penetration, on account of the woman's possible inability to describe all that actually took place. The Legislature cannot have been so absurd as to mean that where there is evidence to show that the offence was not completed, yet the *inference* arising from proof of the doing of a part shall control the *positive testimony* of the non-performance of the whole.

After addressing the jury on the question of identity, a witness was called for the purpose of proving an alibi, but he was not able sufficiently to speak to the precise time at which he saw the prisoner on the day in question.

*Clarkson*, in reply.—I agree with the counsel for the prisoner, that the act was not intended to do more than enable a jury to say that the offence was committed, when there was only proof of penetration: but that it was not intended to dispense with proof of the completion of the offence when such proof can be given—still less to decide that the offence shall be considered to have been committed in point of law, when the evidence clearly shows that it was not committed in point of fact.

TINDAL, C. J., in summing up, said—There are two questions for your consideration in this case: the first, whether the prisoner was the person who attacked the prosecutrix; and the second, whether the offence charged was completed or not. With respect to the second

(a) Soon after the passing of that statute, Mr. Justice TAUNTON ruled, that notwithstanding the provision, it was still necessary, in order to complete the offence, that all which constitutes carnal knowledge should have happened, and that the jury must be satisfied from the circumstances that emission took place: *Russell's case*, 1 Moo. & Rob. 122. But this decision was overruled by other individual Judges, and lastly by all in a case reserved, *Ree v. Reekpear*, 1 Moo. C. C. R. 342, and the same point was determined in *Cox's case*, 1 Moo. C. C. R. 387, and ante, Vol. 5, of these Reports, p. 297.



question, if you feel any reasonable doubt on the facts as applying to the law, when I shall have stated it to you, viz., whether the offence was actually completed or not, you will have no difficulty, if you have decided the first question in the affirmative, in saying that the prisoner was guilty of an atrocious assault. [His Lordship, after reading the evidence, and making several observations on the question of identity, proceeded thus:] The statute 9 Geo. 4, c. 31, s. 18, recites, that upon trials for rape, &c., "offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes." It was thought that the law was holding itself up to contempt by having these subtle and critical subjects discussed before judges and juries; and the statute therefore goes on to say, "For remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only." The only question, therefore, for the jury, in such a case, is, whether the private parts of the man did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered. However, you must be satisfied that there was actual penetration, and not that it is the case of a person attempting to commit the offence, and being disturbed before he had actually penetrated. The prosecutrix may be mistaken as to the extent to which the prisoner had proceeded in the commission of the offence. If, therefore, you feel any doubt whether (and I can use no other word than the statute uses; I am not here to make the law, but only to expound and declare it)—if, I say, you feel any doubt whether it has been proved to your entire satisfaction that there has been penetration, you will acquit the prisoner of the felony.(a)

Verdict—Guilty.

*Clarkson*, for the prosecution.

*Payne*, for the prisoner.

(a) See the cases of *Rez v. Gammon*, 5 Car. & P. 321; *Rez v. M'Rue*, 7 Id. 641; and *Rez v. Jordan*, post.

## JULY SESSION, 1839.

BEFORE MR. COMMON SERGEANT MIREHOUSE.

REG. v. GEORGE JAMES FULLER, GEORGE WESTBROOK,  
WILLIAM WESTBROOK, AND MERRICK BURRELL.—p. 35.

*Seemle*, that where there are several indictments against prisoners, on all of which they have *been arraigned*, the prosecutor having *tried* some of the indictments, and *failed* in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session.

THERE were several indictments against the prisoners. The first indictment stated, that the prisoner, Fuller, on the 24th November, 1837, being servant to Russell Pontifex, stole thirty-six milk-washers and plugs, of the value of 4*l.*, the goods of his said master; and that the prisoner, George Westbrook, received the same of Fuller, well knowing them to have been stolen by him.

There was also a count charging W. Westbrook with receiving them from a certain evil-disposed person. Both prisoners were acquitted upon this indictment, and also upon another which charged Fuller with stealing, on the 3d of May, 1838, a quantity of valves and other articles, and Westbrook with receiving them, knowing them to have been stolen.

C. *Phillips*, and *Clarkson*, for the prosecution, upon this applied to the common serjeant to postpone the trial of the remaining indictments till the next session, on the ground that the prosecutor had not had time to prepare the cases properly for the instruction of counsel.(a)

The common serjeant was of opinion that the application ought not to be granted; but suggested that the matter had better be mentioned to Mr. Justice PATTESON, who was then sitting in the adjoining court.

Upon this the common serjeant and the several counsel in the case went into the adjoining court, and the matter was publicly mentioned to Mr. Justice PATTESON.(b)

After hearing the objection which the counsel for the prisoners had to make to the proposed postponement—

PATTESON, J., said—The difficulty I feel is not as to this particular case, but on principle. If the application for postponement had been made previous to the prosecutor's going before the grand jury, there would have been no doubt as to the propriety of granting it; and I will not say that it might not have been done after the bills had been found, and after the prisoners had been arraigned. But to decide that, after prisoners have been tried upon two indictments, and the evidence has failed, the other indictments against them may be postponed to another session, in my opinion would be very dangerous. My objection to it is, that it is holding out a premium for the getting up of fresh evidence, and is similar to the case of supplemental affidavits, which we do not

(a) The evidence was all contained in one set of depositions, and the difficulty was in selecting and separating the different portions which were applicable to the various indictments.

(b) This is a much better and far more satisfactory plan, and less liable to mistake and misunderstanding, than the private mention of the matter, in the absence of counsel, by the judge trying the case to the judge whose opinion he wishes to obtain. See post, *R. v. Sells*.

allow in the Court of Queen's Bench. It is inviting persons to come forward and give evidence which the prosecutor was not in possession of at the previous session.

*C. Phillips*, for the prosecution.—The transactions extend over a period of two years, and there has not been time to separate them properly.

*PATTESON, J.*—It is very unfortunate; but it is much better that justice should be defeated in this particular case, than that we should break in upon a great principle.

The trials proceeded, and the result was, that Fuller and William Westbrook were found guilty, and George Westbrook and Burrell were acquitted.

*C. Phillips*, and *Clarkson*, for the prosecution.

*Payne*, *Montagu Chambers*, and *Ballantine*, for the several prisoners.

## AUGUST SESSION, 1839.

BEFORE LORD DENMAN, C. J.

### REGINA v. JOHN PULBROOK.—p. 37.

A paper in the following form held to be a request for the delivery of goods, though not addressed to any one:—"Aug. 3, '39—One 16-in. helmet scoop—one 4 qt. kettle—Jas. Hayward."

THE prisoner was charged with feloniously forging and uttering a request for the delivery of goods, with intent to defraud Messrs. Warner & Co. The indictment also stated a previous conviction of felony.

The prisoner had been in the employment of Mr. James Hayward, an ironmonger, who stated that he had had dealings for some years with Messrs. Warner, but had not had any account with them for about eighteen months; that the prisoner quitted his service about twelve months ago; and that once or twice, during the time he was in his employ, he had taken orders from him to Messrs. Warner. The witness identified the order in question in this case as being in the prisoner's handwriting, and denied that it was written by his direction or authority.

Richard Ward said, "I am in the service of Messrs. Warner, and received this order from the prisoner, and delivered him the goods stated in it."—Alfred Warner said, "I am the son of one of the partners, and manage their business. It is the custom in our business to deliver goods on the authority of such papers as this. We constantly do it every day." He was asked by the Court whether he had done so as between the firm and Mr. Hayward. His reply was, "Certainly; it is the ordinary form of a request to deliver goods to Mr. Hayward or to anybody."

The instrument was in the following form: "Aug. 3, '39.—One 16-in. helmet scoop; one 4 qt. oval kettle.—Jas. Hayward."

The prisoner was found guilty, and judgment was respited, that the opinion of the judges might be taken as to whether such a paper

amounted in law to a request for the delivery of goods within the meaning of the statute.

In the November session, Mr. Baron PARKE pronounced the judgment of the Court, stating that the judges were of opinion that the document amounted to a request for the delivery of goods within the meaning of the statute, although it was not addressed to any person; and the prisoner was sentenced to be transported for ten years.

*C. Clarke*, for the prosecution.

See *Carney's case*, 1 Moo. C. C. R. 351, and the other cases collected in Roscoe's Crim. Dig., title *Forgery*; and the case of *Reg. v. Rogers*, post, p. 28.

## OCTOBER SESSION, 1839.

BEFORE MR. JUSTICE BOSANQUET AND MR. BARON GURNEY.

### REGINA v. STEPHEN JENKINS.—p. 38.

If a person, *not being the servant* of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his own use, he is guilty of larceny.

THE prisoner was indicted for stealing, on the 4th of October, one 20*l.* bank note, and three 10*l.* bank notes, the property of Thomas George Shelton, his master.

The prosecutor, on his examination in chief, stated that he was an agent to a hosier in Wood street; that the prisoner had been in his service four years and a half; that on the 4th of October he gave him a parcel to take to the Bull and Mouth Inn, to be sent by the mail to Davis and Wilson, Nottingham; it contained three 10*l.* and one 20*l.* Bank of England notes; that about three days afterwards he received intelligence from Nottingham, in consequence of which he asked the prisoner who he gave the parcel to; that he said he gave it to one of the clerks in the office of the Bull and Mouth, and pointed out the man, who admitted having received the parcel. It appeared that the parcel arrived at its destination, but that the notes, and a letter which had accompanied them, were not in it. Two of the 10*l.* notes and nine sovereigns were afterwards found at the prisoner's lodgings. On cross-examination the prosecutor stated, that the proprietor of the business was Mr. Lowe, of Nottingham, to whom he was an agent, and from whom he received a salary; that the prisoner was Mr. Lowe's servant, and not his; but that the money enclosed in the parcel was his and not Mr. Lowe's.

*Bodkin*, for the prisoner, submitted that this was not larceny, as the prisoner was not a servant, and consequently there was no trespass.

GURNEY, B., was of opinion, that as the parcel must have been opened, and the notes abstracted, it did amount to larceny.

*Bodkin* submitted that the cases as to breaking bulk were all cases in which the parties were common carriers.

GURNEY, B., was of a contrary opinion, and, with the assent of BOSANQUET, J., who was present, the case went to the jury, and the prisoner was convicted of stealing, but not as a servant, and being

recommended to mercy, was sentenced to twelve months' imprisonment.

*Bodkin*, for the prisoner.

See the case of *R. v. Jones*, 7 C. & P. 151.

## NOVEMBER SESSION, 1839.

BEFORE MR. JUSTICE PARKE, AND MR. JUSTICE BOSANQUET.

### REGINA v. ST. JOHN.—p. 40.

At the Central Criminal Court, a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of W." The prosecutor stated that the correct name of the parish was *St. Mary W.* In the statute 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act), s. 2, this parish is called "the parish of W." :—*Held*, sufficient.

**BURGLARY.**—The prisoner was indicted for a burglary in the dwelling-house of Henry Moody, situate "at the parish of Woolwich," and stealing therein a watch and other articles, above the value of 5*l.*

In his cross-examination, the prosecutor stated, that the correct name of the parish was "the parish of St. Mary, Woolwich."

Mr. Clark (the clerk of arraigns) referred the court to the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 2, in which this parish is called "the parish of Woolwich."

**BOSANQUET, J.**—As it is called "the parish of Woolwich," in the act of Parliament, I think that that is sufficient.

**PARKE, B.**—The act of Parliament shows that this parish is known by the name of "the parish of Woolwich;" and, being so described in the act, I think that that is an answer to the objection.

**Verdict**—Guilty of stealing in a dwelling-house above the value of 5*l.*

*Ballantine*, for the prisoner.

### REGINA v. ROGERS.—p. 41.

A prisoner was indicted on the stat. 2 & 3 Will. 4, c. 123, s. 3, for forging a warrant for the payment of money (not setting it out). The forged paper was as follows:—"This is to satisfy that R. R. *as* swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria (signed), J. N. 4*l.* 10*s.* 0*d.*" It was proved, that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay 4*l.* 10*s.* 0*d.* :—*Held*, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that as it appeared that this document, if genuine, would have been a voucher for the payment of the money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money; and that if, in an indictment for forgery, the instrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and that averments to show that the document comes *within* the designation given of it in the indictment, are now (in this form of indicting) unnecessary.

**FORGERY.**—The prisoner was indicted for forging "a certain warrant for the payment of money, to wit, for the payment of the sum of 4*l.* 10*s.*," with intent to defraud William Lightly and another. Second count, for uttering. The forged instrument was not set out in either of these counts, neither did they contain any prefatory allegations or inuendoes.

It appeared that the prisoner was a chimney-sweeper, and had on several occasions been employed to sweep the funnels of the steam-vessel *Princess Victoria*, and it was proved by Mr. John Nicholson, the engineer of that vessel, that the course of business was for the prisoner when he had swept the funnels to bring in his bill to the witness, who upon that gave him a certificate that the work had been done, and that, on his presenting that certificate at the counting-house of Messrs. Lightly & Simons, he was paid the amount. It was proved by Mr. Thomas, a clerk of Messrs. Lightly & Simons, that the prisoner, on the 11th of October, 1839, presented a paper, of which the following is a copy, and received from the witness the sum of 4*l.* 10*s.* 0*d.*

“Oct. 11, 1839.

“This is to satisfy that R. Rogers *as* swept the flues, and cleaned the bilges, and repaired four bridges of the *Princess Victoria*.

“4*l.* 10*s.* 0*d.*

“J. NICHOLSON.”

It was proved by Mr. Nicholson that this was a forgery; and to show guilty knowledge evidence was given of the uttering of a similar forged document by the prisoner on the 18th of October, 1839.

*Prendergast*, for the prisoner.—This is rather a certificate of work done, than a warrant for the payment of money.

BOSANQUET, J.—This is not a case in which the warrant is set out in the indictment: and as the indictment has been framed on the statute 2 & 3 Will. 4, c. 123, s. 3, without setting it out, the question is, whether on the evidence this is shown to be a warrant for the payment of money. It has been proved that this was the mode of transacting business that had been usual with these parties, and if this, provided it had been a genuine voucher, would have properly authorized the payment of the money, I think that enough has been shown to sustain this indictment.

PARKE, B.—I think that the written evidence and the parol testimony taken together, show that the paper, if genuine, would have authorized the payment of the sum mentioned in it. Under the old law averments would have been necessary to show that this was a warrant for the payment of money; but as the law is at present, no such averments are necessary, if the indictment is framed on the 3d section of the statute 2 & 3 Will. 4, c. 123. In the present case it appears by the evidence which has been given, that this (if genuine) was a voucher for the payment of this money. If you describe the instrument in the indictment instead of setting it out, averments are, since the statute 2 & 3 Will. 4, c. 123, not necessary as they were before that act; and if the instrument be described under that statute, it is matter of evidence whether the instrument comes within the description given of it by the indictment.

*Prendergast*.—The paper is not addressed to any one.

BOSANQUET, J.—It is not necessary that it should be addressed to any particular person.

PARKE, B.—The evidence of the course of dealing shows that (if genuine) it would have been an authority to Messrs. Lightly & Simons to pay the amount.

Verdict—Guilty.

*Prendergast*, for the prisoner.

PARKE, B.—A question of this kind was considered by the judges in the case of *Reg. v. Raahe*, 8 C. & P. 626.

## REGINA v. ELIZABETH HOLLOWAY.—p. 43.

The grand jury had come into court, and had been discharged, and had left the court, but had neither left the building nor separated. The judges directed them to be sent for back into court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them.

THE grand jury had come into court, and on their foreman stating that there were no more bills, Mr. Baron PARKE discharged them. The grand jury retired from the court, and it being stated to his Lordship almost immediately afterwards, that there was another bill, and that the witnesses on it were going abroad, his Lordship directed that the grand jury should be sent for, provided that they had not separated.

The grand jury returned into court, and their foreman stated that they had not separated, and that all of them had continued together in the sessions-house after they had left the court.

PARKE, B.—I wish you to consider another bill before you separate.

The grand jury retired, and afterwards returned a true bill against Elizabeth Holloway for stealing a shirt.

## REGINA v. BIRD.—p. 44.

A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but he should tell K. of it., and that he sometimes bought goods for the shop, and sometimes K. did it:—

*Held*, that M. was a bailee, and that the goods in the shop might properly be laid as his property. It was proved as to the breaking that the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till the prisoner pushed it in and stole the goods:—*Held*, a sufficient breaking.

HOUSEBREAKING.—Indictment for breaking and entering the dwelling-house of Louis Kyezor, and stealing a watch, the property of David Miers.

It was proved by Mr. Miers, that the house was taken by his brother-in-law, Mr. Kyezor, and that the witness (who lived on his own property) carried on the business of a silversmith there for the benefit of Mr. Kyezor and his family, but had himself no share in the profits and no salary. He stated, that he had power to dispose of any part of the stock, which was worth near 3,000*l.*, and that he might, if he pleased, take money from the till as he wanted it, but he should inform his brother-in-law that he had so done. He also stated, that he sometimes bought goods for the shop, but that sometimes his brother-in-law did so; with respect to the breaking, he stated, that a pane of glass in the shop window had been cut for as much as a month before, but that there was no opening whatever, as every portion of the glass remained exactly in its place, and that at the time of the theft he both saw and heard the prisoner put his hand through the glass, and take the watch.

*Horry*, for the prisoner, submitted—First, that as Mr. Miers exercised so much dominion over the stock in the shop, he ought to have been described as a partner with Mr. Kyezor; and, secondly, that as the glass of the window had been cut before, there was no breaking.

BOSANQUET, J.—Upon this evidence, Mr. Miers was a bailee of the stock, and therefore in a case of this kind the property may be properly laid in him; and with respect to the breaking, that is quite sufficient to support the present indictment.

Verdict—Guilty.

*Horry*, for the prisoner.

### REGINA v. ELIZABETH PARKER.—p. 45.

In a case of arson it was proved that “the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze.”—*Held*, that this would be a sufficient burning to support an indictment for arson.

ARSON.—The prisoner was indicted for setting fire to the house of Edward Stammers, persons being therein at the time of the offence.<sup>(a)</sup>

The only evidence to show that the house was on fire was that of a fireman, named Barker. He said, “The floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not in a blaze.”

PARKE, B.—That would be sufficient.

The witness, in answer to further questions, stated, that he had not examined the floor to ascertain how deeply the charring went in; neither could he at all form a judgment as to how long it had been done.

BOSANQUET, J. (to the jury).—We think that this evidence is much too slight, and that you ought to require better proof that the house was on fire at the time in question. This is the only evidence on this part of the case, and we think you ought to acquit.

Verdict—Not Guilty.

(a) Under the stat. 1 Vict. c. 89, s. 3.

### COURT OF QUEEN'S BENCH.

*Sittings at Westminster after Michaelmas Term, 1839.*

BEFORE LORD DENMAN, C. J.

### DOE, on the demise of GOSLEE, v. GOSLEE.—p. 46.

In ejectment the lessor of the plaintiff made out his title as the heir of W. G. The defendant put in the will of W. G., made in 1837, devising the property to the lessor of the plaintiff and T. G. :—

*Held*, that the lessor of the plaintiff might put in another will of W. G., made in 1838, devising the whole property to the lessor of the plaintiff, and that the lessor of the plaintiff was not bound to make this will part of his original case. Under these circumstances the defendant's counsel will be allowed to reply on the new case set up by the lessor of the plaintiff, and the counsel for the plaintiff has the general reply.

EJECTMENT for a house at Edmonton.

It was opened by *Humfrey*, for the plaintiff, that the house had belonged to the late Mr. Thomas Goslee, and that the lessor of the plaintiff was his eldest son, the defendant being his daughter, and that the lessor of the plaintiff claimed as the heir of Thomas Goslee.

Evidence was given that Thomas Goslee received the rents of the



house in question, and that he died on the 4th July, 1838, and that the lessor of the plaintiff was his eldest son.

*W. H. Watson*, for the defendant, put in a will, made and duly executed by Thomas Goslee, dated the 25th of April, 1837, by which he bequeathed the house in question to his sons, Charles (the lessor of the plaintiff) and Thomas.

*Humfrey*, for the plaintiff, proposed to put in another will, executed by Thomas Goslee, in the year 1838, by which he devised the house to the lessor of the plaintiff alone.

*W. H. Watson*.—Does your Lordship think that this can be done now? The lessor of the plaintiff relied on a case as heir, and can he now be allowed to set up a will? If the lessor of the plaintiff had meant to have relied on this will, he should have done so in the first instance.

*Humfrey*.—We rely on the title as heir, and only wish to put in this will to show that the will of 1837 is revoked.

Lord DENMAN, C. J.—I think they may do it.

The will of 1838 was put in, and the case ultimately turned on the question, whether, at the time of the making of this will, the testator was of sound disposing mind.

*W. H. Watson* replied on the new case set up by the lessor of the plaintiff, and *Humfrey* had the general reply.

The jury found that the testator was not of sound disposing mind, and a verdict was entered for the plaintiff for a moiety of the property.

*Humfrey and Peacock*, for the plaintiff.

*W. H. Watson*, for the defendant.

### CLAY, Esq., v. THACKRAH.—p. 47.

To an action of trespass on land the defendant pleaded that for 20, 30, 40, and 60 years he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. Replication, denying the rights claimed. It appeared that within forty years B. had been lessee of the mill under one landlord, and of the land under another:—*Held*, that this was such a unity of possession as prevented his having an easement on the land.

*Held*, also, that this unity of possession need not be specially replied, and that without a special replication the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence.

*Held*, also, that B.'s lease of the land having expired more than 30 years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right.

Where, by a Judge's order, a copy of a letter sent by R. to M., dated December 16, 1836, was ordered to be admitted, it is not enough to put in the notice to admit and the Judge's order, and to put in a copy of a letter from R. to M. of that date; but if a witness also prove that he was at the Judge's chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter proposed to be given in evidence, that is sufficient.

TRESPASS.—The first count of the declaration was for breaking and entering the plaintiff's close, called the Large Paddock (described also by the abutments), on the 14th of March, 1837, and on divers other days and times: second count, for breaking and entering the plaintiff's close, called Long Meadow (described also by abutments), at the same days and times.

Plea, first, that the defendant was and is the occupier of a certain ancient mill, called Twickenham Oil Mill, situate upon a stream called

Isleworth Mill River, and of right ought to have the benefit of the water of the said river flowing to the said mill, and "that the respective occupiers of the said mill, for the full period of twenty years next before the commencement of this suit, actually enjoyed as of right and without interruption by themselves and their servants the liberty, easement, and privilege of repairing and amending such parts of the banks and sides of the said stream, called Isleworth Mill River, as are situate within and are parts of the said closes, in which, &c., as occasion required, to prevent the water of the said river escaping, oozing, or running through the said banks and sides in consequence of the defects and insufficiencies thereof, and so that the water of the said river might flow to the said mill for supplying the same with water for the working thereof, and, for the purposes aforesaid, to enter the said closes in which, &c., and to do and perform in and upon the said closes all such things as should be necessary for the purpose of enjoying and using the said liberty, easement, and privilege. The plea went on to aver that because the banks were ruinous and in bad condition, and the defendant having to repair them, he entered the closes for the purpose of repairing them, and did repair them as he lawfully might, and in so doing unavoidably trod down, &c., the grass, &c., doing no unnecessary damage,(a) (concluding with a

(a) As the forms of this plea and the replication to it may be useful in practice, we have subjoined them:—

"*Form of Plea.*—And the defendant, by W. H. M., his attorney, says, that he, the defendant, at the said several times when, &c., and from thence hitherto, hath been, and still is the occupier of a certain ancient mill called Twickenham Oil Mill, with the appurtenances, situate upon the said stream called Isleworth Mill River, and by reason thereof, before and at the time of the committing of the several alleged trespasses in the declaration mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of the said river, which, during the said several times when, &c., ought to have flowed to the said mill for the working thereof: and the defendant further says, that the respective occupiers of the said mill for the full period of twenty years next before the commencement of this suit, actually enjoyed as of right and without interruption by themselves and their servants the liberty, easement, and privilege of repairing and amending such parts of the banks and sides of the said stream called Isleworth Mill River, as are situate within and are parts of the said closes in which, &c., as occasion required to prevent the water of the said river escaping, oozing, or running through the said banks and sides in consequence of the defects and insufficiencies thereof, and so that the water of the said river might flow to the said mill for supplying the same with water for the working thereof, and, for the purposes aforesaid, to enter the said closes in which, &c., and to do and perform in and upon the said closes all such things as should be necessary for the purpose of enjoying and using the said liberty, easement, and privilege: and because the said banks and sides of the said river situate in the said closes in which, &c., at the several times when, &c., were ruinous, defective, and in bad condition, and insufficient for want of needful and necessary reparation and amendment, he the defendant being such occupier of the said mill as aforesaid, and having occasion to repair and amend the said banks and sides of the said river situate in the said closes in which, &c., for the purposes aforesaid, at the several times when, &c., entered on the said closes in which, &c., for the purpose of repairing and amending the said banks and sides of the said river situate in the said closes in which, &c., as he lawfully might for the cause aforesaid, and did repair and amend the same; and in so doing he the defendant unavoidably a little trod down, trampled upon, consumed, and spoiled a little of the grass and herbage of the plaintiff then there growing, and did tear up, subvert, and damage and spoil a little of the earth and soil of the said closes, and did cast and throw the earth, stones, and rubbish in the declaration mentioned upon the said closes in which, &c., doing no unnecessary damage to the plaintiff on the occasions aforesaid, as he lawfully might for the cause aforesaid, which are the same several alleged trespasses in the declaration mentioned, and whereof the plaintiff hath above complained against him the defendant.—And this the defendant is ready to verify, &c."

"*Replication.*—And the said plaintiff as to the plea of the defendant by him first above pleaded, says, that the respective occupiers of the said mill did not, for the full period of twenty years next before the commencement of this suit enjoy as of right, and without interruption by themselves and their servants, the liberty, easement, and privilege of re-

verification). Second plea: the like, substituting thirty years for twenty years. Third plea: the like, substituting forty years for twenty years. Fourth plea: the like, substituting sixty for twenty years. Fifth plea: leave and license.

Replication to the first four pleas denying the rights stated in those pleas, and a replication de injuriâ to the plea of leave and license.

The defendant's counsel began.

It appeared that the mill in question belonged to the Duke of Northumberland, to whom the defendant was lessee, and that the site of the mill was, on the 29th of March, 1755, demised by the Earl and Countess of Northumberland to Mr. Thomas Betts for the term of fifty years, from the 5th of April, 1755, with liberty to Mr. Betts to erect a mill. It appeared also that the mill in question had been erected, and that for upwards of fifty years Mr. Betts, and the occupiers of the mill who had succeeded him, had entered on the lands in question to repair the banks as often as it was necessary.

It was opened by *Campbell*, A. G., for the plaintiff,—that the lands in question, which now belonged to the plaintiff, had in the year 1758 belonged to the Earl of Feversham, who had let them to Mr. Betts (who was then lessee of the mill) for a term of forty-seven years, which had expired in the year 1805; and he submitted that as there was a unity of possession of the lands and the mill, the occupier of the mill could not be said to have an easement on the lands; and that, if the repairing of the banks was originally done by permission under the Earl of Feversham's lease, no adverse right would accrue by the continuance of it after the lease had expired; and with respect to the plea of leave and license, it would be shown that all license was revoked before this trespass.

It was proposed, on the part of the plaintiff, to put in the lease of the land from the Earl of Feversham to Mr. Betts.

*Cresswell*, for the defendant.—I submit, that this lease is not receivable in evidence on these pleadings. It is not denied on the other side that we did not, in point of fact, exercise the right, but it is said to have been done under a contract; this, I submit, should be specially replied under the 5th section of the stat. 2 & 3 Will. 4, c. 71.

Lord DENMAN, C. J.—I thought so at Exeter,<sup>(a)</sup> but the court afterwards thought otherwise.

*Wightman*, for the defendant.—I admit that the plaintiff might show acts done inconsistent with our acts, so as to show that our acts were not of right; but here the plaintiff proposes to go into a case which is clearly within the latter part of the 5th section.

Lord DENMAN, C. J.—I shall receive the lease.

The lease was put in. It was a lease dated the 2d of June, 1758, from the Earl of Feversham to Mr. Betts, of the lands in question, "with full and free liberty to use and employ the space of ten feet of assize in breadth for banking, and to raise the same banks on any part of the

pairing and amending such parts of the banks and sides of the said stream called Isleworth Mill River, as are situate within and are parts of the said closes in which, &c., in manner and form as the defendant hath above in his said first plea alleged, and this the plaintiff prays may be inquired of by the country, &c."

(a) In the case of *Tickle v. Brown*, 6 N. & M. 230: see also the cases of *Bright v. Walker*, 1 C., M. & R. 211; *Monmouthshire Canal Company v. Harford*, Id. 614; *Beazeley v. Clarke*, 3 Scott, 258; *Onley v. Gardiner*, 4 M. & W. 498; and *Gale on Easements*, 424.

extent thereof, to any height not exceeding two perpendicular feet from the present surface of the ground, for the better use and enjoyment of the mill erected by the said Thomas Betts on the stream of the said river, in pursuance and by virtue of a contract for that purpose made by him with the said Earl of Northumberland.

It was proposed, on the part of the plaintiff, to put in a memorial of Mr. Betts written to Lord Feversham, and some letters to his agents, written after Mr. Betts became lessee of the mill, and before the lease from Lord Feversham.

*C. Cresswell*, for the defendant, objected, that Mr. Betts's letters were not receivable in evidence.

Lord DENMAN, C. J.—I think I must receive them.

The letters were read.

To prove the revocation of any license, it was proposed to put in copies of a notice given by Messrs. Roy, Blunt, & Co., the plaintiff's attorneys, to Mr. Morris, the defendant's attorney, and also the letter of Messrs. Roy, Blunt, and Co., enclosing that notice.

To render these copies admissible, an order of Mr. Justice WILLIAMS was put in, by which Mr. Justice WILLIAMS by consent did order "that the defendant upon the trial of this cause hereby make the admissions specified by the notice served by the plaintiff's attorney or agent upon the defendant's attorney or agent, dated the 4th day of December, 1839."

The notice to admit, which was in the form prescribed by the rule of H. T., 2 Will. 4, c. 20, was annexed to this order, and at the foot of it was written, in the handwriting of a clerk of Mr. Justice WILLIAMS, "Notice referred to in the annexed order." At the end of the notice was the following:—

<i>Description of Documents—Copies.</i>	<i>Date.</i>	<i>Original or Duplicate served, sent, or delivered, when, how, and with whom.</i>
A letter from Messrs. Roy, Blunt & Co., to W. H. Morris. A notice enclosed in such letter.	15th Dec. 1836.	Original sent per post on date.

*C. Cresswell*.—How do we know that the copy of the letter and of the notice proposed to be put in, are copies of the same letter and notice that are mentioned in the admission? There may be many letters and notices of the same date.

It was proved by Mr. Field that he attended at Mr. Justice WILLIAMS's chambers, when the order was made, and that he produced to the clerk of Mr. Morris, the defendant's attorney, the copies now proposed to be read, and that Mr. Morris's clerk said he would admit them.

Lord DENMAN, C. J.—That is sufficient.

The notice was read. It was dated December 15th, 1836, and it was a notice to the defendant "not to go upon, touch, or in any way interfere with the banks of a river known as Isleworth Mill stream, where the same flows through the grounds of the Fulwell Lodge estate."

Lord DENMAN, C. J., in summing up.—This is an action by Mr. Clay, the owner of the Fulwell Lodge estate, against the tenant of the Duke of Northumberland, for a trespass committed in repairing the banks of a stream. The defendant, very properly, does not plead the general issue,

but at once enters on the question of right; and he pleads, that for twenty, thirty, forty, and sixty years, he has of right repaired these banks. I think that the pleas as to the forty years and sixty years are put out of the case by the unity of possession within both those periods. Mr. Betts had a lease of the mill, and was lessee of the land; and it appears to me that he had such a community of interest as would prevent him from claiming an easement on the one while he was owner of the other. With respect to the twenty years and thirty years, it is proved that the defendant, and those who held the mill before him, have repaired these banks for the whole of these periods. *Primâ facie* this would be evidence that they did it as of right, and the act of Parliament was intended to make long enjoyment evidence of a right. The plaintiff's counsel admit these facts, and meet them by saying that this was originally matter of contract; and the question is, whether, when Mr. Betts's lease expired in 1805, all that was done afterwards was not done as of right. I confess it appears to me to admit of little doubt. When a lease expires, new persons come in; and when that is so, the parties who become owners should at once say, "The right is at an end, and you must not exercise it." If it were otherwise, the act of Parliament would be a snare to persons instead of a benefit; and persons would lay out their money on the faith of long enjoyment, which might afterwards be met in this way. I think that the early transactions under the expired lease have little bearing on this part of the question. There is nothing like a renewal of any license within the twenty and thirty years; these acts have been uniformly done by the defendant and his predecessors at the mill, without any leave asked on the one side, or notice of any adverse claim on the other; and I think that it must be taken, that what was done was done as of right.

Verdict for the plaintiff, as to the right claimed for forty years and sixty years, and on the plea of leave and license; and for the defendant as to the right for twenty years and thirty years.(a)

*Campbell*, A. G., Sir *W. Follett*, *W. H. Watson*, and *Wilson*, for the plaintiff.

*C. Cresswell*, *Wightman*, and *Corrie*, for the defendant.

(a) It may be well worthy of consideration whether, under the stat. 2 & 3 Will. 4, c. 71, sect. 1, a plea of thirty years' user applies to a right of this kind.

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*Adjourned Sittings in London, after Michaelmas Term, 1839.*

BEFORE LORD DENMAN, C. J.

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## THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY v. PRICE.—p. 55.

By the Cheltenham and Great Western Union Railway Act, 6 Will. 4, c. lxxvii., it is enacted, that in an action for calls on shares in that company, the book of shares, under the seal of the company, shall be *prima facie* evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836:—*Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836.

DEBT for a call of 5*l.* per share upon ten shares in this company. (*a*) Pleas—first, nunquam indebitatus; and secondly, that the defendant was not a proprietor.

By the 143d section of the stat. 6 Will. 4, c. lxxvii., it is, with respect of calls on shares in the company, enacted “that the directors, to be appointed as aforesaid, [under this act], shall have power from time to time to make such calls of money from the subscribers to, and proprietors of, the said undertaking, for the time being, to defray the expenses of, and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or principal money paid for or in respect of any such shares, shall not amount to more than the sum of one hundred pounds on any such share, and so that no such call shall exceed the sum of ten pounds upon each share, which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that the total amount of such calls in any one year shall not exceed twenty-five pounds upon each share, and so that an interval of three calendar months, at the least, shall always elapse between the day appointed for payment of one call and the day appointed for payment of the next succeeding call, and twenty-one days’ notice, at the least, shall be given of every such call by advertisement inserted in two or more newspapers circulating in the county of Gloucester, and in one or more newspaper or newspapers published in London; and all moneys

(*a*) By the stat. 6 Will. 4, c. lxxvii. (local and personal), sect. 145, it is enacted, “that in any action to be brought by the said Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share, or so many shares, as the case may be, in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to, for a call or so many calls of such sum or sums of money upon a share or so many shares belonging to the said defendant whereby a right of action hath accrued to the said Company by virtue of this act without setting forth the special matter.”

As the form of the declaration and second plea may be useful in practice, we have subjoined them:

“*Declaration.*—In the Queen’s Bench. The 17th day of January, in the year 1838, London (to wit). The Cheltenham and Great Western Union Railway Company, by F. H. J., their attorney, complain of Mark Price, who has been summoned to answer the said Cheltenham and Great Western Union Railway Company, by virtue of a writ issued on the 29th day of December, in the year of our Lord 1837, out of the Court of our Lady the Queen, before the Queen herself at Westminster, for that whereas the defendant, on the 1st day of December, in the year of our Lord 1837, and from thence hitherto being, and now being the proprietor of divers, to wit, ten shares in the undertaking mentioned in and authorized by a certain act of Parliament made and passed in the sixth year of the reign of his late Majesty King William the Fourth, for making a railway from Cheltenham and from Gloucester to join the Great Western Railway near Swindon, to be called “The Cheltenham and Great Western Union Railway,” with a branch to Cirencester (that is to say), a certain undertaking for making and maintaining the railway and other works mentioned in the said act, was and still is indebted to the plaintiffs in 50*l.* for a call of the sum of 5*l.* upon each and every of the said ten shares belonging to the defendant in the said undertaking, whereby and by reason of the non-payment thereof a right of action has accrued to the plaintiffs by virtue of the said act of Parliament, to demand and have of and from the defendant the said call of 5*l.* upon each of the said shares, together with interest upon the same after the rate of 5*l.* per cent. per annum from the day appointed for the payment of the said call, amounting in the whole to the sum of 80*l.* above demanded, yet the defendant, although often requested so to do, has not as yet paid the said sum above demanded or any part thereof; but he to do this hath hitherto wholly refused, and still does refuse, to the damage of the plaintiffs of 80*l.*, and thereupon they bring suit, &c.

“*Second plea.*—And for a further plea the said defendant says, that he was not nor is the proprietor of the said shares in the said undertaking mentioned, nor of any or either of the said shares in manner and form as the said plaintiffs have above in their said declaration alleged, and of this the said defendant puts himself upon the country, &c.”

so called for shall be paid to such persons at such times and places and in such manner as in such notice shall be appointed; and the respective owners of shares in the said undertaking shall pay their rateable proportion of the moneys to be called for as aforesaid to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid; and if any owner or proprietor, for the time being, of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same, after the rate of five pounds per centum per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor, for the time being, of any such share shall neglect or refuse to pay such his rateable proportion, together with the interest, if any, which shall accrue for the same, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of his Majesty's Courts of Record by action of debt, or on the case, or by bill, suit, or information; or the said directors may, if they think proper, and they are hereby authorized to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold."

To prove this part of the case, a resolution of the directors for the making of this call, dated October the 11th, 1836, was put in. It was contained in the minute book, which (by section 128 of the act) is made evidence.

The advertisements in the Gloucester Journal, Cheltenham Free Press, and Times Newspaper, announcing the resolution of the directors, dated the 11th of October, 1836, were put in.

By the 138th section of the act, it is enacted, "That the said company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time, as occasion may require, to cause the names of the several corporations, and the names and additions and places of abode of the several persons who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book, to be kept by the said company; and after such entry made, to cause their common seal to be affixed thereto; and by the latter part of sect. 145 it is enacted, that "on the trial of such action [for calls] it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such shares in the said undertaking, as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such call or calls having been made, without proving the appointment of the directors who made such call or calls, or any other matter whatever. And the said company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, on such call or calls, unless it shall appear that the principal moneys previously paid on any such share, together with such call, exceeded the sum of 100*l.* on each share, or that any such call exceeded 10*l.* upon each share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore re

quired, or that calls amounting to more than 25*l.* in the whole had been made in some one year; and in order to prove that the defendant was a proprietor of such share or shares in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

The book mentioned in the 138th section of the act was produced by Mr. Merrick, the secretary of the company, and in it the name of the defendant was inserted as the proprietor of ten shares, from number 1253 to number 1262, both inclusive.

It was proved by Mr. Merrick, that these entries in the book were made before the end of September, 1836, but that the seal of the company was not affixed to the book till the 3d of November in that year. He also stated that the book was made from a rough draft which had been prepared from written claims by which the different shareholders claimed to be registered for their respective shares.

*Peacock*, for the defendant.—I submit, that there is no evidence that the defendant was a shareholder at the time of the call on the 11th of October, 1836; the book is not evidence till the seal is affixed to it, which was in November. It may be that there is *primâ facie* evidence from the book that he was a shareholder in November, but that is no proof that he was so in October.

Lord DENMAN, C. J., held that there was no evidence to go to the jury that the defendant was a shareholder at the time of the call in October, and directed the plaintiff to be nonsuited, with liberty to move to set aside the nonsuit.

Nonsuit. (a)

*C. Cresswell, R. V. Richards*, and *Cripps*, for the plaintiff.  
*Campbell, A. G.*, and *Peacock*, for the defendants.

(a) No motion was made.

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TEBBUTT, Gent., one, &c., Surviving Partner, v. AMBLER.—*l.* 60.

A paper in the following form, signed by the party, "Memorandum, 30th April, 1836, Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for, (signed) J. T.;" stamped with an agreement stamp, is receivable in evidence without a receipt stamp.

ASSUMPSIT.—The first count of the declaration was on an attorney's bill by the plaintiff, as surviving partner of Thomas Tebbutt, deceased; second count, for money paid; third count, on an account stated, with a promise in the lifetime of the deceased Mr. Tebbutt; fourth count, for



work and labour by both partners; fifth count, work and labour by the plaintiff alone; sixth and seventh counts, money paid and account stated with the plaintiff. Pleas—first, except as to 104*l.* 1*s.* 9*d.*, parcel of the money claimed by the fifth, sixth, and seventh counts, non assumpsit; second, as to 104*l.* 1*s.* 9*d.*, payment of that sum; third, except as to that sum, the Statute of Limitations; fourth, payment into court of 104*l.* 1*s.* 9*d.*, and no greater damages; fifth, a set-off.

Replication traversing the allegations of the pleas.

On the part of the defendant, it was proposed to put in the following paper, which had been stamped with an agreement stamp, on payment of the penalty. It was signed by the defendant:—

“Memorandum, 30th of April, 1836.—Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for.  
(Signed) JOHN TEBBUTT.”

*Platt*, for the defendant.—I submit, that this paper is not receivable in evidence without a receipt-stamp. By the Stamp Act, 55 Geo. 3, c. 184, schedule (part 1) “Receipt,” it is enacted, that “any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand, *therein specified*, and amounting to 2*l.* or upwards, shall be expressed or acknowledged to have been *paid, settled, balanced, or otherwise discharged or satisfied*, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be *a receipt for a sum of money* of equal amount with the sum, debt, or demand, so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly; and any receipt, discharge, note, memorandum, or writing whatever, given to any person for or upon the payment of money, which shall contain, import, or signify any *general* acknowledgment of any debt, account, claim, or demand, debts, accounts, claims, or demands, *whereof the amounts shall not be therein specified*, having been paid, settled, balanced, or otherwise discharged or satisfied, or whereby any sum of money therein mentioned shall be acknowledged to be received *in full*, or in discharge or satisfaction of any such debt, account, claim, or demand, debts, accounts, claims, or demands, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be *a receipt for the sum of 1000*l.* or upwards*, within the intent and meaning of this schedule, and shall be charged with the duty of 10*s.* accordingly.” This paper clearly imports an acknowledgment of an account having been settled.

*Sir F. Pollock*, for the plaintiff.—The highest receipt-stamp is 10*s.*, and this paper bears a higher stamp, and is therefore no injury to the revenue. The portion of the statute 55 Geo. 3, c. 184, that has been cited, applies to papers that are in themselves really receipts. This is not so, as it contains an agreement to give a receipt, and contemplates some other paper in addition to and subsequent to that which I propose to give in evidence: indeed, this very paper has been received by Lord LANGDALE at the Rolls.

Lord DENMAN, C. J.—I shall receive the evidence.

The paper was read.

Lord DENMAN, C. J., suggested, that, as the case was entirely matter of account, it should be referred.

The case was referred.

*Platt and Humfrey*, for the plaintiff.

*Sir F. Pollock and Hoggins*, for the defendant.

### HODSOLL v. STALLBRASS and ANOTHER.—p. 63.

In an action by the master of an apprentice for an injury done to him per quod servitium amisit, the declaration alleged as special damage, that the apprentice was permanently injured, and could never again be capable of serving the plaintiff as his apprentice during the remainder of the term:—*Held*, that the jury might award damages for the loss of the master up to the end of the term, by reason of the permanent injury of the apprentice, and that they were not limited to give damages for the loss of the master up to the time of the commencement of the action only.

CASE.—The declaration stated that the defendants kept a dog, well knowing it to be accustomed to bite mankind, and that the dog, on the 21st of March, 1839, bit James Young, the apprentice and servant of the plaintiff, and injured his fingers, whereby James Young was, from time to time till the commencement of this suit, rendered incapable of doing his duty as such servant and apprentice of the plaintiff in his trade of a watchmaker, in the way of which trade J. Y. was apprenticed to the plaintiff by an indenture dated the 9th of July, 1836, from that time till the 1st of August, 1843. The declaration then stated as special damage, that the plaintiff was obliged to hire one William Evans in the stead of the said J. Y., and concluded with the following allegation:—

“And the plaintiff further saith, that by means of the premises of the said fingers and hand and arm of the said James Young have become, and are permanently crippled and hurt, and rendered unfit for use, and the general health of the said James Young hath become and is greatly injured and impaired; and he, the said James Young, will never again be capable of working at the said trade and business of a watchmaker, as he otherwise might and would have done, and the plaintiff will thereby lose all the benefit and advantage which he might and would otherwise have received and acquired from the future service and assistance of the said James Young, as such servant and apprentice as aforesaid, from thenceforth until the end and expiration of his said apprenticeship; and he, the plaintiff, having in and by the said indenture of apprenticeship covenanted and agreed to find, provide, and allow unto the said James Young, his said servant and apprentice, competent and sufficient meat, drink, and apparel, lodging, washing, and all other things necessary and fit for an apprentice during all the term aforesaid, and will remain liable so to do until the end and expiration of the said term, notwithstanding he may hereafter receive little or no benefit from the service and assistance of the said James Young, as such servant and apprentice as aforesaid, in his, the plaintiff's, said trade and business, in consequence of the wounds and injuries aforesaid, occasioned as aforesaid; and he, the plaintiff, hath been and is, by means of the premises aforesaid, otherwise greatly injured and damnified, to the plaintiff's damage,” &c.

Plea, a payment into court of ten pounds, and that the plaintiff had sustained no greater damages.

Replication, that the plaintiff had sustained greater damages.

The facts of the case were proved, and it appeared that the plaintiff's apprentice, James Young, had had the end of one of his fingers bitten off by the defendant's dog, which rendered him permanently unable to do some parts of the watchmaking business that he had before that time been able to do.

*Erle*, for the defendant.—I submit that the plaintiff cannot recover for any injury sustained by him for the loss of the service of his apprentice after the time of the bringing of the action. His right of action arises from the injury that he has received, and he is therefore not entitled to recover for any prospective damage.

*J. Jervis*, for the plaintiff.—The loss of the service of the plaintiff's apprentice, caused by the wrongful act or wrongful negligence of the defendants, gives the plaintiff a right of action, and it is mercy to him that all the damages should be recovered in one action, instead of having a fresh action, from time to time, till the end of the apprenticeship; and if the plaintiff has a cause of action in this case, the jury have a right to consider the whole extent of the injury sustained.

LORD DENMAN, C. J.—I think that under this declaration the plaintiff may recover a compensation for the damage he sustains by the permanent injury of his apprentice to the end of his apprenticeship.

*Erle*, for the defendant, asked, that to save expense the jury might assess the damages separately for the permanent injury done to the apprentice.

LORD DENMAN, C. J.—I see no objection to that.

Verdict for the plaintiff, the jury finding that 20*l.* was the amount of the damages to the plaintiff from the permanent injury to the apprentice, and that the sum paid into court was sufficient for the damages up to the time of the commencement of the action.

LORD DENMAN, C. J., gave leave to move to enter a verdict for the defendant, in case the court should be of opinion that the plaintiff could not recover for any damage later than the commencement of the action.

*J. Jervis* and *Barstow*, for the plaintiff.

*Erle* and *Butt*, for the defendant.

In the ensuing term *Erle* applied, in pursuance of the leave given for a rule to show cause why a verdict should not be entered for the defendant; but the court refused a rule.

See *Ongram v. Lawson*, post.

# BELL, Gent., one, &c., v. FRANCIS and Others.—p. 66.

In an action against the directors of an intended company, it was proved, (in order to let in secondary evidence of their minute-books, called for under a notice to produce,) that four months before the trial, the late secretary had the books in a desk at the office of the company, and that he then gave up the key of the desk to the manager of the company, who acted for the directors:—*Held*, sufficient.

In an action by the solicitor of an intended company for preparing their copartnership deed, a person may be liable without being one of the directors. The persons who are directors are

liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitors in preparing the deed.

DEBT for work done.—Plea, never indebted.

It was opened by *R. V. Richards*, for the plaintiff, that the defendants were sued as the Directors of the London United Trades' Bank, for money due to the plaintiff as their solicitor—in preparing their deed of partnership, and for other business.

On the part of the plaintiff, *R. V. Richards* called for the production of the minute-books of the directors.

*Thesiger*, for the defendant, declined to produce them.

To trace the books to the possession of the directors, Mr. Edgehill, the late secretary to the company, was called; he said, "The account-books were kept in my desk, at the office of the company. I last saw the books there on the 26th of August last. Mr. Thompson, one of the defendants, was then a director. I have not seen the books since they were taken out of my possession in consequence of a dispute; and I, on the 26th of August last, placed the key of the desk in which the books were contained in the hands of the manager of the company, who acted for the directors.

*Thesiger*.—Does your lordship think that this is enough to let in secondary evidence of the books?

LORD DENMAN, C. J.—I think that it sufficiently traces them to you.

It appeared that the plaintiff was appointed in December, 1837, to be solicitor to the company by a resolution of the then directors, and that he was to attend all meetings of the directors, &c., and be paid 350*l.* a year besides his legal charges. It further appeared that the deed was prepared by the plaintiff in December, 1838, but that the defendant Francis did not become a director till the 1st of March, 1839.

LORD DENMAN, C. J.—In cases of this kind, a person *may* be liable without being a director.

It was further proved by Mr. Jamieson, the manager of the company, that at a meeting of the company on the 20th of December, 1838, at which the defendant Francis was present, the draught of the deed was produced, and its clauses discussed; and that the defendant Francis took a part in suggesting alterations in the draught.

LORD DENMAN, C. J.—The question is, whether the defendant Francis so acted before he became a director as to become one of the employers of the plaintiff in preparing this deed. Where persons become directors in one of these proposed companies, they make themselves liable, and other persons may do so if they interfere in the management, and hold themselves out as persons giving the order.

Verdict for the defendant.

*R. V. Richards*, and *Mansel*, for the plaintiff.

*Thesiger*, and *W. H. Watson*, for the defendant.

BEFORE LORD DENMAN, C. J.

## LYONS v. DE PASS and Another.—p. 68.

\* A sale of goods, being those in which he usually deals, made to a tradesman in his warehouse or shop, in the city of London, is a sale in market overt, notwithstanding the construction of premises be such, that a person from the outside cannot see what is going on within.

TROVER for a quantity of slippers.—Pleas, 1st, not guilty; and 2d, that at the time when, &c., the plaintiff was not possessed of goods and chattels in the declaration mentioned, or of either of them, or of any part thereof, as of his own property, in manner and form as he had alleged.

It appeared that the slippers in question had got into the possession of the defendants under the following circumstances. On the 4th of March a person named Fuller went to the house of the plaintiff, and told him he had got an order for fifteen dozen pair of slippers to sell; the plaintiff asked him at what price, and being told 15s. 6d. a dozen, agreed that he should sell them, and have the odd 6d. a dozen for his trouble in doing so. Fuller wished the plaintiff to intrust him with the goods, but the plaintiff declined, saying he would not trust his property to anybody: upon which Fuller said, "Well, you shall go with me *to the warehouse*." Upon this the goods were packed up, and the plaintiff, Fuller, and a porter who carried the goods, went together to the premises of the defendants, in Cateaton street, in the city of London. When they arrived there, Fuller told the plaintiff to stay at the door, that he might not spoil his custom; accordingly the prisoner and the porter only went *inside the warehouse*. The porter immediately came out and went away; Fuller, having remained in about a quarter of an hour, made his appearance, upon which the plaintiff asked him for his money. He replied, "The gentleman has not paid me yet; he has ordered four dozen ladies' slippers more; I will give you a check for the whole amount." While they were walking along together, Fuller suddenly ran away from the plaintiff, and was not seen till several days after, when the plaintiff, meeting him in the street, seized him and demanded his money; but he got away again, and had the effrontery to summon the plaintiff before the lord mayor for assaulting him in the street. However, upon the matter being explained, the lord mayor committed Fuller on a charge of feloniously obtaining the slippers, and he was subsequently tried and convicted, and sentenced to be transported for seven years.

One of the defendants was examined as a witness at the trial, on the part of the prosecutor, and gave his evidence as follows:—"I live in Cateaton Street; the prisoner came to me on the 4th of March, about ten o'clock in the morning, to know if we could buy a lot of jobslippers, about 14s. a dozen. We told him he might bring them, but we had not seen a sample of them; he called again about an hour after with sixteen dozen, and said, 'Here are the slippers;' he said there were only fifteen dozen. We gave him 12s. a dozen for the men's and less for the other, 9l. 4s. altogether, and gave him a check for the amount; he said he had them  $\alpha$  commission from a person who wanted money. We did not give him an order for four dozen more."

The slippers having been resold by the defendants, were not produced at the trial at the Central Court, and therefore the court could not make an order for their restitution, under the statute 7 & 8 Geo. 4, c. 29, s. 57.

An examined copy of the record of Fuller's conviction at the Central Criminal Court was put in, (a) and the short-hand writer of that court proved from his notes the evidence given by the defendant as above stated. A witness was also called, who proved that he applied to one of the defendants, on the part of the plaintiff, for a settlement, and was told by him that they would give the plaintiff 3*l.*, if he would take it, but not a farthing more. This the plaintiff declined.

Sir *F. Pollock*, for the defendants, relied on two grounds of defence:—first, that there had been a sale in market overt, which passed the property to them; and, secondly, that the sale was a *bonâ fide* sale, made by the authority of the plaintiff, to whom the goods belonged.

Lord DENMAN inquired of *Platt*, who led for the plaintiff, what was his answer to the objection that there had been a sale in market overt.

*Platt* replied, that it was not, in point of law, a sale in market overt.

Lord DENMAN, C. J., in summing up, said—This is an action of trover, brought to recover the value of a quantity of slippers, which the defendants purchased of a person named Fuller, who was afterwards prosecuted by the plaintiff, and convicted of having stolen them from him. It is said that Fuller got possession of the goods by a trick; and, if so, it seems to me that the property did not pass by the mere fact of his selling them to the defendants. It seems to me that the plaintiff's conduct will not affect the question of whether the goods were stolen or not. (b) You will find your verdict for the plaintiff, unless you think there was a sale in market overt; for such a sale cures a felony. It is for you to say, under all the circumstances of the case, whether this was a sale in market overt. The defendants are not charged with receiving the goods knowing them to have been stolen; but merely with receiving them from Fuller while they were the property of the plaintiff. (c) The property did not pass unless there was a sale in market overt. If you think there was such sale, you will find your verdict for the defendants; if you think there was not, then you will find for the plaintiff.

Verdict for the defendants, with leave to enter a verdict for the plaintiff for 9*l.* 4*s.*, the sum paid for the slippers, if the Court of Queen's Bench should be of opinion that, under the circumstances, the sale was not in law a sale in market overt.

*Platt, Payne, and Pashley*, for the plaintiff.

Sir *F. Pollock*, and *W. H. Watson*, for the defendants.

(a) It was necessary for the plaintiff to prosecute the thief; if he had not done so, he could not have maintained the action of trover, not as it seems on the ground mentioned by Lord Kenyon in *Howard v. Smith*, 2 T. R. 755, that during the interval between the felony and the conviction, the property remains in *dubio*, but for the reason mentioned by the Court of King's Bench, in *Peer v. Humfrey*, 2 Ad. & E. 495, and 4 Nev. & Man. 484. See *Gimson v. Woodfull*, Vol. 2 of these Reports, p. 41, and 1 Hale's P. C. c. 47, p. 538, where it is said—"A. steals the goods, viz. 50*l.* in money, of B., is convicted, and hath his clergy upon the prosecution of B. B. brings trover for the 50*l.* adjudged for the plaintiff, because now the plaintiff hath prosecuted the law against him, and no mischief to the commonwealth; but, before prosecution, trover lies not, for so felonies would be healed."

(b) Leave was given to Sir F. Pollock to argue this point in showing cause, if the court should grant a rule upon the other.

(c) In Coke's 2d Instit. p. 713, it is said—"If they be sold of *covin* between two, of purpose to bar him that hath right, this barreth not."

BEFORE LORD DENMAN, C. J.; LITLEDALE, J.; AND COLERIDGE, J.

IN the ensuing Hilary Term, *Payne* (a) moved, pursuant to the leave given at the trial. He contended that the sale was not a legal sale in market overt upon two grounds: first, on account of the nature of the place in which the sale took place, viz. a *warehouse*, and not an *open shop*; and, secondly, on account of the character of the purchaser, he not having been shown to be a freeman of London. On the first point he referred to Comyn's Dig., title *Market*, E, in which (after the statement that a sale in an *open shop* in London of proper goods is a sale in market overt, and changes the property) it is said, "A sale in a *covert place* within a fair or market, does not change the property, as in a *back room* or *warehouse*, or behind a hanging or cupboard, *where a man passing before the shop cannot see*, or where the windows of the shop are shut." He also referred to the case of *Taylor v. Chambers*, (b) as an authority to show that the shop must be an open shop, and that one of the contracting parties, at least, must be a freeman; and he argued, that, in addition to the fact of the place in question *being called a warehouse*, it was evident that it was in fact a covert place, into which a person could not see from without, or the plaintiff would have been able to see in, and the fraud would not have been committed upon him. He relied

(a) *Platt* was absent, from indisposition.

(b) Cro. Jac. 68. That was an action of trover for a silk quilt, a tester of a bed, five silk curtains, a petticoat, and a cloak. The defendant pleaded not guilty to all but the petticoat and cloak, and as to them he pleaded that the city of London is an ancient city, and there is a market there in every open shop on every day besides Sundays and holidays from sunrise to sunset, so that one of the contractors is a freeman, and that he, being a freeman of the Company of Mercers, bought those things in his open shop. To this plea the plaintiff demurred, and the court held that it was not good. "For," said they, "the custom is too general that every freeman might buy all manner of wares in every shop, &c., for then a scrivener might buy plate in his shop and the like, &c., which is not reasonable. And here he, being of the mystery of mercers, to buy petticoats and cloaks, &c., it is not agreeable to his trade." And Popham said, that it had been resolved that such custom, being found by a special verdict, was unreasonable; wherefore it was adjudged for the plaintiff.

In *Pulmer v. Wolley*, Cro. Eliz. 454, it is said that a draper's shop is not a market overt for the purchase of plate; "and so if the sale be in a *back shop*, or in another place not open, no property shall be changed by such sale."

Also, in the case of market overt, 5 Coke, 83, b, before referred to, it is said that the sale of stolen plate in a goldsmith's shop in London vests the property if the plate be sold openly; but that if the sale be in the shop of a goldsmith, either behind a hanging or behind a cupboard, upon which his plate stands, so that one who stood or passed by the shop could not see it, it would not change the property; and so if the sale be not in the shop, but in the warehouse or other place of the house, it would not change the property. In Hale's P. C. c. 47, his lordship, speaking of restitution, says—"1st. This act was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution; and it would be small encouragement, if a thief by sale in market overt, which is every day in almost every shop in London, should elude it.

"2d. It were against the common good, and would encourage offenders to the common detriment, if this sale should conclude the owner.

"3d. The man that is robbed is robbed against his will, and cannot help it; but the buyer of stolen goods may choose whether he will buy, or if he buy, may yet refuse to buy unless well secured of the property of the goods, or knowing the owner." He goes on to state that there is no authority, but it is only *gratus dictum*, that sale in market overt barred restitution on appeal, and cites as authorities contra, the following:—"1st. It hath been the constant practice at Newgate that sale in market overt hath not been allowed against this writ of restitution, and this Mr. Lee, secondary there for above thirty years, hath attested openly. 2d. Lord Coke says on the stat. 21 Hen. 8, c. 11, "the party robbed or owner shall have restitution notwithstanding any sale in market overt, and with this agreed myself and Justice Twiden upon consideration of this statute."

also upon the fact of there being no modern case in the books on the subject of a sale in a London ware-house being a sale in market overt, as strongly tending to show that, with the change in the construction of the premises, the privilege was altogether lost; on the principle that the reason ceasing the thing itself ceases, and according to the maxim, "debile fundamentum fallit opus." He further submitted, that if, notwithstanding such change, the privilege were held to exist, it would open a door to the disposal of stolen property to a very great and fearful extent. Under all these circumstances, he urged upon their lordships the propriety of granting a rule, that the question, which he considered as of much importance, might be fully and solemnly argued.

LORD DENMAN, C. J., said, that with respect to the nature of the premises in which the sale took place, reference was made at the trial on both sides to the knowledge of the jury, and they had found the fact that it was market overt; and with respect to the objection that the purchaser should be a freeman, no question was raised on that ground at *Nisi Prius*.

LITLEDALE, J.—After referring to the case of market overt in 5 Coke, 83, b, in which it is stated that every shop in London is market overt for such things only as, according to the trade of the owner, are put there for sale, said that in his opinion the circumstance of the alteration in the shops of London, in which glazed windows were substituted for open fronts, did not render a sale in such shops less a sale in market overt than it would have been if they had continued in their former state.

COLERIDGE, J., said, that if the argument used with reference to the alteration in the construction of the buildings were to prevail to the extent to which it had been pressed, it would have the effect of destroying the custom altogether, and preventing there being any sale in market overt in a shop in London. His lordship added, that in his opinion it would be productive of so much mischief to have the law on the subject questioned, that he could not consent to grant any rule upon the subject.

Rule refused.

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## OXFORD SUMMER CIRCUIT, 1839.

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BEFORE MR. BARON ALDERSON, AND MR. JUSTICE WILLIAMS.

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### BERKSHIRE ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON ALDERSON.

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SELWOOD *v.* MOUNT, Esq., and OTHERS.—p. 75.

Magistrates having convicted a party under the Highway act, they drew up a conviction and returned it to the clerk of the peace, and on an action being brought against them, they put in



the conviction returned to the clerk of the peace (which was open to some formal objections), and also another conviction drawn up afterwards in a more formal shape:—*Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case.

*Semble*, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity, than of one who cannot do so.

TRESPASS, for entering the plaintiff's house and close, and taking his goods. Plea—Not guilty.

It was opened by *Whateley*, for the plaintiff, that the plaintiff had applied to two magistrates, under the stat. 5 & 6 Will. 4, c. 50 (the Highway Act), s. 84, (a) to cause a footpath to be stopped up, as useless: and that they having, under sec. 85 of the act, certified that it was so, Mr. Williams, of East Ilsley, had, under sec. 88 of the act, appealed against their certificate; and on the trial of that appeal at the Quarter Sessions at Abingdon, on the 3d of July, 1838, the jury found that the footpath was not useless; and the Quarter Sessions ordered that the costs of the appeal should be paid by the respondent. As the order was originally drawn up, no respondent's name was mentioned, though the plaintiff's name was afterwards inserted (as he submitted) improperly, by the direction of the chairman. However, the sessions did not ascertain the amount of costs, and therefore their order was, on that point, inoperative. After this Mr. Williams went before Mr. Mount and Mr. Bunny, two of the defendants, who were magistrates, and they granted a warrant of distress to levy 112*l.* 0*s.* 4*d.* as the amount of these costs, on the plaintiff's goods, which warrant was executed by the defendant Law, who was the constable. He submitted, that as the Quarter Sessions had not ascertained the amount of costs, the defendants, Mr. Mount and Mr. Bunny, had no authority to issue any warrant. They, however, were mere nominal defendants, as Mr. Williams had given them an indemnity.

The taking of the goods was proved, and the counsel of the defendant Law put in the warrant of distress, which the defendant Law had notice to produce. The order of sessions for the payment of the costs was also put in, and did not specify any sum. The indemnity given by Mr. Williams to Mr. Mount and Mr. Bunny, was also put in.

ALDERSON, B.—Magistrates ought not, I think, to take an indemnity. It is a bad practice, as it has the effect of enabling them more safely to decide in favour of a party who is able to give an indemnity, than of one who cannot do so.

*Ludlow*, Serjt., for the defendants, Mount and Bunny.—By the 90th sect. of the stat. 5 & 6 Will. 4, c. 50, the Quarter Sessions are bound to order the costs to the successful party, on an appeal of this kind; and that being so, I submit that the magistrates, by whom the payment of them is to be enforced under the 103d section, may ascertain the amount; and that, at all events, even if this is not so, the plaintiff should have made this his defence when summoned before Mr. Mount and Mr. Bunny; instead of which, he never either appeared to their summons, or made any defence or objection before them, till a warrant of distress is granted, and then brings his action. I submit, that as the magistrates had jurisdiction over the subject-matter, their conviction is a bar to the present action; and his remedy, if any, was by appeal under the 105th

(a) The sections of the Highway Act referred to in this case will be found in Burn's Justice, tit *Highways*.

section. I ought to mention also, that a conviction was returned by the magistrates to the Quarter Sessions, and that that conviction is open to some objections. Since that the magistrates have drawn up another conviction, which is free from those objections. I submit that they are right in doing so. It has long been the practice for magistrates not to draw up their convictions at the time. If the conviction returned to the sessions is good, *cadet questio*; and if it is not, it is a nullity, and nothing at all; and the magistrates are then in the same situation as if no conviction had ever been returned to the sessions.

ALDERSON, B.—I do not see any impropriety in the magistrates drawing up another conviction in a more formal shape, provided that the latter is according to the truth, and supported by the facts of the case.

Both the convictions were put in, and the learned Baron being of opinion that they were in point of law no answer to the action, there was a

Verdict for the plaintiff against the defendants Mount and Bunny, and for the defendant Law.

*Whateley, Tyrwhitt, and J. Jeffreys Williams*, for the plaintiff.

*Ludlow and Talfourd*, Serjts., and *Carrington*, for the defendants Mount and Bunny.

*Walesby*, for the defendant Law.

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In the ensuing term, *Ludlow*, Serjt., applied to the court of Queen's Bench for a new trial, on the ground that the facts before stated were a good defence for the magistrates. The court granted a rule to show cause.

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## WORCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON ALDERSON.

If one of the grand jurors be a Quaker, the indictments should commence, "The jurors for our lady, the queen, upon their oath and affirmation present," &c.

ON the grand jury being called, one of them, Josiah King, Esq. (who was stated to be one of the Society of Friends), made his affirmation. (a)

ALDERSON, B., directed that all the indictments should commence "The jurors for our Lady the Queen, upon their oath and affirmation, present that, &c."

(a) By the stat. 3 & 4 Will. 4, c. 49, s. 1, it is enacted, "That every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration instead of taking an oath in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law or by any act of Parliament already made or hereafter to be made, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form."

## REGINA v. SANDERS.—p. 79.

A shop, to be within the stat. 7 & 8 Geo. 4, c. 29, s. 15, & 1 Vict. 90 (as to breaking into shops), must be a shop for the sale of goods, and a mere workshop will not be sufficient.

INDICTMENTS on the stat. 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. 90, (a) for breaking into the shop of William Ramsdell and stealing coals therein.

It appeared that the prosecutor sold coal, and was also a blacksmith, and that the place from which the coal was stolen was a shop, to which persons went who bought it, it being a room beyond the prosecutor's blacksmith's shop.

ALDERSON, B.—To come within the provisions of these acts of Parliament the place must be more than a mere workshop, it must be a shop for the sale of articles; a workshop, such as a carpenter's shop or a blacksmith's shop, would not, I think, be within the acts.

Verdict—Guilty.

*W. J. Alexander*, for the prosecution.

(a) By which it is enacted, "that if any person shall break and enter any shop, warehouse, or counting-house, and steal any chattel, money, or valuable security," every such offender is liable to be transported for life, &c. But now, by the stat. 1 Vict. c. 90, the punishment is reduced to transportation for any term not exceeding fifteen years, or less than ten years, or imprisonment not exceeding three years, to which hard labour and solitary confinement may be added.

## REGINA v. LEDDINGTON.—p. 79.

A person cannot be tried for inciting another to commit suicide, although that other commit the suicide.

THE indictment charged that Ann Burton murdered herself by poisoning herself with arsenic, and that the prisoner did feloniously incite and procure the said Ann Burton the said felony and murder to do and commit.

ALDERSON, B.—(To the jury.)—You have no authority to inquire into this charge; this is a case of suicide, and the prisoner is charged with inciting it; that is a case that by law we cannot try. The prisoner must be acquitted. (a)

Verdict—Not guilty.

*Domville and Huddleston*, for the prosecution

*W. H. Cooke*, for the prisoner.

(a) In the case of *Rez v. Russell*, M. C. C. 356, it was held by the fifteen judges, that an accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried, and that he is not now triable for a substantive felony under the stat. 7 Geo. 4, c. 64, s. 9, as that statute was to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried. And it was also held, that if a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not, and that the person who furnished her with the poison for that purpose will, if absent when she took it, be an accessory before the fact only.

## STAFFORD ASSIZES.

BEFORE MR. BARON ALDERSON.

## REGINA v. ORGILL.—p. 80.

In Ireland the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself to be a Roman Catholic, and the woman be a Roman Catholic, this is a good marriage as against him; and if he be afterwards tried for bigamy on this marriage, (he having been before married to another wife who was still alive,) he will not be allowed to set up his supposed Protestantism as a defence to the charge. To prove such a marriage, evidence was given that the Rev. W. O'S. (who officiated) acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin, and that having asked the man if he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married:—*Held*, sufficient.

**BIGAMY.**—The prisoner was indicted for marrying Ellen Nagle, his former wife, Ann Orgill, being alive.

It was opened by *Carrington*, for the prosecution, that the first marriage took place at Burton-on-Trent, on the 27th of July, 1827, and the second at the house of the Rev. W. O'Sullivan, a Roman Catholic priest at Cork; Ellen Nagle being a Roman Catholic, and the prisoner, in answer to a question put by the priest immediately before the second marriage, stating that he was a Catholic also. He submitted that a marriage of two Catholics in Ireland by a Roman Catholic priest was a valid marriage, and that if the prisoner declared himself to be a Roman Catholic, he could not be permitted now to say that he was not. He cited the cases of *Rex v. Hanley*(a) and Dr. Browne's Irish Ecclesiastical Law.(b)

**ALDERSON, B.**—If at the time of the second marriage the prisoner

(a) Cited *Carrington's Supp.* 254. In that case, which was tried at the Ennis Assizes, 1815, before the Lord Chief Baron O'Grady, for bigamy, in 1806, the prisoner was married by a Catholic priest to his first wife, who was an Irish Catholic, the prisoner stating that he was a Catholic. In 1815, he married his second wife, he then passing for a Protestant. This marriage was celebrated by a clergyman of the Established Church. The prisoner's counsel contended, that as the prisoner was in fact a Protestant at the time of the first marriage, it was void, as every marriage of a Catholic and a Protestant by a Catholic priest would be, and witnesses were called to show that up to the time of the first marriage the prisoner always went to church and was considered a Protestant. The lord chief baron said that the law was correctly stated by the prisoner's counsel, and left it to the jury to say whether they did not consider the prisoner to be a Catholic at the time of the first marriage. The jury found that he was so, and convicted him. *Rex v. Hanley*, (MS.) 1815.

(b) "In cases of marriage by license in Ireland, security must be given that there is not any impediment or suit depending; that the consent of parents or guardians (when required) has been obtained; and that the marriage shall be in the parish church or chapel where one of the parties dwells, between the hours of eight and twelve in the forenoon. Two persons must swear to the consent, and one of the parties that there is no impediment. The parishes of their abode must be mentioned in the license, and ministers marrying without banns or license, or at improper hours, may be deprived if beneficed, or degraded if not. In Ireland none of these requisites are essential to the validity of the marriage, except that it should be celebrated by a person in holy orders. But if a marriage be celebrated in Ireland by a person not in holy orders, it is void. Browne's Irish Ecc. Law, 266. (Dr. Browne was Professor of Civil Law in the University of Dublin, and a member of the Irish Parliament.)

declared himself to be a Roman Catholic, it is a good marriage as against him. The law on this subject was much considered by the Privy Council in the case of *Swift v. Swift*. If the prisoner at the time of his marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his protestation as a defence to this charge.

The first marriage at Burton-upon-Trent was proved by the production of the original parish register, and the evidence of the parish clerk who was present at it. To prove the second marriage Ellen Nagle was called: she stated that the Rev. W. O'Sullivan acted as a Roman Catholic priest, and that the marriage took place at his house, as was usual with the marriages of Roman Catholics in Ireland. She stated that before the commencement of the marriage service Mr. O'Sullivan asked the prisoner if he was a Roman Catholic, and that he said that he was so. She also stated that a part of the ceremony was in Latin and the remainder in English, and that the priest having asked the prisoner if he would take the witness as his wife, and having asked the witness if she would take the prisoner for her husband, and each having answered in the affirmative, he pronounced them married.

Evidence was also given that the first wife was alive, and that the prisoner was apprehended in the county of Stafford.

ALDERSON, B., (in summing up,) told the jury, that if they believed the evidence of Ellen Nagle, the marriage in Ireland was sufficiently proved, and that there was no doubt as to the other parts of the case.

Verdict—Guilty.

*Godson and Carrington*, for the prosecution.  
*Price*, for the prisoner.

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BEFORE MR. JUSTICE WILLIAMS.

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REGINA v. OWEN, ELLIS, and THOMAS.—p. 83.

Three persons were indicted for a rape, and were also indicted for the murder of the party alleged to be ravished. Before the trial on the indictment for the rape, the counsel for the prosecution asked to have one of the prisoners acquitted, that he might call him as a witness against the others. This was opposed by the prisoners' counsel:—*Held*, that in cases of this kind the Court will, if it sees no cause to the contrary, intrust it to the discretion of the counsel for the prosecution to determine whether he will have a prisoner acquitted before the trial commences to enable him to call such prisoner as a witness against the other prisoners.

On the trial of the indictment for the rape, it was proposed to put in the depositions of each of the prisoners, taken on oath at the inquest held on the party alleged to have been ravished. It appeared that each of the prisoners was in custody at the inquest; that no inducement to confess was held out, and that each was asked if he wished to make a statement, and said that he did. The judge received the statements in evidence, but said he would reserve the point if it should become necessary.

The prisoners being acquitted of the rape, the counsel for the prosecution moved to put off the trial for the murder till it could be ascertained whether the crown would pardon a person convicted of bigamy, to whom it was alleged that one of the prisoners had made an important statement. The judge postponed the trial, and would not admit the prisoners to bail.

RAPE.—The 1st count of the indictment charged the prisoner Owen with having ravished Christina, the wife of Robert Collins, and the other prisoners with having aided him in so doing; in the 2d count the prisoner Thomas, charged as principal, and the other two prisoners as

aiders; and in the 3d count the prisoner Ellis was charged as the principal, and the other two as aiders.

As soon as the jury were sworn, *Ludlow*, Serjt., for the prosecution, asked that the prisoner Owen should be acquitted before the case was gone into, as he proposed to examine Owen as a witness against the other prisoners.

*Godson*, *E. Yardley*, and *Beudon*, for the respective prisoners, objected that the prisoner Owen ought not to be made a witness after the grand jury had returned a true bill against him.

*WILLIAMS*, J.—I have very little doubt in this matter; but as this is a case of importance, I will confer with my brother *ALDERSON* on this point.

His lordship having conferred with *ALDERSON*, B., said, “I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the Court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the learned counsel who conduct the prosecution. I shall therefore, in this case, intrust it to the discretion of the learned serjeant to determine whether he will have the prisoner Owen acquitted before the case is gone into or not. I think it almost of course.”

It was opened by *Ludlow*, Serjt., that Mrs. Collins had taken her passage from Preston Brook to London on board one of Messrs. Pickford’s fly-boats, of which the prisoner Owen was the captain, and the other two prisoners the hands: and the learned serjeant opened a great deal of evidence, from which it was sought to be inferred that Mrs. Collins had been ravished by the prisoners while she was on board the fly-boat, and had afterwards been drowned by them in the canal at a place near Fazeley. At the conclusion of his opening, *Ludlow*, Serjt., asked the prisoner Owen whether, if he were then acquitted, he was willing to give evidence.

The prisoner Owen said that he was not, and the trial proceeded as against him as well as the other prisoners.

On the part of the prosecution Mr. Fowke, the coroner, who held the inquest on the body of Mrs. Collins, was called. He said, “At the inquest the prisoner Owen made four statements; he had been sworn before he made each statement. Each of the statements was taken down in writing by me, and signed by him. The prisoner Ellis made and signed a statement, and so did the prisoner Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement, neither threat nor promise; they were all three brought before me in custody.”

*Ludlow*, Serjt., proposed to give these statements in evidence.

*Godson*.—I submit that they are not receivable, as they were on oath.

*WILLIAMS*, J.—I will reserve the point if it should become necessary.

*Godson*.—I believe that the cases have gone to this, that where the coroner has examined witnesses who have come voluntarily, their depositions have been afterwards read. These persons were in custody; and in the case of a person named Wheely, who was tried at Worcester on a charge of having poisoned his wife, Mr. Baron *ALDERSON* rejected the deposition of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody.

*WILLIAMS*, J.—I know that my brother *ALDERSON* did so; but I also

know, that since that there has been a reaction in opinion, (if I may be allowed the expression;) I shall therefore receive the evidence and reserve the point if it should become necessary.

Mr. Fowke recalled.—“ I asked Owen if he was desirous of giving his evidence, and he said, yes: he was sworn and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did.”

The statements were read.

At the conclusion of the evidence for the prosecution, WILLIAMS, J., being of opinion that there was no sufficient evidence to call on the prisoners for their defence, directed an acquittal.

Verdict—Not Guilty.

There was another indictment which charged the prisoners with the murder of Mrs. Collins, by drowning her.

*Ludlow*, Serjt., applied to have the trial of this indictment postponed till the next assizes, on the ground that the prisoner Owen had, while in prison, made an important statement to a person named Orgill, who was at present incompetent to be examined as a witness, as he had been convicted of bigamy. And he made this application that it might be ascertained whether her majesty would pardon Orgill, that he might become a witness against Owen.

*Godson*, *E. Yardley*, and *Beadon*, for the prisoners, objected to the postponement of the trial.

WILLIAMS, J.—I think that, under all the circumstances, I ought to postpone the trial.

*Godson*.—I hope that, if your lordship postpones the trial, the prisoners may be admitted to bail.

WILLIAMS, J.—In a case of this kind, they must remain in custody till the next assizes; I cannot admit them to bail.(a)

The prisoners were remanded.

*Ludlow*, Serjt., and *F. V. Lee*, for the prosecution.

*Godson*, for the prisoner Owen.

*E. Yardley*, for the prisoner Thomas.

*Beadon*, for the prisoner Ellis.

(a) See the case *Rez v. Chapman*, ante, vol. 8, p. 558.

## SHROPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

DAVIES v. DAVIES.—p. 87.

and his wife boarded and lodged in the house of B., the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to whi

B. pleaded a set-off for board and lodging :—*Held*, that neither the services on the one hand nor the board and lodging on the other, could be charged for, unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid ; but that, if that were not so, no *ex post facto* charge could be made on either side.

**ASSUMPSIT.**—The first count of the declaration was on a promissory note made by the defendant for eighty pounds, payable to the plaintiff or his order on demand, with interest at four per cent. There were also counts for work and labour by the plaintiff and his wife, as servants of the defendant, and for money lent, and on an account stated.

**Pleas**—First, as to all but the promissory note, non-assumpsit ; second, to the whole declaration a plea of payment ; and third, to the whole declaration a plea of set-off for board and lodging of the plaintiff and his wife.

It was opened by *Talfourd*, Serjt., for the plaintiff.—That the plaintiff and defendant were brothers, and that the promissory note was given by the defendant to the plaintiff for the balance of his share of the effects of their mother, to which the plaintiff was entitled on her death ; and that, with respect to the charge for services, it would be shown that the plaintiff had lived with the defendant at his house, which was a public-house, at Sned's Hill, from the 22d of May, 1837, till the 4th of October in that year, and assisted in the business ; and that the plaintiff then married, and from that time till the 4th of November, the plaintiff and his wife both lived there, and both of them assisted in the business and in the housekeeping. Against this item the defendant made a claim, by his set-off, for their board and lodging.

**WILLIAMS, J.**—Neither the services on the one hand, nor the board and lodging on the other, can be charged for, unless the jury are satisfied that there was a contract, express or implied. That is, that the parties came there on the terms that they were to pay and to be paid ; but if that was not so, there can be no *ex post facto* charge made on either side.

The item for services was abandoned on the one side, and the item for board and lodging on the other ; and the case proceeded on the plea of payment.

Verdict for the defendant.

*Talfourd*, Serjt., and *Carrington*, for the plaintiff.

*R. V. Richards* and *Whateley*, for the defendant.

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IN the ensuing term, *Talfourd*, Serjt., applied to the Court of Exchequer for a new trial, on affidavits, and the court granted a rule, which was afterwards made absolute on payment of costs.



## HEREFORD ASSIZES.

BEFORE MR. BARON ALDERSON.

REGINA v. MORRIS.—p. 89.

*Seemle*, that in an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 22, for destroying or concealing a will for any fraudulent purpose, the purpose ought to be stated in the indictment.

If a defendant concealed a will, and the money which ought, by the will, to have gone to A. and B., and with it paid the debts of the husband of the next of kin to whom he was a creditor, this would be a fraudulent purpose within the stat. 7 & 8 Geo. 4, c. 29, s. 21.

**SECRETING a will.** The indictment was in the following form:—

“Herefordshire, } “The jurors for our lady the queen, upon their oath  
to wit. } present, that John Morris, late of, &c., on, &c., at, &c.,  
a certain will, the same being a testamentary instrument of one Mary Baskerville, then and there being found, unlawfully did take, steal, and carry away, against the form of the statute,” &c.

Second count—“That the said J. M. on, &c., at, &c., a certain other will, the same being a testamentary instrument of the said Mary Baskerville, after the death of the said Mary Baskerville [then and there being found, unlawfully and for a fraudulent purpose did conceal], against the form of the statute,” &c. Third count.—The like, omitting the words between [ ] and inserting the words ‘unlawfully and for a fraudulent purpose did destroy.’

It was opened by *C. Phillips*, for the prosecution, that Mrs. Baskerville had died in the year 1835, having made her will, by which she left a sum of money to a person named Apperley—the interest of other money to her (Mrs. B.’s) sister, Mrs. Rowland, and after her decease the principal to be divided among Elisha Cooper’s children—and that this will was given by Mrs. Baskerville to a nurse, who gave it to Mr. Rowland, the husband of Mrs. Rowland, who put it on a desk, from which it was taken away by the defendant; and that, after this, administration was taken out by Mrs. Rowland as sole next of kin of Mrs. Baskerville, and that the defendant, who was the assignee of Mr. Rowland, for the benefit of creditors, paid away the property in making a dividend on Mr. Rowland’s debts.

**ALDERSON, B.**—The words of the Act of Parliament are, “for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument.” The purpose ought, I think, to be stated in the indictment, which here it is not.<sup>(a)</sup> But I think also that if the defendant concealed this will, and took the money which ought to have gone to Mrs. Apperley and Elisha Cooper’s children, to pay Mr. Rowland’s debts, that would be a fraudulent purpose within the act of Parliament.

On the part of the prosecution, evidence was given with a view of

(a) It is worthy of consideration whether this objection would be aided after verdict under the stat. 7 Geo. 4, c. 64, s. 21, by which it is enacted, “that where the offence charged

showing that the defendant took away the will; but the case ultimately turned on the credit the jury gave to some of the most important parts of the evidence.

Verdict—Not guilty.

*C. Phillips* and *F. V. Lee*, for the prosecution.

*Talfourd*, Serjt., and *Greaves*, for the defendant.

has been created by any statute, or subjected to a greater degree of punishment by any statute, or excluded the benefit of clergy by any statute, the indictment or information shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute, *if it describe the offence in the words of the statute.*" If it be within this statute, the objection seems to be only available on demurrer. See on this point the cases of *Rex v. Harris*, ante, vol. 7. p. 429; the case of *Regina v. Casper*, post; and the case of *Martin v. Regina*, in Error, 3 N. & P. 472.

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### REGINA v. VINCENT, EDWARDS, DRINKWATER, and TOWNSEND.—p. 91.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.

The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine him, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and it seems that the same discretion may well be exercised in misdemeanor.

If persons duly called upon by the magistrates to serve as special constables refuse to do so, the magistrates ought to cause them to be indicted.

THE first count of the indictment stated that the defendants, being seditious and evil-disposed persons, intending to disturb the public peace and to excite discontent and disaffection, and to excite her majesty's subjects to hatred and contempt of the government and constitution of this realm, heretofore, to wit, on, &c., at, &c., did conspire, &c., together with divers other persons unknown, "unlawfully, maliciously, and seditiously to meet and assemble themselves together, and to cause and procure a great number of other persons unlawfully, maliciously, and seditiously to meet and assemble themselves together with the said H. V., W. E., J. D., and W. A. T., and the other conspirators at N. aforesaid, in the county aforesaid, for the purpose of exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and for the purpose of moving and exciting the liege subjects of our said lady the queen to hatred and contempt of the government and constitution of this realm as by law established."

The second count was similar, but stated as an overt act of the conspiracy that the conspirators assembled at Newport on the 19th of April, 1839, to the number of two thousand and more, in a menacing manner with offensive weapons, and did cause great terror and alarm to the peaceable and well-disposed subjects of her majesty.

The third count was in the following form: "And the jurors afore

said upon their oath aforesaid do further present that the said H. V., W. E., J. D., and W. A. T., being such persons as aforesaid and unlawfully and maliciously and seditiously intending and devising as aforesaid, heretofore, to wit, on, &c., with force of arms at, &c., unlawfully, maliciously, and seditiously, and in a tumultuous manner, did meet and assemble themselves together with divers other ill-disposed persons whose names are to the jurors aforesaid unknown, to a large number, to wit, to the number of two thousand, in a formidable and menacing manner, in a certain public and open place near the dwelling-houses of divers liege subjects of our said lady the queen, inhabiting therein, for the purpose of raising and exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and of exciting the said subjects to hatred and contempt of the government and constitution of this realm as by law established, and of moving the said subjects to unlawful and seditious opposition and resistance to the said government and constitution, and being so met and assembled together, for the purpose aforesaid, did then and there unlawfully and tumultuously continue together with the said other ill-disposed persons in such formidable and menacing manner for a long space of time, to wit, for the space of four hours, and did then and there during all such time by loud and seditious speeches, exclamations, and cries, raise and excite such discontent and disaffection as aforesaid, and did thereby, then and there, cause great terror and alarm to divers peaceable and well-disposed subjects of our said lady the queen, in contempt," &c., and against the peace, &c.

The 4th, 5th, 6th, 7th, 8th, 9th, and 10th counts were exactly similar to the 3d, except that they each stated a different day.

The 11th count was nearly similar, except that it stated that the two thousand persons were armed with offensive weapons in addition to stating that they met and assembled in a formidable and menacing manner.

The 12th count stated, that the defendants, "together with divers other evil-disposed persons to the jurors aforesaid unknown, to a great number, to wit, to the number of two thousand, heretofore, to wit, on, &c., with force and arms, at, &c., unlawfully and in a tumultuous manner did meet and assemble themselves together, and being so met and assembled together, did then and there unlawfully and tumultuously continue together for a long space of time, to wit, for the space of four hours, near the dwelling-houses of divers liege subjects of our lady the queen, inhabiting within the said town, and also in divers streets and common highways, there making loud exclamations, cries, and noises, to the great terror, annoyance, and disturbance of many of the liege peaceable and quiet subjects of our said lady the queen, to the great damage," &c., and against the peace, &c.

The 13th count was for a riot.(a)

(a) The following is an extract of Mr. Baron Alderson's charge to the grand jury, delivered at the Monmouth Summer Assizes, 1839:

"There is one case in the calendar as to which it is desirable that I should address you. In that case four persons are charged with having 'on the 19th of April, at Newport, unlawfully met with divers other persons calling themselves chartists, unlawfully intending to disturb the peace of this realm, and to excite discontent, disaffection, and hatred to the government and constitution of the country.' This is a misdemeanor of a serious nature if satisfactorily proved, and it will be for you to say upon the evidence whether these persons have outstepped the line of duty, and instead of confining themselves to the temperate and proper representation of such

*Tulfourd*, Serjt.,—In his opening cited the following passages from the summing up of Mr. Justice BAYLEY on the trial of the case of *Rex v. Hunt and Others* at York in the year 1820. "On the subject of unlawful assemblies he would quote the expressions of Mr. Serjt. *Hawkins*, who says, 'any meeting whatsoever of a great number of persons with such circumstances of terror as could not but endanger the public peace, and raise fears and jealousies among the king's subjects, properly constitutes an unlawful assembly;' where, for instance, those numbers, having some

grievances which they either endure or think they endure, have constituted themselves into that which in point of law is an unlawful assembly of the people. To ascertain what is an unlawful assembly, it is well that we should see what our best lawyers have laid down with respect to unlawful assemblies. Mr. Serjeant *Hawkins*, one of the best authorities on this subject, [Bk. 1, c. 28. s. 9.] says that 'any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers complaining of a common grievance meet together armed in a warlike manner in order to consult together concerning the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. So in Mr. Hunt's case, which was tried at York, and afterwards came before the Court of King's Bench. Mr. Justice Bayley (than whom no man was more learned in the laws, or more enlightened in his views) says, 'If the persons who assemble together say, "We will have what we want, whether it be according to law or not," a meeting for such a purpose, however it may be masked, if it be really for a purpose of that kind, is illegal. If a meeting from its general appearance, and from all the accompanying circumstances, is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful.' These are, as I take it, the clear principles of law; an unlawful assembly differing in this respect from a riot, that a riot must go forward to the perpetration of some act which the unlawful assembly is calculated to originate and inspire. Something must be executed in a turbulent manner to constitute a riot; but in these cases it must be some enterprise of a private nature, because if the enterprise be of a general and public nature it savours of high treason, and there is no doubt that if you find these persons assembled together by delegates, dispersed from any central jurisdiction in this kingdom, and those persons, so meeting together, in consequence of a delegation from a central body, commit any act of violence for the purpose of carrying into effect any general political purpose, they run the risk of being charged with high treason, and it is well that they should know that, before they attempt the accomplishment of such a purpose; but it is far better and far more humane, far wiser and far more politic, to stop these things in their early stages—it is far better that the individuals should be stopped before they proceed to outrage and violence; as a small amount of punishment, in the first instance, will probably save a great amount of crime afterwards. I am, therefore, glad to see that the magistracy of this county have interposed in the early stage of the proceeding. You will investigate the circumstances under which the assembly took place—whether the individuals who presided and were present were so by previous concert, or by accidentally having met—and if they met by previous concert, you will inquire whether they have met at unseasonable hours of the night—if they have met under circumstances of violence and danger—if they have been armed with offensive weapons, or used violent language—if they have proposed to set the different classes of society at variance the one with the other, and to put to death any part of her majesty's subjects; if any, all, or most of these things should appear before you, there will, I think, be little difficulty in saying that an assembly of such persons, under such circumstances, for such purposes, and using such language, is a dangerous one, which cannot be tolerated in a country governed by laws; and it is but doing to others as you would that they should do unto you, to repress meetings of that description; because, what right have any persons to do that which produces terror, inconvenience, and dismay among their fellow-subjects? Let me not, however, be misunderstood. There is no doubt that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be their grievances. That right they always have had, and, I trust, always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law, and restrained by reason. Therefore, let them meet, if they will, in open day, peaceably and quietly, and they would do wisely when they meet to do so under the sanction of those who are the constituted authorities of the country. To meet under irresponsible presidency, is a dangerous thing; nevertheless, if, when they do meet under that irresponsible presidency, they conduct themselves with peace, tranquillity, and order, they will perhaps lose their time, but nothing else. They will not put other people into alarm, terror, and consternation—they will, probably, in the end, come to the conclusion that they have acted foolishly; but the constitution of this country does not (God be thanked) punish persons who, meaning to do that which is right in a peaceable and orderly manner, are only in error in the views which they have taken on some subject of political interest."

grievance to complain of, met armed for the purpose of discussing the best way of ridding themselves of that grievance. This is an unlawful meeting, because under such circumstances no one could say what would be the result of such a meeting."

On the part of the prosecution, the following evidence was given:—

Mr. Thomas Phillips.—I am mayor of Newport. In consequence of information I received on the 19th of March last, I directed the superintendent of police to go to Pentonville, to protect persons and property. At eight o'clock in the evening of the 19th of March I went to Pentonville, an open place in the town of Newport, about one hundred yards long and fifteen wide. It is an oblong space of ground. I found about three hundred persons. A stage was erected against the lamp-post, and Mr. Vincent was addressing the meeting. My attention was first called to his description of the system of government under which we lived in this country. He described it as a cannibal and atrocious system. He said he could not call it by any other name, for it doomed men, women, and children to toil in factories in a state approaching to starvation and nakedness, for the sake of increasing the wealth of the aristocracy. He then cited an anecdote, which he said was in Paley, of a flock of industrious pigeons, who were employed in collecting grain, and one overgorged pigeon remained in a corner doing nothing but devouring the produce of the working pigeons. The overgorged pigeon called to its aid other pigeons that did no work, and they drove away the working pigeons from the grain which they had collected, allowing the working pigeons, to whom the grain belonged, nothing but chaff. He said, "Such is the system under which we live—the wealthy classes devour the labour of the working classes, devouring the corn, and leaving them nothing but chaff." He asked if such a system should longer exist, and said a home in a cavern would be preferable to living in such a state as this. He then referred to the People's Charter, and to the snowball of chartism, which was gradually increasing in size. He said they had got near the top of the hill, and he called on the men of Newport to assist in getting the snowball to the top of the hill, and when there they would call on their oppressors to beware, and get out of the way, or the snowball would roll down and crush them. He said their fathers and grandfathers had served in the militia long enough. He said, "If Lord John Russell were to ask me to take a musket, I should say no; for if am to fight at all, it will be against the oppressors of the people." He said that Magna Charta had been obtained by the barons marching against King John, and asked why should the people now be less successful? He said the government contemplated the establishment of a rural police, and added, "If any policeman interferes with you, break his head." He went on to say that, if the people appealed to government, the answer was, "Do not we build beautiful prisons for you?"

On April 19th I had been from home, and returned about eight in the evening. I saw groups of people about, and as it became dark I heard shouting, and on looking out I saw a large crowd. They were shouting and cheering. Myself and the other magistrates published a caution, which was generally circulated.

On the 25th of April there was a meeting. I saw Mr. Edwards. He had a stick, and people followed him. He halted them in front of Mr. Frost's house for a short time, and then went on. This was about seven in the evening, and about eight I went out with the late mayor. I heard

shouts, and a crowd passed us. In the front of the crowd were a great many young lads, from twelve to eighteen years old; following them were a number of men, arm in arm, to the amount of some hundreds. (The population of Newport is about 12,000.) The mob was about 1000 persons, and the street was crowded by spectators besides. When they approached us they hooted; I understood it to be meant for me. Mr. Edwards was with them. They sang, at intervals, the line of *Rule Britannia*—"Britons never will be slaves." They came to a stage, and Mr. Edwards said that Mr. Vincent was not come, and proposed that Mr. Dickenson should take the chair. Mr. Edwards said he must go and look after his special constables, and he said to some persons, "Each of you must watch his neighbour." Mr. Dickenson addressed the meeting, and said they had heard a sermon, and been told to fear God and honour the king, and that they did fear God; but the doctrines of the sermon advised honour to a Nero or a Caligula. (A sermon on this text had been preached at the church on the previous Sunday.) Mr. Vincent came, and was received with much shouting. He said the magistrates had branded their meetings as illegal, but they were perfectly legal. He challenged the magistrates to apprehend him, as there was nothing but a letter of Lord John Russell to make these meetings illegal. He said the magistrates were liars and base insidious knaves. He said, "I understand you to mean that you will have the charter by the consent of the government if it may be, but that you will have it." This was responded to by shouts of "Yes." Mr. Vincent compared the constitution to a three-legged stool—the sovereign was a leg, whether useful or not he would not say; the House of Lords another leg, whether useful or not he could not say; the House of Commons was the third; he did not say whether that was useful or not. He said that on the following Tuesday he was going to the Convention, and should inform the Convention that the men of Wales would join the men in other places to obtain the charter. He said that the Convention must go on, as the people were a wall behind them. They would soon triumph over their enemies, and would meet to proclaim one universal jubilee. There was much cheering during the speech. Mr. Dickenson said that they ought to do honour to Mr. Vincent by accompanying him next day to the packet-station. Next day there was a crowd, at about one o'clock, opposite Mr. Frost's house. Mr. Phillips, of Whitson, who is a county magistrate, passed in his carriage. He is a magistrate, and active in getting up the yeomanry. The mob groaned at him. At half-past one the crowd moved to the packet-station. Mr. Vincent addressed the crowd from a wall, where he was with Mr. Dickenson and Mr. Townsend. Mr. Vincent said, in reference to Mr. Phillips's corps of yeomanry, "If they interfere with you, throw them over the bridge. What fists you have! What legs you have! What feet you have! And your shoes, how thick they are, and what nails are in them! And if, by chance, you should kick one of the fellows, what would become of him?" This speech was received with cheers and laughter. The people were in an excited state. Mr. Vincent further said, "I hear I am to be arrested in Gloucestershire, but they had better take care of what they are about, for there are many good fellows there who will stand by me!" The packet bell rang, and Mr. Vincent went on board the packet. In my judgment, these meetings were calculated to lead to a breach of the peace, and to injury to persons and property. The meetings caused much alarm.

Cross-examined.—I have not attended many public meetings. I never reported a speech in my life. I heard Mr. Vincent tell the crowd to disperse peaceably, and to keep the peace. He may have said this more than once. There was no breach of the peace to my knowledge. No riot took place at all. By excitement, I mean a state of mind in which they might easily be induced to commit violence. I have been at a reform meeting; I did not see such excitement there. I did not consider the meetings calculated to alarm till the 19th of March. I did not understand that by telling each man to watch his neighbour he meant they should keep the peace. I did not see any people with bludgeons, nor hear any instigation to break the laws; both those things are stated in the caution. I there stated them from the information I received. I received no personal ill-treatment.

Mr. Morris Morris.—I am a master shoemaker. I was a member of the Working Men's Association. All the defendants were members of it. Meetings were held and speeches made. Mr. Vincent was introduced as a member of the convention and a missionary from that body to agitate the people of Newport and its vicinity. I attended one meeting at which he was present. He made a speech that the people were labouring under difficulties that ought not to exist, and ought to be removed. That they paid half their earnings in taxes direct and indirect, for which they received no consideration; and by the members and other persons who were present, joining, they should obtain the people's charter, and have a different sort of government, and the abuse removed. He said the mayor of Newton was a nincompoop. There was a fund called the national rent. I paid what I paid to the treasurer, Mr. Townsend. It was no definite amount. That was raised for the members of the convention. Mr. Frost was at these meetings. He attended as the delegate of Newport to the convention, and at first as a member of the association.

Mr. Watkins Richards.—I am harbour-master at Newport. On the 19th of April, in the evening, I saw a crowd. Mr. Edwards was forming them in rank and file to the number of from 60 to 100. Some of them had sticks. They went away, and returned to the number of 700, including all the defendants. They were hallooing and hissing, and the boys singing "Britons never will be slaves." Many had sticks, and some of them had them concealed under their jackets, and end in their trousers pockets; one had a piece of wood seven feet long and two inches diameter. I saw the platform, but could not get near, as near 1000 persons were there. All the defendants were on the platform. I heard Mr. Vincent speak. He spoke of bastilles, poor-law commissioners, and destruction of children. The meeting broke up between ten and eleven o'clock at night. They came in a body to Mr. Frost's, and there cheered and parted. I was alarmed, not for myself personally, but I was alarmed for my family and the general peace of the town.

Mr. Hawkins.—I am an alderman of Newport. On the 19th of April I saw the procession pass, four or five abreast. It was calculated to produce alarm and endanger the public peace. I had guns and pistols in my shop. I removed them to my bed-room for security.

Cross-examined.—There is a benefit society in Newport. They walk two and two, but not arm in arm; nor do soldiers.

Henry Webber.—I attended four or five meetings, and saw the pro-

cession. They caused alarm to me. I expected a disturbance in the town.

Cross-examined.—I heard hissing and hooting when they passed my door. That alarmed me. There were 3000 persons in the crowd at the time.

Examined by the learned baron.—I do not hold any office in the borough. I do not know why they hissed me.

Mr. Fraser.—I am one of the public officers of the banking company. On the 19th of April I was at the meeting. I heard Mr. Vincent say that the working classes were not bound by any laws enacted by a parliament in which they were not represented. He told them they were entitled to be armed. These meetings were calculated to endanger the public peace.

Cross-examined.—I have heard him recommend the people to be peaceable. I received no interruption.

Mr. Thomas Griffin Phillpotts.—I am an attorney, residing at Newport. I was in my office on the 19th of April. At about eight o'clock in the evening I heard cheering. I saw a crowd of persons, as many as twenty had sticks. They were walking-sticks, all but one, and that was short. The persons were in number several hundreds. In about half an hour I went to the meeting, and saw all the defendants, except Dickenson. I heard Mr. Vincent speak. He said the working class was an industrious class, and the upper classes were the idle classes, and living upon the industrious. He said a rising of the people was likely soon to happen; that parties were not bound to obey the laws unless they were represented. A great deal was said about the people's charter. Mr. Vincent said a great deal was said about the British soldiers, and Mr. Vincent said when the time for resistance arrived, let the cry be, "To your tents, O Israel! and then with one heart, one voice, and one blow, perish the privileged orders. Death to the aristocracy! Up with the people and the government they have established." The meeting was calculated to excite alarm. I was not alarmed. Mr. Townsend interrupted Mr. Vincent, and said they were going to shoot Mr. Vincent, and pointed at the direction from which they were going to fire. No firing occurred. Mr. Edwards was moving about, and said something about his police.

Cross-examined.—I did not hear Mr. Vincent say that if the meetings were illegally put down, the time of resistance is come. I had a stick myself. I always carry a good-sized one. I had dined, and had taken three or four glasses of wine. The words, "To your tents, O Israel!" is from the First Book of Kings, when the tribes revolted. I have looked at the passage since, as it struck me. Mr. Vincent proposed that they should treat the soldiers kindly.

Re-examined.—He advised that they should treat the soldiers as brothers, and he proposed three cheers for the British soldiers.

Mr. Henry Williams deposed to seeing the defendants at a meeting on the 19th of March, 27th of March, 18th of April, and 25th of April. This witness also said—I heard Mr. Vincent speak at one of the meetings. He said the charter was the only remedy, and they must resort to force if they could not get it in any other way. This was received with cheers. I apprehended danger to life and property.

Cross-examined.—I apprehended danger as early as the first meeting. I attended the meetings for the protection of my property. I was at my



own door. I live close to the meetings. I heard Mr. Vincent at every meeting tell the people to keep the peace. I once heard the phrase that their motto ought to be "Peace, law, and order." I have heard it urged on the people not to injure persons or property in Newport or elsewhere. I considered it likely that life and property would be in danger if the meeting continued.

Isaiah Waterloo Nicholson Keyes.—I am in the printing-office of the *Merlin* newspaper. I attended the meeting of the 25th of March. I heard Mr. Vincent address the meeting. I made a report for the *Merlin*. Mr. Dickenson said that if the Chartists were attacked they would be justified in treating those who attacked them as they would treat a mad dog; and at the meeting of the 27th of March, Mr. Vincent said that every hill and valley should send forth its army in the event of its being called for by the Convention. I believe he asked those who would be prepared to hold up their hands. Mr. Edwards did so, and said, "Here is stuff." Many others held up their hands. I attended a meeting on the 18th of April. Mr. Vincent spoke. He said England was a large farm, the poor labourers on which had been plundered. He said the plunderers should earn their bread as the labourers did, or the Chartists would throw them over the hedge. He said a blow should be struck in England, and twenty-four hours would decide its fate. At the meeting on the following day, I heard the expression used by Mr. Vincent, "To your tents, O Israel!" and then, with one heart, one voice, and one blow, perish the privileged orders; death to the aristocracy, and up with the people and the government they have formed." On the 25th of April I was at another meeting. Mr. Vincent began by calling the people assembled "the British democracy."

Cross-examined.—I did not consider myself in danger. At one of the meetings some one, on the mayor's name being mentioned, said "Choke him," and Mr. Vincent said, "Don't do that; I hope to convert them all."

Mr. Johnstone.—I am a commercial traveller. I reside at Liverpool. On the 27th of April I called on Mr. Townsend. After business, he asked me what I thought of the Chartists in Lancashire. I said I pitied them, as they were the deluded victims of designing knaves, who had no character or property to lose, but who sought to excite the people to rebellion, in the hope that in a general scramble they should get something. I asked if they had many Chartists about Newport. He said they had a great many, and that at a meeting just held, they had beaten or frightened the magistrates, and he said he was the treasurer to the body. I said, in a careless way, that if we had been in our former trade we might have turned it to a pecuniary profit. He inquired what it was, and I said we had been in the trade of supplying the African chiefs with muskets, matchets, (a sort of short sword used in cutting sugar-cane,) cutlasses, and pistols. He asked the prices, and said he could give me an order, and pay cash for them, as he was treasurer of the body. I asked to what extent his order would go, and he replied, two hundred to three hundred muskets, five hundred to six hundred cutlasses, and pistols in proportion; and he added, "You must undertake the delivery at Newport." I then said very seriously, for I spoke jocularly before, that we would not supply arms for such an abominable purpose.

Cross-examined.—I found great excitement at Pontypool, and I com-

municated with one of the magistrates, and I learned at the iron works that Mr. Vincent, Mr. Edwards, and Mr. Townsend had been there, and they feared a revolt.

Re-examined.—I heard that commercial men could get neither money nor orders, as the country was in such an excited state that business was at a stand-still. It was then that I communicated what I heard to the magistrates.

William Needham, Esq.—I am a magistrate. I had great difficulty in getting special constables. At several of the iron works the men all refused.

ALDERSON, B.—Did you indict them for refusing?

Witness.—No, my lord.

ALDERSON, B.—You had better do so, if it occurs again.

Mr. Harris.—I heard Mr. Vincent, at one of the meetings, say that the mayor was a nincompoop, and his partner, Mr. Protheroe, no better; and they were the greatest enemies to the working people. The crowd shouted, "They are, they are." Mr. Vincent further said that he should like to see Mr. Protheroe hung up to the lamp-post, and he should like for the people to cut him down, and he would name the place for the interment of his carcass.

Cross-examined.—I am sure that Mr. Vincent did not say, in my hearing, that the mayor and his partner, and such as they were, mistook the Chartists for persons who would hang people to the lamp-post. I am quite sure that he said that he should like to see Mr. Protheroe hung up to the lamp-post. I did not run away in horror. There was a good deal of cheering at the last sentence. I believe this was on the 25th of March.

Edward Kames.—I reside at Newport. My father and Mr. Townsend talked of the Chartists. The latter said the Chartists were so powerful in Newport that they could pull down the house of any one who opposed them in an hour or half an hour.

At the conclusion of the case for the prosecution, *Roebuck*, for the defendants, asked that a witness, whose name was on the back of the indictment, might be called, that he might cross-examine him.

*Talfourd*, Serjt.—This is not a case of felony.

ALDERSON, B.—The calling of a witness whose name is on the back of the indictment, for the other side to cross-examine him, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and I think it may well be exercised in misdemeanor.

*Talfourd*, Serjt.—I shall make no objection.

The witness was called, but did not answer, and it was stated that he was not in Monmouth.

*Roebuck*, for the defendants.—The first charge against the defendants is a charge of conspiracy for certain purposes contrary to law. Now, without meaning to justify every indiscreet expression used at a public meeting, I do mean to contend, that these meetings were just such as have been seen in the country for the last ten or fifteen years, their object being to obtain what the defendants called "the charter;" and their mode of arriving at this their object was by obtaining so great a number of signatures to their petition as would entitle it to respect. From whom then did this prosecution come? From the last persons from whom it ought. The present ministers had taught the people that

this was the way in which they were to obtain their ends. There was no large town which had not had its peace invaded by meetings just of this kind. Ministers had taught the people this mode of proceeding on one day, and could not unteach them on the morrow. There is a man on whose breath the very existence of the present ministry depends, who has been guilty of more crime (if crime it was) in carrying on agitation, in procuring what he called justice for Ireland, than any thing done by these defendants. And if Mr. O'Connell may one day assemble fifty thousand fighting men, and next day dine with the Lord-Lieutenant of Ireland, the august representative of her majesty, may not the defendants reasonably say, what harm can there be in our having a few meetings in the county of Monmouth? The defendants wished for what they called the five points of the charter, which were, annual Parliaments, the vote by ballot, universal suffrage, no property qualification, and payment to the members. It is said that they wished to bring the government into contempt. If by the government was meant the ministry, and the offence was to bring them into contempt, I am the most offending man alive; but that was no crime, for if the ministers met with contempt, they deserved it. But it is then said, the means were unlawful, because the meetings were calculated to alarm. Now, this must be not an alarm such as would frighten any timid person, but must be under such circumstances as would alarm persons of reasonable courage, and used to the world. If persons had seen the meetings of the last ten years—some for reform, some for emancipation of the blacks, some against the poor laws, would they fear these? Indeed, there was scarcely any subject on which some busy man or other did not get up a meeting, and every one got as large a meeting as he could, and if it was really a large meeting, it was held in the open air; and if very few people came, the originator of the meeting always then said it was a highly respectable meeting which assembled in a very small room. With respect to the story of the pigeons, this was not the invention of the defendant Vincent, but is to be found in the work of a clergyman of the Church of England, whose works are taught in our universities. The evidence given as to the speeches of the defendants consists only of isolated phrases and sentences. It is unjust to take a part of a speech or writing without the rest; and I could take a part of the writings of the learned serjeant, (*Talfourd*), and if taken alone, it would form a very democratic speech; but that is an unfair way of putting it. What a jury should look at is the intention of the men, and not mere words, for there are few persons who speak for an hour who do not say something which they wish afterwards unsaid. I fear also that there is a good deal of personal feeling in the case. The defendants have been unwise enough to quarrel with the mayor and magistrates, and they having called the mayor and his partner nincompoops, it was considered by the magistrates that they must, to keep up their own dignity, bring forward the prosecution. The phrase, "The charter we will have," is no worse than the words that I have heard till I am quite tired of hearing them; I mean, "The bill, the whole bill, and nothing but the bill." I know not if any of you have used those words; but if you have, I have no doubt that an indictment might have been preferred just as easily as the present indictment has been preferred against the defendants. The present ministry gave the cry of "Nothing but the bill," and yet they will not allow to the defendants the cry of "Nothing but the charter." The

ministers have got their bill passed, and now they say to others, "We have got our bill, but we will take care you don't get your charter." It is alleged that the defendants have said that persons ought not to pay taxes imposed by a Parliament in which they were not represented; but taking that to be so, we ought not to forget that at the time of the reform bill, Earl Fitzwilliam said he would pay no more taxes imposed by the unreformed Parliament, because it did not represent the nation. In this case there was no going to be drilled, no assemblies with arms, and as to the bad hours, the example was set by our superiors in Parliament, all the legislation being after midnight, and all the speeches before. The poor can only meet at particular times, and in places to which they have access; and, in almost the language of Lord John Russell, I will say that the pent-up feelings of the people evaporating at a public meeting does more good than a host of mayors and magistrates, with their special constables around them, and the yeomanry to boot. The only material evidence is the supposed proposal to hang Mr. Protheroe: that was a thing upon which the witness might easily be mistaken, and probably was so. There is indeed the statement of the witness from Liverpool, (Mr. Johnstone,) that he being a person who sold muskets to the negroes, and being an enemy to the Chartists, and out of that business, the defendant, Townsend, intended to buy muskets and cutlasses of him. It is clear that he could not be serious, more especially as the talk about the muskets originated with the Liverpool iron trader, and not with the defendant.

ALDERSON, B.—In summing up—I take it to be the law of the land that any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly. You will have to say whether, looking at all the circumstances, these defendants attended an unlawful assembly, and for this purpose you will take into your consideration the way in which the meetings were held, the hour of the day at which the parties met, and the language used by the persons assembled and by those who addressed them. Every one has a right to act in such cases as he may judge right, provided it be not injurious to another, but no man or number of men has a right to cause alarm to the body of persons who are called the public. You will consider how far these meetings partook of that character, and whether firm and rational men having their families and property there would have reasonable ground to fear a breach of the peace; for I quite agree with the learned counsel for the defendant, that the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. The indictment also contains charges of conspiracy, which is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means. The purpose which the defendants had in view as stated by the prosecutors was to excite disaffection and discontent; but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons

whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English universities.

If, however, the defendants say that they will effect these changes by physical force, that is an offence against the law of the country. No civilized society can exist if changes are to be effected in the law by physical force. And if eminent persons have done as the learned counsel has stated, and their conduct were to come before us in a court of justice, we should (however painful it would be to be placed in such a situation) act towards them also, exactly as we ought now to act towards the present defendants. With respect to the speeches of the defendants at the meetings, I entirely agree with the observations of their learned counsel that nothing is more unfair than taking a part of a speech without its fair context, and you will therefore take the whole which is proved, and consider whether any thing else that was said altered the effect of the passages relied on by the prosecution. You will say, whether you are satisfied that the defendants conspired to excite disaffection; if you are so, you will find the defendants guilty of the conspiracy. You will also say, whether you think that the nature of the meetings was such as would excite alarm in the minds of rational and constant men; for if so, I am of opinion that they were illegal meetings, and then you ought to find the defendants guilty on the counts for attending unlawful assemblies.

The jury found all the defendants not guilty of conspiracy, but guilty of attending unlawful assemblies.

*Talfourd, Serjt., R. V. Richards, and Whateley, for the prosecution. Roebuck, and Keating, for the defendants.*

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## GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON ALDERSON.

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DOE d. COUNSELL & PARKER v. CAPERTON.—p. 112.

A. in the year 1819 agreed to purchase lands of B. for 670*L.*, and paid a deposit of 10*L.* The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so at Michaelmas in the year 1819. A. continued in possession, and neither paid any more of the purchase-money nor any rent or interest, and in 1822 A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters:—*Held*, that these facts were no bar to B. in ejectment brought within twenty years after, Michaelmas, 1839. as A. coming in under an intended purchase was in equity the owner of the land, with a liability to pay the purchase-money, and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will.

The attestation of a deed was in the following form:—"Sealed and delivered by the within-mentioned C. A., in the presence of R. P. C." It was proved by the attesting witness that the signature R. P. C. was of his handwriting, and that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed:—*Held*,

sufficient, and that the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference.

It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity. A will was attested by the signature T. B. V. and the marks of C. and M. D. All these were dead; the signature of Mr. V. was proved, and the daughter of C. and M. D. proved that they were both dead, and that when alive they lived near the testator, no other persons of those names living anywhere in that neighbourhood; and this witness also stated that M. D. could not write, and C. D. could write his name only:—*Held*, sufficient.

A witness who resides in Dublin is out of the jurisdiction of the courts of this country so as to let in proof of his handwriting, the same as if he were dead.

A court-roll stating that a surrender was by power of attorney, would be secondary evidence of the power of attorney, if the power of attorney cannot be found after a sufficient search.

The steward of a manor proved that where a surrender was by power of attorney, the practice was to keep the power of attorney with the court rolls. The power in question, which was for a surrender in 1814, could not be found either with the court-rolls or anywhere in the office in which the court-rolls had been kept ever since 1814, both by the present steward and his predecessor, who was steward in 1814:—*Held*, sufficient to let in secondary evidence.

**EJECTMENT** to recover freehold and copyhold property situate at Upton St. Leonards.

It was opened by *Ludlow*, Serjt., for the plaintiff, that this property had originally belonged to Mr. William Abell, who died, and of whose family Mr. Counsell, one of the lessors of the plaintiff, had bought it in the year 1814. And that in the month of August in the year 1819, Mr. John Abell, the son of Mr. William Abell, being desirous to repurchase it of Mr. Counsell at the same price Mr. Counsell gave for it, an agreement was made between them for the repurchase, upon which a deposit of 10*l.* was paid, and Mr. John Abell let into possession, and that no more of the purchase-money had been paid, neither had any interest or rent, although Mr. John Abell and those who represented him, had been in possession of the property ever since. The intended defence was, that John Abell who was since dead had levied a fine.

On the part of the plaintiff it was proposed to put in deeds of lease and release, dated the 24th and 25th of March, 1814, the release being between Comfort Abell and Anne Abell, of the first part, Richard Haviland, a trustee of an attendant term of one thousand years of the second part, George Worrall Counsell, of the third part, and Charles Parker, of the fourth part, by which the two Misses Abell conveyed the freehold property to Mr. Counsell, in fee. Mr. Haviland assigning the term to Mr. Parker to attend the inheritance.

The attestation of the release was in the following form: "Sealed and delivered by the within-named Comfort Abell, Anne Abell, Richard Haviland, and George Worrall Counsell, in the presence of

"R. P. CHANDLER."

To prove the execution of the release Mr. Chandler was called: he stated that the signature R. P. Chandler was of his handwriting, but that he had no recollection of the transaction; but in answer to questions by *ALDERSON*, B.; he said, he should not have signed the attestation if he had not seen the deed executed.

*Talfourd*, Serjt.—I submit that this is not enough; certain formalities are necessary in the execution of a deed, which the witness cannot depose to, and they might have been omitted from his not knowing that they were necessary. If he had been an attorney, it might be otherwise.

*ALDERSON*, B.—In this respect there is no distinction between attorneys and other persons. Mr. Baron *PARKE* and I conferred on this subject on the last Northern Circuit, and we held, that such proof as the attesting witness has here given was sufficient.

The deeds were put in.

It appeared that William Abell died on the 19th of September, 1812; and it was proposed to put in his will, dated September the 6th, 1812, which was attested by the signature of T. B. Villiers and the marks of Charles and Mary Drinkwater. The death and handwriting of Mr. Villiers were proved; and to prove the deaths of Charles and Mary Drinkwater, their daughter, Mary Drinkwater the younger, was called. She said, "I am the daughter of Charles and Mary Drinkwater; they are both dead; they lived near Mr. William Abell. My mother could not write, and my father wrote his name only. No other Charles Drinkwater and no other Mary Drinkwater lived anywhere in that neighbourhood."

ALDERSON, B.—I think that this is sufficient evidence of the identity of Charles and Mary Drinkwater. It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity.

The will was read.

With respect to the copyhold, Mr. Jenkins, the steward of the manor of King's Barton, produced the court-roll of a surrender by John Abell, as the heir of William Abell, to the use of George Worrall Counsell, on Oct. 12, 1815, and the admission of Mr. Counsell of the same date.

Mr. Jenkins said, "the surrender was under a power of attorney, which I cannot find. The powers of attorney are usually deposited with the rolls."

ALDERSON, B.—The court-roll stating it to be by power of attorney would be secondary evidence of the power of attorney, if it cannot be found.

Mr. Jenkins.—"Mr. Philpotts, the member of Parliament, was steward of this manor in the year 1814. I succeeded him; and when I did so, I succeeded to the room in which the documents were kept, and they have never been removed."

ALDERSON, B.—As the papers were never shifted, this is in effect a search in Mr. Philpotts's office.

Mr. Jenkins.—I have also searched in the office of Messrs. Whitcombe and Helps, in which Mr. Philpotts was formerly a partner, but could not find the power of attorney there.

ALDERSON, B.—I think that this is quite sufficient to make the surrender admissible.

The surrender was read.

It was proposed to put in the agreement between Mr. Counsell and Mr. John Abell, dated the 14th of August, 1819. This agreement was attested by Mr. Thomas Dance; and it was proved by his brother that Mr. Thomas Dance resided in Dublin, and that he (the witness) had received a Dublin newspaper from him within a week of the time of the trial.

Talfourd, Serjt.—Is that out of the jurisdiction?

ALDERSON, B.—It is. Our subpoena will not reach a witness in Dublin.

The agreement was read. It was dated the 14th of August, 1819; and by it Mr. Counsell agreed to sell, and Mr. John Abell to buy the property for 670*l*. The agreement did not contain any stipulation that the vendee should be let into possession; but on the back of it was a receipt for a deposit of 10*l*.

To prove that Mr. John Abell was let into possession, Mr. Hulbert

was called. He said, "I occupied the property; John Abell came to me, and asked for possession; he said he had bought it of Mr. Counsell, and paid 10*l.* deposit. I went with him to Mr. Counsell, who told me I might give possession, and I did so; this was nineteen years ago last Michaelmas."

Evidence was given of a demand of possession made on the premises in 1834.

*Tulfourd*, Serjt., for the defendant, opened, that John Abell had dealt with the property as his own, and had, in the year 1824, levied a fine of it, and raised 200*l.* on it by a mortgage; and that John Abell, who died in the year 1827, by his will, dated on the 3d of July in that year, devised the property (subject to the mortgage) to his daughters, one of whom had married the defendant.

ALDERSON, B.—There is no adverse possession.

*Tulfourd*, Serjt.—The agreement does not contain any permission to enter.

ALDERSON, B.—We must take the facts all together. You are let into possession on the ground of a purchase.

*Tulfourd*, Serjt.—As to the copyhold, I know that the fine can have no effect; but as to the freehold, we can show adverse acts, such as cutting down timber, and the like; and in the year 1822, which was before the fine, Mr. Counsell brought an action for cutting down timber, which was defended.

ALDERSON, B.—You come in under an intended purchase, and I think that all this is not adverse. A purchaser thus in possession is in equity the owner of the land, with a liability to pay the purchase-money; and his cutting down trees is consistent with his holding in that character, and not adversely to the right of the vendor, to whom at law he is tenant at will.

An examined copy of a fine, with proclamations, of Easter Term, 5 Geo. 4, was put in; and evidence was given, that John Abell had cut down timber on the property soon after he was let into possession, and had built a house there, and that Mr. Counsell said he should keep an account of it.

ALDERSON, B., (in summing up.)—The only question is, whether there was an adverse possession. These parties make a bargain for a purchase, and Mr. John Abell is let into possession as a purchaser. You will say whether he was in adverse possession or not. If he were not so, you will find for the plaintiff.

Verdict for the plaintiff

*Ludlow*, Serjt., *Thomas*, and *Francillon*, for the plaintiff.

*Tulfourd*, Serjt., and *W. J. Alexander*, for the defendant.



(Crown Side.)

BEFORE MR. JUSTICE WILLIAMS.

REGINA v. JORDAN and COWMEADOW.—p. 118.

A boy under 14 years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty.

To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female; *but, as matter of law*, it is not essential that the hymen should be ruptured.

A. was charged with feloniously carnally knowing and abusing a girl under ten. B. was charged with being present, aiding and abetting. A.'s counsel called no witnesses. B., who had no counsel, called a witness to prove an alibi for A.:—*Held*, that this evidence was in effect evidence for A., and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was *summum jus*, and ought to be exercised with great forbearance.

THE prisoner John Jordan was indicted for feloniously carnally knowing and abusing Harriett Thomas, an infant under the age of ten years, and the prisoner Ann Cowmeadow was charged with aiding and abetting him in the commission of the felony.

The prosecutrix stated that the offence was committed at a time when she had been sleeping with the two prisoners, but it was doubtful, on the evidence given in support of the prosecution, whether the prisoner Jordan was fourteen years of age or not; but the surgeon stated positively that he had arrived at the full state of puberty. No evidence was given to show that the hymen of the prosecutrix had been ruptured.

*Greaves*, for the prisoner Jordan.—It has been held that, in point of law, a boy under fourteen years of age cannot be guilty of the crime of rape as a principal in the first degree, and the same rule of law must, I submit, apply to this offence. It was also laid down in the case of *Reg. v. Gammon*, ante, vol. 5, p. 321, that in order to constitute a sufficient penetration to warrant the conviction of the offender on a charge of rape, it is essential that the hymen should have been ruptured.

For the prisoner Jordan no evidence was adduced.

The prisoner Cowmeadow had no counsel, and she called the father of the prisoner Jordan to prove that Jordan had always slept at home, and, consequently, could not have been sleeping with the prosecutrix and the other prisoner, as stated by the prosecutrix. (a)

*W. J. Alexander*, for the prosecution, claimed the right to reply upon the whole case, upon the ground that this witness, though called by the prisoner Cowmeadow, was at least equally a witness for Jordan, as the evidence of the witness went in direct terms to prove an alibi for Jordan, and it was only as a consequence that this evidence was available for the prisoner Cowmeadow.

*Greaves*.—I must object to this being done, no authority or precedent can be cited for such a course. In replying, the counsel has only a right to reply as to those prisoners who call witnesses. If Jordan had been

(a) We believe that *Greaves* had no instructions to set up an alibi, and did not even know that his client's father was in court.

tried alone no reply would have been allowed, and it is too much to say that because another prisoner, with whom he happens to be tried, chooses to call witnesses, that therefore the counsel for the prosecution may reply upon the whole case. In the case of *Rex v. Cool and Burnell*, tried at the Gloucester Spring Assizes, 1839, the prisoner Cool called witnesses to prove an alibi, who also stated that Burnell was at the same place at which they stated Cool to be, and I in my reply was confined to observing on the evidence adduced for Cool, without advert- ing to the speech of the counsel for Burnell.

WILLIAMS, J.—I think that this evidence in effect is evidence given for Jordan, and that in strictness the counsel for the prosecution has a right to reply on the whole case; but it is summum jus, and ought to be exercised with great forbearance.

*W. J. Alexander* replied on the whole case, and adverted to the argu- ments used for the prisoner Jordan as well as to the evidence.

WILLIAMS, J., (in summing up.)—Before you can convict the prison- ers, you must be satisfied that the prisoner Jordan was of the age of fourteen at the time of the alleged offence, for I do not hesitate to say, that I am clearly of opinion that the same rule which applies to rape applies to this offence also, notwithstanding the evidence of the sur- geon.(a) I am also of opinion, as matter of law, that it is not essential that the hymen should be ruptured. In the case of *Rex v. Gammon* it was proved, that the hymen was ruptured, and the point was therefore not necessary to the decision of that case. I also think that it is impos- sible to lay down any express rule as to what constitutes penetration. All I can say is, that the parts of the male must be inserted in those of the female, but I cannot suggest any rule as to the extent.(b)

Verdict—Not guilty.

*W. J. Alexander* and *A. M. Skinner*, for the prosecution.

*Greaves*, for the prisoner Jordan.

(a) See the cases of *Rex v. Eldershaw*, ante, vol. 3, p. 396; *Rex v. Groombridge*, ante, vol. 7, p. 582; and *Reg. v. Phillips*, ante, vol. 8, p. 736; and the case of *Reg. v. Allen*, ante, p. 31.

(b) See the observations of Mr. Justice Bosanquet, in the case of *Rex v. M'Rue*, ante, vol. 8, p. 641.

## WESTERN CIRCUIT.

BEFORE MR. JUSTICE COLERIDGE, AND MR. JUSTICE ERSKINE.

## DEVIZES ASSIZES.

*(Crown Side.)*

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. JAMES SHEPPARD.—p. 121.

A., who intended to sell his mare, sent his servant with her to M. fair, the servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price, and desired the servant to trot her out, and the prisoner then went to two men, and having talked to them went away. These two men then came up and persuaded the servant to exchange the mare for a horse they had, and they would give 24*l.* for the chop. They changed the saddles, and without giving any money rode away with the mare, leaving the servant with a horse of little value. Four days after the prisoner sold the mare at B., stating that he had got her in a chop at M. fair.

*Held*, that as the servant had the mere charge of the mare, and had no right to deal with the property in her, the prisoner ought to be convicted of stealing her, provided that the jury were satisfied that the prisoner was in league with the two other men, and that they three, by a fraud in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare.

**HORSESTEALING.**—The prisoner was indicted for stealing a mare, the property of William Browne Canning.

It appeared that Mr. Canning, who resided at Ramsbury, being desirous of selling his mare at the Marlborough November fair, on the 23d of that month, in the year 1837, sent his mare thither by a servant, named Isaac Newbury, but gave no authority to Isaac Newbury to sell the mare, or to deal with her in any way till he had himself arrived there. It further appeared, that at Marlborough, the prisoner asked Isaac Newbury the price of the mare, which Newbury, who had known him before, told him was 25*l.* The prisoner then told him to take her on the hard road and trot her out; and the prisoner went and talked to a man on horseback, and a man on foot, and then walked away. These two men then went up to Newbury, and the man on foot offered the man on horseback 24*l.* for the horse he was riding, which the latter refused, saying, he would not sell to him at any price; upon which the man on foot stepped aside to Newbury, and said, if he would chop the mare (Mr. Canning's) for the horse the man was riding, he (the man on foot) would give him 24*l.* for the chop, and 5*s.* to put in his own pocket, at the same time taking from his pocket what appeared to be bank-notes. Newbury declined, saying, the mare was not his; but, being persuaded by the man on foot, Newbury accompanied the two men for about half a mile, and then agreed to the exchange of horses on the terms pro-

posed; and as soon as the saddles were changed, the man who had been on horseback rode away; and on Newbury looking round for the man on foot, he perceived that he had gone away while the saddles were changing. The horse left in exchange was worth about 4*l*.

It was also proved, that, on the 27th of November, 1837, the prisoner had sold Mr. Canning's mare to Mr. Mountain, of Bristol, for 14*l*., stating it to be his own, and that he got it in a chop at Marlborough fair.

*Ball*, for the prisoner, submitted, that, as the servant of Mr. Canning meant to part with the entire property in the mare, and not with the possession only, it was no larceny; and that the possession and the property passed by the delivery of the mare. (*a*)

COLERIDGE, J., in summing up.—If the owner of goods gives up the possession of his goods, at the same time intending to part with the entire property in them, it is no larceny, although he may be defrauded in the bargain. Here, however, there was no parting with the property. The servant Newbury had the mere charge of the mare, and had no right to deal with the property in her in any way whatever. If the prisoner was in league with the two other men, and they three, by a fraud, in which each of them was to take his part, and did take his part, induced Newbury to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare, the prisoner ought to be found guilty on this indictment. (*b*)

Verdict—guilty.

*Stone*, for the prosecution.

*Ball*, for the prisoner.

(*a*) In the case of *Rex v. Jackson*, M. C. C. 119, a pawnbroker's servant, who had a general authority from his master to act in his business, delivered up a pledge to a pawnor on receiving a parcel from the pawnor which he supposed to contain valuables which he had just before seen in the pawnor's possession. It was held that the receipt of the pledge by the pawnor was not larceny, because the servant, who had a general authority from his master, parted with the property and not merely with the possession; and in the case of *Rex v. Longstreeth*, M. C. C. 137, it was held that the getting of a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken *animo furandi*, is a larceny, for the servant has no authority to part with it but to the right person.

(*b*) It is not essential that each of the principals in a felony should be present at the entire transaction. In the case of *Rex v. Dyer and Disting*, 2 E. P. C. 767, it appeared that Dyer was the master of a boat which was to carry barilla from a ship to the shore; Disting, with the privacy of Dyer, separated a portion of the barilla which was on board the boat and placed it at another part of the boat, and the two prisoners together carried it ashore, and carried it off:—*Held*, that though for some purposes the larceny was complete by the first separation of the portion from the bulk, yet, as it was one continuing transaction, Dyer was properly convicted as a principal.

In the case of *Rex v. Bingley, R. & R.*, C. C. 446, which was a case of forgery, it was held that as each of the prisoners acted in completing some part of the forgery, and in pursuance of a common plan, each was a principal in the forgery, and that although one of them was not present when the note was completed by the signature, he was equally guilty with the others.

In the case of *Rex v. Kirkwood*, M. C. C. 304, the judges confirmed the decision in *Rex v. Bingley*, and held that if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others; and in the case of *Rex v. Dade*, Id. 307, it was held that the makers of the paper and plate respectively, for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts were executed.

## CENTRAL CRIMINAL COURT.

BEFORE MR. BARON PARKE, AND MR. JUSTICE BOSANQUET.

REGINA v. DAVID PIKESLEY.—p. 124.

In a case affecting the life of a party, it is very desirable that a magistrate who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read to prove the correctness of what he took down; but it is not absolutely necessary, in point of law, that he should be called, and the depositions may be read on proof of his handwriting.

Where a magistrate returns with the depositions that a prisoner was sworn and made a statement, the statement cannot be received in evidence against him, although a witness state that he was not in fact sworn.

THE prisoner was indicted for an unnatural offence committed with a boy of eight years of age.

The depositions were proved to have been signed by Mr. Mores, the magistrate, but it appeared, that, not having any clerk, he took them himself. It being necessary to read them in evidence to contradict a witness—

PARKE, B., said that in so serious a case it was very desirable that the magistrate himself should be present to prove the correctness of what he took down, although in point of law it was not absolutely necessary. (a)

The depositions were read, and from them it also appeared that the magistrate had written down that the prisoner was sworn, and made a statement which he returned as his examination.

A witness said, that in fact the prisoner was not sworn, but PARKE, B., in the presence of BOSANQUET, J., said, that as the magistrate had returned, that the prisoner was sworn, the statement made could not be received in evidence. (b)

PARKE, B., in his summing up, after stating the law with respect to the necessary proof of the commission of the capital offence, (inter alia,) said:—Then will come the question, whether, if he be not guilty of the capital charge, he can be convicted of an assault? Considerable doubt has been entertained whether, upon such an indictment, a person can be convicted of an assault if the act is done with the consent of the other party. And one, and I believe two cases (c) have been reserved for the opinion of the judges on that point. If he cannot be convicted of an assault, then he may be liable to be indicted in another form, for the attempt to commit the felony. If, therefore, you are not satisfied that the offence was complete, you will find him guilty of assault, and I will reserve the point for the opinion of the judges.

(a) See the case of *Reg. v. Mary Foster*, vol. 7 of these Reports, p. 148, and the cases there referred to.

(b) See the cases of *Reg. v. Walters*, vol. 7 of these Reports, p. 267; and *Reg. v. Wilkinson*, vol. 8, p. 662.

(c) These cases, owing to the time occupied by *Reg. v. Frost, &c.*, have not as yet, we understand, been considered by the judges.

The jury acquitted the prisoner of the capital offence, and found him guilty of an assault :—

But there being another indictment for the capital offence, committed with another boy of about six years old, upon which he was found guilty, and sentence of death recorded against him, with an intimation, that in consequence of his youth the punishment might be commuted to transportation for life. This conviction rendered unnecessary the further consideration of the question as to the conviction of assault on the first indictment.

*Clarkson*, for the prosecution.

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## DECEMBER SESSION.

BEFORE MR. JUSTICE PATTESON AND MR. BARON ROLFE.

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### REGINA v. BOX.—p. 126.

Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for a minute, took it out of the box and put it into his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing :—

*Held*, on the trial of the prisoner for stealing the pin, that, under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it, and also that the prosecutors ought to have called the person who served in the shawl department, and that their not doing so was a circumstance which would justify the jury in looking with some suspicion at the case.

THE prisoner was indicted for stealing a ruby pin, the goods of John Howell and others, in their dwelling-house.

From the evidence of a witness named Webster, who was employed in the jewellery department of the prosecutor's house, it appeared that on the 17th of October the prisoner came there with a lady, and asked to look at some diamond pins, and was shown a tray containing pins, and among them a ruby pin of the value of eleven guineas, which he selected, and it was put into a box for him; that he then selected a signet-ring, and desired that it might be engraved by the following day. After this, wishing to look at some scarfs, he was shown to the shawl department; but, before he went, he desired the witness to make out the bill for the whole, and he would return to him. He, however, did not return; and the witness went out, and saw him about to get on his horse, and assisted him to mount. At this time the witness had not missed the pin; but the next day he sent to the house of the prisoner's father a bill, which included the price of the pin. The witness stated that Mr. Sedgwick, one of the partners, was in the house at the time he missed the pin, but he did not mention the fact to him.

A witness, named Arrow, stated that he saw the prisoner take the pin out of the box, and place it in his stock; but did not tell Webster that he had seen it. This witness admitted that he saw the prisoner the next day in Duke Street, Manchester Square, but added that his presence

of mind did not lead him to take the prisoner into custody; but when he saw him at the Opera, some days after, he had him apprehended.

The person who served the prisoner in the shawl department was not called as a witness for the prosecution.

*Clarkson*, for the prisoner, asked his lordship if he thought any larceny had been proved?

*PATTESON, J.*—I think it is a question for the jury.

*Clarkson* then addressed the jury, and contended that the case was much more like an improvident contract entered into by the young man than a felony. There is no evidence that at the time he so openly took the pin from the box and stuck it in his breast, he intended to steal it, and his going to the shawl department and saying that he would return and give a check, and not doing so, will not alter the case. Webster may have imprudently let the young man take away the pin. As to the witness Arrow's statement, it has every appearance of a credit transaction. The prisoner's conduct also negatives any felonious intent,—he does not run away. Webster's conduct, also, in sending a bill to the house, and not going after the prisoner, and not communicating the fact to Mr. Sedgwick, also tends to show that there was a contract, and that no felony had been committed.

*PATTESON, J.*, (in summing up.)—There is no doubt that the pin was taken by the prisoner, and that it was taken from the dwelling-house of Messrs. Howell and James; but the question is, whether, at the time the prisoner took the ruby pin out of the box, he intended to steal it. It is not because a person pretends to purchase that the taking of an article will not be a felony, if it was a pretended purchase. Generally, we find that parties pretend to purchase one thing, and take the opportunity, while attention is diverted from them, to steal another. But this is a very different case. It is a very peculiar one; and I do not recollect having met with a similar case before. I must say I think that this case has not been presented to you by the prosecutors precisely in the way in which it ought. I think that the person who sold the shawls and scarfs should have been produced before you. The prosecutors could have done this, and they ought: and I think, as they have not, you ought to look at this case with more suspicion than you otherwise would. It seems extraordinary that Webster should let the prisoner, after he had said he would come back and pay for the whole, go away without making any inquiry as to whether he had paid for the things purchased in the other part of the premises. It seems to me, I confess, that that requires a great deal of explanation. The parties who are able to give that explanation are the prosecutors; and for what good reason, in the administration of justice, that explanation is kept back, I cannot conceive. The including the pin in the bill sent the next day will not cure the felony committed previously, if the prisoner intended to steal the pin when he took it from the counter. But it is a circumstance for you to take into account, when you are considering whether you can say you are satisfied that no credit was given, and that the prisoner intended to steal the pin. If the prisoner had reason to conclude that Webster had given him credit, then it will not be a felony; though Webster did not, in terms, give him that credit.

Verdict—Not guilty.

*Doane*, for the prosecution.

*Clarkson*, for the prisoner.

## MONMOUTH SPECIAL COMMISSION, 1839.

BEFORE LORD CHIEF JUSTICE TINDAL, MR. BARON PARKE, AND  
MR. JUSTICE WILLIAMS.

REGINA *v.* FROST and Eleven others.—p. 129.

To constitute the treason of levying war against her majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person act as the leader of an armed body who enter a town, and their object be neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason.

In a case of high treason the prisoner is not bound of necessity to show what was the object or meaning of the acts done. The offence charged must be made out by those who make the charge.

The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it be made appear to the court that the money forms no part of the proof against him.

Counsel may be assigned for a prisoner charged with high treason upon an application made to the clerk of the crown during an adjournment of the commission between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried.

Prisoners charged with high treason will be allowed copies of the depositions against them on the terms prescribed by the stat. 6 & 7 Will. 4, c. 114, s. 3.

A person charged with high treason cannot be allowed by the court before which he is tried to have two attorneys, unless they be partners.

The court before whom a prisoner is charged with high treason will not order that papers taken from his house should be restored to him, neither will they order that he shall be furnished with copies of them.

The only counsel in a case of high treason who are recognised by the court are the two counsel who are assigned by the court, and the court will not take notice of any assistant counsel.

In a case of treason, where the prisoner's counsel asked that the names of the jurors should be taken from a ballot-box instead of being called over in the order in which they stood in the panel, which was alphabetical, and this proposition was acquiesced in by the attorney-general, the court allowed the names of the jurors to be taken from a ballot-box; but if the attorney-general had objected, the court would not have granted the application.

The provisions of the stat. 6 Geo. 4, c. 50, s. 29. with respect to challenging of jurors by the crown, is a mere re-enactment of the law on this subject as it was before the passing of that statute.

The challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby.

In charging a jury with a prisoner in a case of high treason, it is not necessary to read the whole of the indictment at length to the jury, unless the prisoner or his counsel wish it; it is sufficient for the clerk of the crown to state the substance of it.

During a trial for high treason, which was expected to last several days, the court ordered that the prisoner's attorney should have access to him every day after the rising of the court till 10, p. m., and before the sitting of the court from 7, a. m., although it was stated by the governor of the prison that the prison was not open for any other purpose till half-past 7, a. m., and was shut for the night at 9, p. m.

In a case of high treason a witness was described in the list of witnesses as "S. S., of the parish of St. W., in the borough of N., in the county of M., labourer." N. was a place with six thousand inhabitants, and formed only a part of the parish of St. W., which was a large parish extending beyond the borough of N.:—*Held*, sufficient, and that it was neither a mis-description nor too general.

In a case of high treason or conspiracy the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the



different persons, and thus prove the conspiracy; therefore, in a case of high treason, where it appeared that a party met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting, as to where they were to go, and for what purpose.

On a trial for high treason a witness was described in the list of witnesses as "of Cross-y-Cylog, in the parish of L." The witness stated that he lived near Cross-y-Cylog, (which means Cross-of-the Cock,) and that there were two public houses, each so called, and that his house was between them and sixty yards from each. It was also proved that there was a cluster of houses at this place, and that a witness had directed invoices to one of them as Cross-y-Cylog:—*Held*, that the witness was not properly described.

In a case of high treason a witness was described in the list of witnesses as "M. J., of P., in the parish of St. W., in the county of M., sometimes abiding at the house of his son J. J., in the parish of B., in the said county." The witness occupied a house at P., in the parish of St. W., in which his wife resided, he going to work with his son and returning to his house at P. about three days in every two months. The son's house was in the parish of M. and not in the parish of B.:—*Held*, that if the witness had been described as of P., in the parish of St. W., that would have been sufficient, but that, as the latter part of the description was incorrect, it vitiated the whole.

In a case of high treason evidence had been given for the prosecution that an armed party attacked the W. hotel, in which the magistrates and troops were stationed. To show that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove that on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "Surrender up your prisoners." It was proposed to call evidence in reply to show that that was not said at the hotel gate:—*Held*, that this was properly evidence in reply.

In a case of high treason where the crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply also before the second counsel for the prisoner addressed the jury.

On a trial for high treason it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had had no list of witnesses delivered to him under the stat. 7 Anne, c. 21. It appeared that the indictment was found on the 11th of December, and that on the 12th of December a copy of it and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and that on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the lists of jurors and witnesses should have been all delivered *at the same time simul et semel*: *Held*, by a majority of the judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time, and the judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial in order to give time for a proper delivery of the list.

If, in a case of high treason, a point be reserved for the opinion of the fifteen judges, their lordships, if the point be argued, will only hear one counsel on each side; and as the counsel are in the nature of amici curiæ, their lordships will hear counsel who were not assigned at the trial.

If cases be reserved for two different prisoners on the same point, and both are argued, the judges will hear each case quite separately, unless the counsel consent to some other arrangement.

On a trial for high treason any objection to the description of the witness in the list of witnesses must be taken on the *voire dire*, and comes too late after the witness is sworn in chief.

THE special commission, which was a commission of oyer and terminer as to all treasons, misprisions of treasons, insurrections, &c., in the usual form, was directed to Lord Chief Justice TINDAL, Mr. Baron PARKE, and Mr. Justice WILLIAMS, and the indictment for high treason on which Frost, Zephaniah Williams, and William Jones, were tried, included also the names of nine other persons. The first count charged that all the twelve persons included in it traitorously did levy and make war against our lady the queen within the realm, and, being armed, did march in a warlike manner through divers towns, &c., and did with 2000 and more, with offensive weapons, beset houses and force persons to march with them, and did seize arms further to arm themselves to

destroy the soldiers of the queen, and to levy war against the queen within the realm, and thereby subvert the government and alter the laws by force, and did march into the town of Newport and make a warlike attack upon a certain dwelling-house, did fire upon the magistrates, soldiers, and constables there assembled, and did attempt and in a warlike manner to subvert and destroy the constitution and government of this realm as by law established.(a)

Second count (in a concise form)—That they did traitorously levy and make war against our lady the queen within her realm.

Third count—That they traitorously “did compass, imagine, invent, devise, and intend to deprive and depose our said lady the queen of and from the style, honour, and kingly name of the imperial crown of this realm.” In this count seven overt acts were charged—viz. 1st, that the prisoners arranged plans to subvert the government, and to alter the laws by force; 2d, that they conspired to take possession by force of the town of Newport, and to cut off all communication between that and other parts of the kingdom by mails, post, or otherwise; 3d, that they did conspire to fight with the soldiers of the queen, and attack the magistrates and justices of the peace and levy war against the queen within the realm, and subvert the government and change the laws by force; 4th, that they did provide arms and ammunition to destroy the soldiers and subjects of the queen, and to levy war; 5th, that they did, with 2000 and more, march, armed in a warlike manner, along highways, towns, &c., and force persons to march with them and join them, and did seize arms to arm themselves; 6th, that they did with the 2000 march into the town of Newport, and attack a dwelling-house, and did fire upon the magistrates, soldiers, and constables therein; and 7th, that they did prepare, levy, and make public war against the queen within the realm.

Fourth count—That the prisoners traitorously “did compass, imagine, invent, devise, and intend to levy war against our said lady the queen within the realm, in order by force and constraint to compel her to change her measures and counsels,” and in this count were overt acts similar to those in the third count.

The grand jury having returned a true bill against John Frost and eleven others for high treason, the twelve prisoners were placed at the bar.

TINDAL, C. J.—Prisoners, you have been called into court at this time for the purpose of being informed that the grand jury have found a true bill against each of you for high treason. You will have copies of the indictments, and a copy of the panel from which the jury will be taken, delivered to you in due time; the court wishes to know if you have any counsel or wish to have any one assigned to you as counsel, and whether you have any attorneys; but if you are not now prepared to answer, you will only have to express your wish between this time and the time of your trial, which will not take place until the 31st of this month, and it shall be attended to.

*Wightman*, for the crown.—My lords, I am instructed by the crown to apply to the sheriff to furnish a copy of the panel.

Mr. *Owen* (an attorney).—My lord, I appear for one or two of the

(a) In this count the marching, &c., were not charged as overt acts of treason, but were charged in the same way as the marching was charged in the first count of the indictment in *Brandreth's case*, 32 St. Tr. 768.

prisoners, and I wish to make an application to have the money which was taken from them returned to them. I appear for Zephaniah Williams.

TINDAL, C. J. (addressing Zephaniah Williams).—Do you wish to have this gentleman as your attorney?

Zephaniah Williams.—I do, my lord. 10*l.* was taken from me.

TINDAL, C. J.—Before we can grant your application, Mr. *Owen*, we must know if the money forms any part of the proof.

*Wightman*.—My lords, on the part of the crown, we have no objection to give up the money.

TINDAL, C. J.—Then let it be so.

Mr. *Owen*.—May I presume to ask, my lords, if we may not apply to have counsel assigned at a future period between this and the trial?

TINDAL, C. J.—Certainly, upon your making application to Mr. *Belamy*, the clerk of the crown.

Mr. *Bellamy*.—You can make the application to me yourself, or by your agent in town.(a)

Mr. *Owen*.—I now beg, my lords, to make application that copies of the depositions may be furnished to the prisoners.

TINDAL, C. J.—The depositions having been returned to the officers of the court, you may have them on the terms mentioned in the act.(b)

Mr. *Owen*.—My lords, Mr. *Geach* defends some of the prisoners; may I make application also on his behalf?

TINDAL, C. J.—No, but the prisoners may apply themselves.

The prisoner Charles Waters.—I beg leave, my lords, to make application for the depositions in my case.

TINDAL, C. J.—Certainly.

Mr. *Owen*.—I am instructed, my lords, on the part of Mr. Frost, to make application that I may be, together with Mr. *Geach*, assigned as his solicitor.

TINDAL, C. J.—Are you partners?

Mr. *Owen*.—No, my lord.

TINDAL, C. J.—Which gentleman do you wish to have, Mr. Frost?

The prisoner Frost.—I want the two, my lord.

TINDAL, C. J.—But the act only gives a power to have one attorney. If there was a partnership it might be otherwise, but without that we have no authority to allow two persons to act as attorneys for one prisoner; any person you may choose to employ will have free access to you at all reasonable times.

The prisoner Frost.—My lord, a number of papers were taken from my house, which I understand are to be used against me. I therefore apply either for the originals or copies of those papers.

TINDAL, C. J.—We have no authority to grant that.

Some of the prisoners applied to be furnished with copies of the depositions, and their request was acceded to upon their paying for them according to the terms of the stat. 6 & 7 Will. 4, c. 114, s. 3, and they were directed to inform the clerk of the crown which of the great number of depositions they should require.

TINDAL, C. J.—For the present take back the prisoners to the place from whence they were brought.

Adjourned to the 31st of December.

(a) See post, p. 91.

(b) The stat. 6 & 7 Will. 4, c. 114, s. 3, set forth ante, vol. 8, p. 32, and see the case of *Ex parte Greenacre*, *Ib.*

On the 31st of December the court again sat, when the prisoners were all arraigned, and each pleaded not guilty.

*Campbell*, A. G., asked that the prisoners' counsel might state whether they intended to sever in their challenges.

Sir *F. Pollock*, and *Kelly*, stated that they appeared for John Frost only, and they should challenge separately.

*Thomas*.—I shall appear for some of the other prisoners, but have to pray that they may not be called on to name counsel till they are brought up for trial.

TINDAL, C. J.—Let it be so.

Each prisoner was separately asked if he wished to have counsel, and each answered, that he wished to postpone naming his counsel till he was brought up for trial.

*Thomas*.—I am also assistant counsel for Mr. Frost.<sup>(a)</sup>

TINDAL, C. J.—The court can take no notice of that.

*Campbell*, A. G.—I intend to proceed first with the trial of John Frost.

The entire jury panel was called over to ascertain which of the persons appeared, and which were exempt, or to be excused.

Mr. Samuel Babington claimed exemption as a town councillor of Monmouth.

The objection was allowed.<sup>(b)</sup>

Richard Hillier was called.—The juror summoned stated his name to be *Joseph* Hillier. The name was struck out of the panel, and, the list having been gone through, sixty of the jury were excused, and twenty-two fined.

Mr. Bellamy, the clerk of the crown, then began to call over the names of the jurors who appeared, in the order in which the names were placed on the panel, which was alphabetical.

Sir *F. Pollock*.—I must object to the calling of the jurors in alphabetical order. I wish to have the names taken by ballot.

*Kelly*.—If they are taken alphabetically, the sheriff might select persons of particular opinions, and the prisoners' challenges be exhausted in the first few letters.

*Campbell*, A. G.—I am perfectly ready to acquiesce in the course proposed, if the court think it right to accede to it. The present course has been uniformly pursued since the reign of King William the Third.

(a) On the trial of the case of *Rez v. Horne Tooke*, for high treason, tried in 1794 (25 St. Tr. 4), the two counsel assigned by the court were Mr. Erskine (afterwards Lord Erskine) and Mr. Gibbs (afterwards Lord Chief Justice Gibbs); the assistant counsel being Mr. Dampier (afterwards Mr. Justice Dampier), Mr. Felix Vaughan, and Mr. Gurney (now Mr. Baron Gurney).

In the case of *Rez v. Stone*, for high treason, tried in 1796 (25 St. Tr. 1155) the two counsel assigned were Mr. Serjt. Adair and Mr. Erskine (afterwards Lord Erskine), the assistant counsel being Mr. Gibbs (afterwards Lord C. Justice Gibbs), Mr. Adam (afterwards Lord C. C. Adam), Mr. Holroyd (afterwards Mr. Justice Holroyd), and Mr. C. F. Ward; and in the case of *Rez v. Crossfield*, for high treason, tried in 1796 (26 St. Tr. 8), the two counsel assigned were Mr. Adam (afterwards Lord C. C. Adam), and Mr. Gurney (now Mr. Baron Gurney) the assistant counsel being Mr. Moore and Mr. Macintosh (afterwards Sir J. Macintosh).

We believe that in each of these instances the whole of the defence in court was conducted by the two counsel who were assigned by the court, and we believe that the eminent persons who acted as assistant counsel did not in any instance take any part whatever in the public proceedings in court, either by examining, cross-examining, arguing, or otherwise.

(b) Under sect. 122 of the stat. 5 & 6 Will. 4, c. 76 (the Municipal Corporation Act).

I think the alphabetical arrangement is the strongest proof that the names of particular persons are not selected to be placed at the top of the list.

Sir *F. Pollock*.—I believe there has not been till now an alphabetical arrangement.

PARKE, B.—I believe that the list at the Central Criminal Court is alphabetical.<sup>(a)</sup>

Sir *F. Pollock*.—A greater burden is thrown on the earlier letters, which is unfair toward the jurors.

TINDAL, C. J.—If the application had been objected to, I should not have yielded to it. As the attorney-general does not object, the names may be called from the ballot-box.

The names of the jurors were taken from the ballot-box.

Each juror was sworn on the *voire dire*, as to his qualification, before he was sworn to try.

Mr. Edward Davies, of Tintern-parva, had been sworn on the *voire dire* as to his qualification.

*Campbell*, A. G., challenged him for the crown.

Sir *F. Pollock*, and *Kelly*, objected, 1st, that the crown has no right to challenge peremptorily; and, 2d, that the juror had taken the book into his hand to be sworn to try; and that, therefore, the challenge came too late. On the first point they cited the Jury Act, 6 Geo. 4, c. 50, s. 29.

TINDAL, C. J.—We have no doubt as to the first point.

*Campbell*, A. G.—In *Brandreth's case*,<sup>(b)</sup> it was held that the officer of the court should be asked whether he had directed the juror to take the book.

TINDAL, C. J., called on Mr. Bellamy (the clerk of the crown) to state whether he had directed the juror to take the book.

Mr. Bellamy said that he had not.

TINDAL, C. J.—The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. As to the first point we are called upon to deviate from a practice of long standing. I think it is not a correct inference from the words of the statute that the crown is deprived of its right to challenges, except for cause assigned. The 29th section of the stat. 6 Geo. 4, c. 50, is a mere re-enactment of the stat. 33 Edw. 1, st. 4.

PARKE, B.—As to the time of making the challenge, I am of opinion that the prisoner or the crown must challenge before the oath is commenced, and the delivery of the book to the witness is the commencement of the oath. With respect to the other point, the recent statute is a mere re-enactment of the old law on the subject. The words are remarkable; the challenge is not to be void, but only the inquisition is not

(a) We believe that the jury panels on the crown side on the Oxford Circuit are alphabetical, and that they are called over in regular order from the top. On the Nisi Prius side, they are taken from a ballot-box.

(b) 32 St. Tr. 770. In that case Mr. Justice Holroyd says, that the juror must be challenged "before the book is presented to him."

to be postponed by reason of it, which seems to sanction the construction which has been put on it.

WILLIAMS, J.—If the facts had been different with respect to the taking of the book, I should have had great difficulty in distinguishing this from Brandreth's case; for I think the taking of the book is as much a commencement of the taking of the oath as if the first two or three words of the oath had been uttered.

The challenge was allowed.

A full jury having been sworn, Mr. Bellamy, the clerk of the crown, proceeded to give the prisoner Frost in charge, and had read the first count of the indictment to them at length.

TINDAL, C. J.—Sir *F. Pollock*, do you wish the indictment read at length? If you do, it shall be.

Sir *F. Pollock*.—By no means. I think it would be better understood by stating the substance only.

Mr. Bellamy stated the substance of the other three counts to the jury, and concluded the giving of the prisoner in charge in the usual manner.

Sir *F. Pollock* asked that the prisoner's attorney might see him daily after the court broke up, and before it sat in the morning.

TINDAL, C. J.—Let the counsel and attorney have access to the prisoner at any reasonable hour.

*Kelly*.—Perhaps your Lordships will say till 9 or 10 at night.

The governor of the prison stated that the debtors were locked up at 9.

TINDAL, C. J.—I do not think 10 an unreasonable hour. Let them have access till that time.

*Kelly*.—At what hour in the morning? At 7?

The Governor.—The bell is not rung till half-past 7.

TINDAL, C. J.—At any time after 7.

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Jan. 1, 1840.—*Talbot* opened the indictment.

Sir *F. Pollock* wished now to object, that no list of witnesses had been delivered to the prisoner in pursuance of the statute, and wished to be heard on this point before the case was opened by the attorney-general.

TINDAL, C. J.—We cannot interpose without the consent of the attorney-general.

*Campbell*, A. G., opened the case for the crown, and in his opening said:—This indictment against John Frost consists of four counts. There are two for levying war against her Majesty, in her realm; the third is for compassing to depose the Queen from her royal throne; and the fourth is for compassing to levy war against the Queen, with intent to compel her to change her measures. It is probable that your attention may be chiefly directed to the two first counts of the indictment, for levying war against the Queen in her realm. These two counts are framed upon an act of Parliament passed in the 25th Edward the Third, —a statute which, if properly enforced, is to be considered a safeguard of the public peace and of the tranquillity of society; it is a statute neither to be strained nor evaded. There had been, in the reign of Edward the Third, complaints that the law of treason was vague and unknown; and, to secure the country from that miserable state, this statute was passed. It is entitled, "A Declaration which offences shall be adjudged Treason;" and it thus begins:—"Item, whereas divers

opinions have been before this time, in what case treason shall be said, and in what not. The king, at the request of the Lords and of the commons, hath made a declaration in the manner as hereinafter followeth; that is to say"—now these things that follow are to be declared treason—"When a man doth compass or imagine the death of our Lord the King," "or if a man do levy war against our Lord the King in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, and thereof be probably attainted of open deed by the people of their condition." It is therefore hereby declared to be substantive treason to levy war against the king in his realm, and that is to be proved by acts that are done, and it must be proved clearly and satisfactorily. But then, it is not every breach of the public peace, even with an armed force, that makes out the crime of treason; it must be by some public and premeditated plan, and this is guarded by the statute itself, for the statute goes on with an enactment—"And if percase any man of this realm ride armed, covertly or secretly, with men of arms against any other, to slay him, or rob him, or take him, or retain him, till he hath made fine or ransom for to have his deliverance, it is not the mind of the king or his council that in such case it shall be judged treason, but it shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth." Therefore, you have the line drawn by the statute itself, for it is not to be held treason to ride armed to slay a person, or to rob him, or to take him, or retain him till he hath made fine or ransom to have his deliverance. Whenever there is a private wrong only to be complained of, a private grievance to be redressed, or a private object to be attained, although force may be used, and although this is an offence against the law, it does not amount to the crime of treason; but where you have an armed force setting the law at defiance for a general object, that is an offence comprehended by that act of Parliament. Levying war against the king does not mean merely heading a force by a pretender to the crown, as in the wars between the houses of York and Lancaster, or in 1745, but it is where there is an armed force seeking to supersede the law and to gain some public object. I will state to you upon this subject the authority of one of the most eminent and most constitutional of judges that ever adorned the English bench—I mean Sir Michael Foster. He has defined the offence that this statute comprehends, and, after pointing out that it is not to apply to private cases, he says (p. 210):—"The case of the Earls of Gloucester and Hereford, and many other cases cited by Hale, some before the Statute of Treasons, and others after it. Those assemblies, though attended many of them with bloodshed, and with the ordinary apparatus of war, were not held to be treasonable assemblies, for they were not in construction of law raised against the king or his royal Majesty, but for purposes of a private personal nature. Upon the same principle, and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular enclosures, or to remove nuisances which affected, or were thought to affect, in point of interest, the parties assembled for those purposes, or to break prisons in order to release particular persons, without any other acts, have not been holden to be a levying of war within the statute; and, upon the same principle, I think, it was very rightly held by five of the judges, that the rising of the weavers about London did not amount to a levying war, though great

outrages were committed on that occasion, not only in London, but in the adjacent country ;” “for those judges considered the whole affair merely as a private quarrel to prevent the use of a particular engine.” “Five of the judges were of a different opinion, but the attorney-general thought proper to proceed for a riot only.” These are the instances in which he says the statute does not apply ; but every insurrection intended against the person of the king to dethrone him, or to compel him to alter his government, amounts to levying war within the statute, and every conspiracy to levy war with an overt act for these purposes cannot be effected by numbers without manifest danger. Then follows this passage :—“Insurrections, in order to throw down all enclosures, to alter the established law or change religion, or open all prisons, all risings in order to effect these innovations of a public and general concern by an armed force, are high treason within the clause of levying war ; for though they are not levelled at the person of the king, they are against his royal Majesty, and have a direct tendency to dissolve all the bonds of society, and destroy all property and government by an armed force ; insurrection for redressing national grievances, or for reforming real or imaginary evils of a public nature, and in which the insurgents have no special interest, risings of this kind are, by construction of law, within the clause of levying war, for they are levelled at the king’s crown and royal dignity.” It will not be said, I hope, that we are resorting to constructive treason ; we seek to bring our case within the specific offence defined by the act of Parliament, as that law has always been enforced. If these avowed insurrections were not to be considered as treason, and to be punished with great severity, what safety would there be for society ? There are many temptations of revenge, of wrong-headed zeal, which may lead individuals to attempt to bring about a revolution in the government and change the existing state of affairs. Such attempts, if made by one, may be made by many, and the consequence would be a general dissolution of society, confusion and disorder. There is another passage in Mr. Justice Foster’s work, which follows soon after, in section 10 :—“Attacking the king’s forces, in opposition to his authority, upon a march, is levying war against the king :” “but if upon a sudden quarrel, from some affront given or taken, the neighbourhood should rise and drive the forces out of their quarters, that would be a great misdemeanor, and if death should ensue it may be felony in the assailants ; but it will not be treason, because there was no intention against the king’s person or government.” You have it here again laid down that attacking the king’s forces, in opposition to his authority, is levying war against the king. If it should be upon some sudden provocation, or without premeditation, it would not be a levying of war ; but where it is an attack upon the king’s troops by premeditation and design, that is a substantive offence within the act of Parliament. By the stat. 36 Geo. 3, c. 7, the law of treason is clearly defined ; it is enacted “that if any person or persons whatever shall within the realm, or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of our Sovereign Lord the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of his Majesty’s dominions or countries, or to levy war against his Majesty, his heirs and successors, within this



realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both houses or either house of Parliament, or to move or stir any foreigner or stranger with force to invade this realm or any other his Majesty's dominions or countries under the obeisance of his Majesty, his heirs and successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof, upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared, and adjudged to be a traitor and traitors." The third count of this indictment charges the prisoner at the bar with compassing or imagining to dethrone our Sovereign Lady the Queen, and to depose her from her royal state and kingly dignity; and in order to prove this it will be necessary to show you that certain overt acts were done, and it will appear that there was an armed insurrection of a public nature raised and made within the realm with the intention of superseding and destroying the authority of the crown. This, then, if proved by the oaths of two credible witnesses, as I am instructed it will be, and these overt acts being so proved, I will say, under the direction of my Lords who preside here, amount to the crime of high treason. The last count of the indictment charges the prisoners, with others, with endeavouring to compel her Majesty, by force, to change her measures, and this charge also must be proved by overt acts, and if it be so proved there is a clear treason within the meaning of this statute. Before I conclude these few and brief observations upon the law of treason, I will refer you to the latest authority upon the law of treason. The authority of my Lord Tenterden, in the trial of Arthur Thistlewood and others, and from which it will be seen that, from the time of Sir Michael Foster down to the present, Sir M. Foster's views of the law of treason had been universally adopted. In the 33d volume of the State Trials, p. 684, are these words of the Lord Chief Justice Tenterden:—"Before the passing of the late statute it had been settled by several cases actually adjudged, and by the opinions of the text writers on this branch of the law, that all attempts to depose the king from his royal state and title, to restrain his person, or to levy war against him, and all conspiracies, consultations, and agreements for the accomplishment of these objects, were overt acts of compassing and imagining the death of the king. By this statute the compassing or intending to commit these acts, that is, to depose his majesty, to restrain his person, or to levy war against him, for such purposes, is a substantive treason, and thereby the law is rendered more clear and plain, both to those who are bound to obey it and those who are engaged in the administration of it. It may be proper for me to add, that it has been established in the like manner that the pomp and circumstances of military array, such as usually attend regular warfare, are by no means necessary to constitute an actual levying of war within the true meaning of the ancient statute." And this you will particularly observe to be the case, for the learned judge whom I have been quoting continues:—"Insurrections and risings for the purpose of effecting by force and numbers—however ill-arranged, provided, or organized—any innovation of a public nature, for redress of supposed public grievances, in which the parties had no special or

particular interest or concern, have been deemed instances of the actual levying of war, and consequently to compass or imagine such an insurrection, in order, by force and numbers, to compel his majesty to alter his measures or counsels, will be to compass or imagine the levying of war against his majesty for that purpose, within the just meaning of the modern statute. Rebellion at its first commencement is rarely found in military discipline or array, although a little success may soon enable its actors to assume them." Thus, then, we find the learned judge, who presided upon this not very distant occasion, bearing out fully the same view of the law of treason which had been taken by Sir M. Foster; and, therefore, all insurrections of a public nature in which the parties have no special or particular interest or concern, have been deemed treasons and levying of war, within the meaning of the statute.

At the conclusion of the opening, Samuel Simmonds was called as a witness.

Sir *F. Pollock* objected that the prisoner had not been properly served with a list of witnesses.

It was proved that the copy of the indictment and the list of jurors were served on the 12th of December, 1839, and that on the 17th of December the list of witnesses was served.

Sir *F. Pollock* and *Kelly* submitted that by the stat. 7 Anne, c. 21, and the Jury Act, 6 Geo. 4, c. 50, s. 21, the list of witnesses must be served at the same time as the list of jurors, *simul et semel*, and that this was the proper time for taking the objection.

*Campbell*, A. G., argued, first, that the objection was not well founded; and, secondly, that if made at all, it should have been made at the time of arraignment, and was now too late. He was arguing his second point, when,

TINDAL, C. J., said, that the court would allow the trial to proceed, and take the opinion of her majesty's judges on the points, provided that such a proceeding should become necessary.(a)

Jan. 2.—At the sitting of the court,

Sir *F. Pollock* asked whether, in the event of the objection taken by him as to the list of witnesses being decided in favour of the prisoner, the situation of the prisoner would be the same as if this court had decided in his favour, on the objection being taken.

TINDAL, C. J.—If on consideration the judges think that the objection ought to prevail, the prisoner will have the advantage of it.

*Campbell*, A. G.—The situation of things will be precisely the same as in all other cases where the judges have reserved a point for the consideration of their learned brethren in Westminster Hall. No special course can be adopted.

PARKE, B.—Certainly not. If the judges should be of opinion that the objection ought to prevail, and a conviction has taken place, a pardon will be issued as a matter of course by the secretary of state.

The witness Samuel Simmonds was described in the list as "Samuel Simmonds, of the parish of Saint Woollos, in the borough of Newport, in the county of Monmouth, labourer."

(a) As the case was afterwards so fully argued on these points before the fifteen judges, we have omitted the arguments at Monmouth on this part of the case.

It appeared that Saint Woollos is a large parish, which includes the borough of Newport and a considerable quantity of land besides.

Sir *F. Pollock* and *Kelly* objected that this was a misdescription: 1st, because it did not state the witness to be of "that part of the parish of Saint Woollos which is in the borough of Newport:" and 2d, that the description was too vague, as Newport was a place having 5000 or 6000 inhabitants.

PARKE, B.—I think there is a case in which the parish of Lambeth was held to be sufficient.

*Kelly*.—There was a case in which an attorney described himself to be of "New Inn, London," New Inn being in Westminster, and that was held to be bad.(a)

PARKE, B.—That was a misdescription.

TINDAL, C. J.—This objection shapes itself in a double form: first, it is said to be a misdescription; and secondly, that there is a want of certainty. The description given in the list is this:—"Samuel Simmonds, of the parish of St. Woollos, in the borough of Newport, in the county of Monmouth." It appears to me that this is true in every particular. He was a resident of the parish of St. Woollos, in the borough of Newport, in the county of Monmouth. There was no intention to enter into a detail as to how much of the borough of Newport was in the parish of Saint Woollos. The statute says the prisoner shall be furnished with the name, profession, and place of abode of the witness. Then the next question is, whether this is a bad description, on the ground that it is too general. In the first place, it is said that the parish of Saint Woollos is larger than the borough of Newport; but as he is shown to have resided in that part of the parish of Saint Woollos which is in the borough of Newport, you may reject such part of the parish as is out of the borough. It is observable that the statute which first gave to the prisoner the advantage of having the names of the witnesses, and their profession and place of abode, coupled in the same sentence the names, profession, and place of abode of both witnesses and jurors. Upon looking at the panel of the jury, I find each juror is returned not of any particular street, but only of the town or the parish in which he lives. To decide in favour of the objection, would be to assume not merely that there has been a void description of this witness, but also a void description of almost every juror. The witness and the juror are placed in the same predicament, and I am of opinion that the statute has been complied with.

PARKE, B.—I am of the same opinion. With respect to the misdescription, it is entirely out of the question; the description is perfectly accurate; the witness did live in the parish of Saint Woollos, and in the borough of Newport.

WILLIAMS, J.—I think that this is a more favourable description than if the parish had been generally given, because it is in effect that part of the parish which is within the borough of Newport, and, consequently, that limits and confines the inquiry to a smaller space than if the parish was given generally. With regard to the other point, if it had appeared that the house in which the witness lived had been known by any particular name, there might have been a ground for contending that it was too general a description; but nothing of this sort appears here. It

(a) The case of *Steer v. Smith*, 6 Esp. 138.

seems to me that the description is such as is constantly given, and that it is a sufficient description.

The witness was examined.

Matthew Williams was called to prove that he was with a party at a chartists' lodge at Argoed on the 2d of November, when a person named Reed gave them directions to go to Newport on the following night. The witness did not see the prisoner till he was on his march to Newport on the 4th.

*Ludlow*, Serjt., for the crown, proposed to ask the witness what Reed said as to the purpose for which they were to go to Newport.

Sir *F. Pollock*.—I submit that directions given in the absence of the prisoner cannot be evidence against him.

*Kelly*.—We do not object to evidence of the acts of Frost after their meeting; the object here is to show an intent in Frost by things done in his absence, and anterior to his meeting these parties. As Reed is not indicted, he is not even a co-conspirator.

TINDAL, C. J.—I think that this evidence is admissible; the effect of it may be quite another thing. A conspiracy may be shown by antecedent acts; but that is not the only mode. It may also be shown by acts done afterwards what the common design was.

PARKE, B.—On indictments for treason and conspiracy, there are two modes in which evidence is rendered admissible. The one is, first to prove a conspiracy, then the acts of the other conspirators are admissible; the other is, to prove the acts of the parties, and thus prove the conspiracy, and that the party charged adopted those acts. This evidence comes under the second class.

WILLIAMS, J.—I am of the same opinion. The matter is not without difficulty; but, according to the cases, it is impossible to exclude the evidence. This case comes within the case of *Rex v. Hunt*, 3 B. & A. 566, which came before the Court of Queen's Bench, on the question how far Mr. Hunt could be affected by the conduct of other parties two days before the meeting at Manchester? Mr. Hunt first made his appearance at the meeting. But it was held, that evidence of drilling at a different place two days before, and hissing an obnoxious person, was receivable.

The evidence was received.

Jan. 4.—John Phillips was called: he was described in the list of witnesses as of "Cross-y-Cylog, in the parish of Llanvrechva."

The witness said that he lived near Cross-y-Cylog; that there were two public-houses, each called Cross-y-Cylog (which means Cross of the Cock); that he did not live at either of the public-houses, but lived at a house between both, and about sixty yards from each.

It was proved by Mr. Brough, that there was a cluster of houses at the place, and that he had sent invoices to one of them (neither of the public-houses), and directed them "Cross-y-Cylog," and that letters would be so directed.

TINDAL, C. J.—We think that the description is so doubtful, that the witness ought not to be examined.

The witness was not examined.

Morgan James was called. In the list of witnesses, he was described, "of Pillgwenlly, in the parish of Saint Woollos, in the county of Monmouth. collier, sometimes abiding at the house of his son, John James, in the parish of Bedwelty, in the said county, collier."

It appeared that the house of the witness's son was in the parish of Monythusloyne, and not in the parish of Bedwelty; and that the witness had for eleven years occupied a house at Pillgwenlly, at which his wife resided; but he himself used to work with his son, returning to his house about three days in every two months.

Sir *F. Pollock* objected, that this was a misdescription.

*Wilde*, S. G.—The first part of the description is correct, and is quite sufficient.

*Campbell*, A. G.—It would in future be most unfortunate for prisoners, if it should be held that any addition to a correct description, the object of which is to furnish the prisoner with all the information that can be given of the witnesses, should, through some verbal inaccuracy, vitiate what is admitted, *per se*, to be a good description.

TINDAL, C. J.—Perhaps, giving either of two residences might be sufficient; but if you give both, and one of them be faulty, does not that vitiate the whole?

*Campbell*, A. G.—I assume that the first part of the description is correct, and was alone a sufficient compliance with the statute. The addition arose from an anxiety to give the prisoner the benefit of further information. The place of abode of the witness was correctly given in the first instance; but he also resided with his son, whose place of abode happened to be not in the parish described, but in an adjoining parish: I submit that the description is sufficient.

TINDAL, C. J.—If the case had rested upon the first part of the description alone, I should have considered it a sufficient description within the meaning of the act; otherwise parties would be put to endless difficulty when persons possess more than one residence, or reside during any period of the year at another place, or at a distance from what is considered their regular abode. This would often occur,—in the case, for instance, of a fisherman, a commercial traveller, or a merchant who goes abroad perhaps every year. If you wanted to describe such a one by his place of abode, that place where he had his house and family must be considered a proper and sufficient description. It appears, however, that more was intended; it seems to have been doubted whether, with propriety, the description could be limited to Pillgwenlly, and it was thought better to describe him as sometimes residing with his son in another place. The whole must be taken together. If all be true, well; but it is true only in the first part; and, although he resided with his son, the parish where his son resided is incorrectly given; and, although the addition of his occasional residence with his son must have arisen from an anxiety to afford every information, my opinion, looking to the act of Parliament, is, that the description as a whole is inaccurate, and the witness cannot be examined.

PARKE, B.—If a witness has two domiciles, both need not be named. All that the act of Parliament requires is, that the place of abode should be given. The first part alone would have been sufficient, but the latter part is inaccurate, and apt to mislead. It might subject the prisoner to hardship, in spending time and making inquiries about the witness in a place where, it is admitted, he could not be found.

WILLIAMS, J.—The question really is, whether the whole is to be considered as the description of the abode. There has been an endeavour to give a more complete description of the place of abode, and the latter

part is included in the description. The latter part is not correct,—it gives a wrong parish; the whole description is, therefore, vitiated.

The witness was not examined.

On the part of the crown, a great number of witnesses were called; and, from their evidence, it appeared that the prisoner John Frost had been for many years a linen-draper, and was also for a short time one of the magistrates of the borough of Newport; and it further appeared, that, in the week previous to the rising, which took place, there was a general plan of insurrection, and that consultations and meetings took place, at which it was suggested that the plans were discussed. There was one of these meetings held at Blackwood, upon the Friday preceding the day of the insurrection; at which meeting the prisoner and various deputies attended; and it was sought to be inferred that there the plan was laid for the scheme which was afterwards carried into effect: it being suggested that it was there arranged that the different parties of the insurgents should all assemble on the night of Sunday, the 3d of November, in three principal divisions. The first division, under the command of the prisoner John Frost himself, to assemble at Blackwood; another division, to be under the command of Zephaniah Williams, who kept a beer-shop at a place called Coalbrook Vale, and who was to lead the men from Nant-y-Glo, and that neighbourhood; while the third division was to be placed under the control of a person named William Jones, a watchmaker, residing at Pontypool, and who was to collect all the men from the neighbourhood of Pontypool, and from the north and the west; and they were to meet the others at Risca, or the Cefn, about midnight on the Sunday, and, having there all assembled together, they were to march upon the town of Newport, at which town it was intended they should arrive at about 2 o'clock on the morning of Monday, of the 4th. Upon arriving there, they were first to attack the troops, and then break down the bridge which crosses the river Usk, and, thus stopping her majesty's mail, signal rockets were to be thrown up upon the hills, and the stopping of the mail was to be a signal (by its non-arrival for an hour and a half after its usual time) at Birmingham, to those who were said to be there connected with these designs, for a rising at Birmingham, and a general rising throughout the north of England. It further appeared, that in pursuance of these intentions, the division under the command of Mr. Frost did assemble much earlier than the other divisions; and, being so assembled, the prisoner gave them the word of command, and he marched with them down by the way of Risca to the Welch Oak, where the junction was to take place; but, from the difficulties which the weather threw in the way of the march of the men from the upper districts, they did not arrive for a very long time after the hour at which it was arranged that they should be there. Zephaniah Williams did not arrive with his men from Nant-y-Glo until daylight, and William Jones, of Pontypool, with his men, did not arrive there; but a party which he sent forward under the command of a man named Britton, did arrive; the main body of the men from the Pontypool district, under Jones, arriving after the attack. Frost remained with the body under his command until daylight, waiting the arrival of the other bodies. As, however, they had not then arrived, he mustered the forces which he then had there under his command, and marched on with them upon Newport. There were then with him, according to the best calculations which could be made, at least 5000 men, the most of

whom were armed, some with guns, others with swords, a large number with pikes, and some with mandrills, an instrument with which they cut coal (a kind of pick-axe); and others were armed with scythes fixed on sticks, and those who could not get arms of this kind were armed with sticks and bludgeons of various kinds. The prisoner Frost took the command, gave the order to march, and they did so; they marched in a sort of military array; and they proceeded through Tredegar park, the seat of Sir Charles Morgan, where they halted for a time. They then marched on till they came to within about half a mile from Newport. It further appeared, that on the Sunday intelligence was brought to Newport of these movements in the hill country. Mr. Phillips, the then mayor of Newport, caused the special constables, who had been sworn in, to be stationed at the most important points. These were the three principal inns at Newport, the Westgate Inn, the King's Head, and the Parrot; and the mayor went to the Westgate Inn, with other magistrates, and sat up during the whole night in that inn, sending out scouts for information, and making the best preparation they could to preserve peace and defend the town. When day had dawned, intelligence was brought that the insurgents were advancing, and in the neighbourhood of Newport. A person of the name of Walker was sent out to gain information. That person was shot at, and returned dangerously wounded. The mayor then sent for military assistance. There was in Newport only one company of the 45th regiment, under the command of Captain Stack. They were stationed in the workhouse, which had been converted into a temporary barrack. Captain Stack sent thirty men to the assistance of the mayor, under the command of Lieutenant Gray and two sergeants. Lieutenant Gray brought his men to the Westgate Inn, and they were stationed in a room in that inn; that inn being in the Westgate street, fronting the north—there being on the east side a room with a bay window, looking towards the street, in which the military were stationed, and a corresponding room on the western side of the Westgate Inn, where the magistrates had been assembled. Between these two rooms there was a corridor, or passage. The special constables remained before the door of the inn, where they had been placed. The military had not loaded, and they did not load their arms until they had been fired upon. This was the state of things in Newport as the insurgents were approaching. Frost was at the head of that body, and giving the word of command, when they reached the weighing-machine of Court-y-bella, where he inquired respecting the military. He was told by two boys, whom he met, that a number of the military had been sent towards the Westgate Inn. Upon hearing that, the insurgents divided; part of them turned to the left, and went up a hill to St. Woollos' church; part kept on to the right, and went down to the town of Newport, through Commercial street. This last division afterwards came up and joined the others; those who had gone up to St. Woollos' church proceeded down Stowe Hill, which leads to the Westgate Inn, where Frost had been told the military were. He still walked at their head. He passed the Catholic chapel, close to the back of the Westgate Inn; and the insurgents then tried to gain admission into the Westgate Inn by a carriage entrance which leads into the court-yard behind the premises. They failed in effecting their object. They then wheeled round in front of the Westgate Inn, Mr. Frost being still with them. The constables were before the door. The insurgents asked

them to surrender; some one said, "No, never;" upon which the word of command, "Fire!" was given; and the insurgents did fire upon the bay window of the room in which the military were stationed; and then attempted to break in at the front door, through the porch into the interior of the house. They made use of their pikes for the purpose of forcing the door. They succeeded, and got into the hall, and thence into the passage leading from the magistrates' room to that where the military were stationed. The window-shutters were closed. The glass had been broken by the shots which had been discharged, but while the window-shutters were closed, the soldiers could not make use of their guns and fire upon the insurgents. Lieut. Gray went to open the shutters of one part of the window, the mayor of another, and Sergeant Daly of another; and, as the mayor was opening the shutters, he received two wounds,—one about the shoulder, and another in the hip. Sergeant Daly was severely wounded in the head by slugs that were fired from without, and a gun he held in his hand had the lock knocked off by a ball from the insurgents. The soldiers were then ordered to fire. At this time the insurgents had gained admission into the house; they were in the passage leading to the room in which the military were assembled; and it was alleged that if the order to fire had not then been given, there was every reason to believe that the military must all have been killed. The insurgents in the passage were first fired upon by the soldiers, and several fell and were killed. The shutters being removed, the soldiers then directed their fire from the window, and thus they had a complete command of the space in which the insurgents had been drawn up. They fired into the street, and several were there wounded, and fell. There was a speedy dispersion; the insurgents all fled in every direction. Frost was not seen after the time when the firing first began. Zephaniah Williams was about ten minutes too late. He, however, did arrive with his men from Nantiglo; a party nearly as numerous as that led on by Frost himself. William Jones, from Pontypool, did not get nearer than the neighbourhood of Malpas, when he heard of what had happened at Newport. He was proceeding down a lane to meet the other party, when he heard of the defeat that had taken place of his associates at Newport, and he likewise fled, and his men dispersed. It was proved, that all these three parties, as they came down, pressed into their service various persons who were unwilling to attend them, but were compelled by them to march, and also seized all the arms they could find, and broke into several houses for these purposes. Frost himself was seen retreating in Commercial street, and on the road leading towards Tredegar Park, after the firing was over. He was seen soon after in Tredegar Park, about two miles from Newport, making his escape into a wood; and he was apprehended in the town of Newport on the Monday evening, at the house of a person named Partridge, with pistols and powder upon him.

Sir *F. Pollock* addressed the jury for the prisoner, and submitted, that the object of the insurgents was to procure the liberation of certain prisoners who were in custody at the Westgate Inn, and to obtain better treatment for a person named Vincent, who was imprisoned at Monmouth,<sup>(a)</sup> and that the designs of the parties were not of a treasonable nature. He also commented on the fact of the prisoner being a person

(a) See the case of *Reg. v. Vincent*, ante, p. 91.



of good character, whose family was in the town of Newport at the time in question.

On the part of the prisoner, it was stated by Mr. Henry Williams, that when the insurgents came to the Westgate Hotel, the first man who came up said to the witness and others, who were there as special constables, "Surrender up your prisoners."

Before *Kelly*, for the prisoners, addressed the jury, *Wilde*, S. G., proposed to call Edward Hopkins as a witness in reply, to contradict the last witness. He proposed to ask him, whether, when the insurgents came to the inn door, a special constable asked of them what they wanted, and whether or not one of them replied, "Surrender up your prisoners?"

Sir *F. Pollock* and *Kelly* objected, that Edward Hopkins had been already called and examined as a witness, and that this was, in reality (if it occurred at all), a part of the transaction.

*Campbell*, A. G.—There is no doubt that I cannot examine him, except as to some matter which is evidence in reply.

*TINDAL*, C. J.—There can be no doubt about the general rule, that where the crown begins a case (as it is with an ordinary plaintiff) they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply. In this instance there appears to me to be a necessity for asking this question, and, therefore, that it is reasonable for the crown to call this witness back.

*PARKE*, B.—If the crown could have foreseen the necessity of giving this evidence, it ought to have been given in chief; but as it appears to have arisen entirely *ex improviso*, and as the fact is entirely new, the crown has a right to call this witness back.

*WILLIAMS*, J.—I am of the same opinion; but, of course, the examination is to be confined to this matter only.

The evidence was received. (a)

Sir *F. Pollock*.—In common cases, both criminal and civil, I should have a right to comment on this evidence; but I shall not do so in this instance, as my learned friend has to sum up the whole case for the defence. I mention this because I am not aware of any case of the kind that has occurred before.

*TINDAL*, C. J.—It is rather a question of convenience than anything else, that the learned counsel in summing up should take this as part of the case.

Sir *F. Pollock*.—Though I do not mean to use my privilege, yet I am anxious that no right to which the prisoner is entitled, or which is by law enjoined, should be surrendered. I have but a few words to say, and those are for the sole purpose of proving the right of every prisoner in respect of evidence called in reply. My learned friend will, I am sure, do justice to all parts of the case, and I shall, therefore, thank you for the attention with which you heard me yesterday, and only ask you to consider well the value of the evidence which has been given before you.

(a) See the cases of *Rex v. Stimpson*, ante, vol. 2. p. 415: *Rex v. Hilditch*, ante, vol. 5, p. 299, and *Rex v. Findon*, ante, vol. 6, p. 132.

*Kelly* addressed the jury for the prisoner, and argued that the question, as far as the prisoner was concerned, was one of intention, and that although they might be of opinion that the acts of outrage had been clearly proved, and that the prisoner had participated in them, yet they could not find him guilty of high treason unless they were satisfied that he had the intentions and designs attributed to him in the indictment; as, without that, the offence would be no more than an aggravated misdemeanor. He referred, in the course of his address, to *Hale's Pleas of the Crown*, pp. 130, 135, 136; *Rot. Parl.* 5 Hen. 4, 12; and *Lord George Gordon's case*, 21 St. Tr. 485.

At the conclusion of *Kelly's* address to the jury, the prisoner was asked by the court whether he wished to say anything in addition to what had been urged by his counsel, and he replied that he did not.

*Wilde*, S. G., in reply, contended, that the intention of the prisoner was to take possession of the town of Newport by surprise, by terror, or by force, and to use that possession as a mode of raising a rebellion; and that whether or not he incidentally intended to procure the release of Vincent, would not make any difference. He referred to *Brandreth's case*, and Lord TENTERDEN's charge to the grand jury in the *case of Thistlewood*.

TINDAL, C. J., in summing up (after citing the stat. 25 Edw. 3, st. 5, 36 Geo. 3, c. 7, and the works of Mr. Justice FOSTER and Sir M. HALE), told the jury that it was essential to the making out of the charge against the prisoner that there must be an insurrection, that there must be force accompanying such insurrection, and the object of it must be of a general nature; and his lordship also laid down that it was not incumbent on the prisoner to show what was the object and meaning of the acts done, but that it was the duty of the prosecutors to make out their case against the prisoner.

Verdict—Guilty.(a)

Counsel for the crown—*Campbell*, A. G., *Wilde*, S. G., *Ludlow* and *Talfourd*, Serjts., *Wightman* and *Talbot*.

Counsel for the prisoner—Sir *F. Pollock* and *Kelly*.

Assistant counsel—*Thomas*

(a) For the report of the points decided in this case, we are indebted to the kindness of one of the learned counsel engaged in it.

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THE case stated for the opinion of the fifteen judges was as follows:—

*The Queen v. John Frost and Eleven Others.*

The prisoners were indicted for high treason, the indictment containing two counts upon the statute 25 Edw. 3, for levying war against the queen in her realm.

The several prisoners were arraigned on this indictment upon Tuesday, 31st of December, 1839, and pleaded thereto not guilty; and, having declared their intention of severing in their challenges, the attorney-general, on the part of the crown, applied to the court, that John Frost might be first put upon his trial, which application was granted.

The jury were thereupon called, and, after challenges made on the

part of the prisoner and the crown, a jury was sworn, and charged with the prisoner upon the said indictment.

Upon the first witness being called, and before he was sworn, the prisoner's counsel objected, that neither that witness nor any other could be examined, as the list of the witnesses had not been delivered according to the statute 7 Anne, c. 21, s. 11.

By that section it is enacted, that, after the period of time therein mentioned (which has long expired), "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also *given at the same time that the copy of the indictment is delivered to the party indicted*, and that copies of all indictments for the offences aforesaid, *with such lists*, shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses, any law or statute to the contrary notwithstanding."

At the time of passing the statute above referred to, the law which required the delivery of a copy of the indictment and of the panel of the jurors returned for their trial, stood upon the statute 7 Will. 3, c. 3, by the first section whereof it was enacted, "that from and after the 25th of March, 1696, all and every person and persons whatsoever that shall be accused and indicted for high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered unto them or any of them five days, at the least, before he or they shall be tried for the same, whereby to enable them and any of them respectively to advise with counsel thereupon to plead and make their defence, his or their attorney or attorneys, agent or agents, or any of them requiring the same, and paying" as therein mentioned. And by section 7, the same persons indicted "shall have copies of the panel of the jurors, who are to try them, duly returned by the sheriff, and delivered unto them and every of them so accused and indicted respectively, two days, at the least, before he or they shall be tried for the same."

The only legislative provision which has taken place since the statute of 7 Anne, as to the delivery of the jury panel, is the 6 Geo. 4, c. 50, s. 21, by which it is enacted, "that when any person is indicted for high treason or misprision of treason in any court other than the court of king's bench, a list of the petty jury, mentioning the names, profession, and place of abode of the jurors, shall be given *at the same time* that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the court of king's bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid, but the list of the petty jury, made out as aforesaid, may be delivered to the party indicted *at any time* after the arraignment, *so as the same be delivered ten days before the day of trial*; Provided always, that nothing herein contained shall anyways extend to any indictment for high treason in compassing and imagining the death of the king, or for misprision of such treason where the overt act or overt acts of such treason alleged in the indictment shall be assassination or killing of the king, or any

direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm, or to any indictment of high treason for counterfeiting his majesty's coin, the great or privy seal, his sign manual, or privy signet, or to any indictment of high treason, or to any proceedings thereupon against any offender or offenders who by any act or acts now in force is and are to be indicted, arraigned, tried, and convicted by such like evidence, and in such manner as is used and allowed against offenders for counterfeiting his majesty's coin." And amongst the statutes and parts of statutes repealed by the 62d sect. of the said last-mentioned act, is "so much" of the 7 Anne, c. 21, s. 11, "as relates to giving a list of the jury to the party indicted of high treason or misprision of treason."

The bill of indictment was found by the grand jury on the 11th of December, 1839. On the 12th, a copy of the indictment and of the panel of the jury intended to be returned by the sheriff was served on each of the prisoners personally, in the presence of two witnesses.

And on the 17th of December, a list of the witnesses intended to be produced on the trial, mentioning their names, professions, and places of abode, was served in the same manner on each of the prisoners.

Upon these facts it was contended on the part of the crown—first, that the service of the list of witnesses was a good service under the statute of 7 Anne, c. 21. And secondly, that at all events the application came too late.

This point is reserved for the consideration of her majesty's judges.

(Signed)

N. C. TINDAL.

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITTLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.; GURNEY, B.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; MAULE, J.; AND ROLFE, B. *Jan.* 25.

CAMPBELL, A. G. (with whom were *Wilde, S. G., Ludlow and Talford, Serjts., Starkie, Wightman, and Talbot*), suggested that some arrangement should be made as to what counsel should address the court and in what order, and whether one counsel for each prisoner or two counsel for each (as it was a case of treason) should be heard.

Sir *F. Pollock* stated that he was counsel for Frost, Mr. *Kelly* for Zephaniah Williams, and Sir *W. Follett* for Jones.

LORD DENMAN, C. J.—Sir *F. Pollock* called on me, and I then thought that we were not bound to hear more than one counsel on a side in each case, but that we must hear one counsel in each case, unless some other arrangement was made by consent.

GURNEY, B.—The counsel here are in the nature of *amici curiæ*.

TINDAL, C. J.—If that were not so, we could not hear Sir *W. Follett*, as he was not assigned as counsel for Jones; nor could we hear Mr. *Kelly* in the case of Zephaniah Williams, for the same reason.

*Kelly*.—I submit that Williams and Jones are each entitled to a reply on the whole case, independently of what is urged in reply for Frost.

LORD DENMAN, C. J.—As you ask a separate reply for Williams and Jones, we think that each case must be heard quite separately.

Sir *F. Pollock*, for the prisoner Frost.—In this case two great questions arise:—first, whether the delivery of a list of witnesses ten days

before the trial, but five days after the delivery of the copy of the indictment and list of the jurors, is sufficient?—and secondly, whether it was competent to take this objection at the time at which it was taken, namely, when the first witness was called? I propose, in the first place, to consider the construction of the statute 7 Anne, c. 21, together with the other statutes, and, secondly, those authorities that throw any light on the construction that ought to be put on acts of Parliament; and, thirdly, the authorities of the Scotch law, with respect to the list of witnesses, as by the stat. 7 Anne, c. 21, the English law of treason was introduced into Scotland, and by the same statute the law of Scotland was imported into England, as to the delivery of a list of witnesses, but not as to the period of ten days. As to the first point, by the stat. 7 Will. 3, c. 3, persons accused of treason were to have a copy of the indictment, but not the names of the witnesses (which in this statute meant not a list of the witnesses to be called, but a copy of the names on the back of the indictment), and this copy of the indictment was to be delivered five days before the trial, on the conditions of the attorney requiring and paying for it; and by sect. 7 of the same statute there is a positive direction to deliver a list of the jury two days before the trial, and free of expense. By the stat. 7 Anne, c. 21, sect. 11, it is enacted, that when any person is indicted for treason or misprision of treason, a list of the witnesses to be produced on the trial, and of the jury, mentioning the names, &c., of both, “be also given at the same time that the copy of the indictment is delivered to the party indicted, and that the copies of all indictments for the offences aforesaid, *with such lists*,” shall be delivered to him ten days before the trial, in the presence of two or more credible witnesses. The first question is, whether the words, “at the same time,” have a clear meaning? I should say that they had—and as the legislature have added the words “*with such lists*,” I should submit that no doubt whatever can exist. The next enactment is the Jury Act, 6 Geo. 4, c. 50, s. 21. That act provides that the list of jurors and indictment shall be delivered ten days before the arraignment, but it leaves the list of witnesses as it stood on the statute of Anne, and I submit that the statute of Anne is not, so far as it regards the list of witnesses, at all affected by the stat. 6 Geo. 4, c. 50, s. 21; but that statute makes one alteration, which is, that the words ten “days before arraignment,” as to the list of jurors and the delivery of the indictment, are substituted for “ten days before trial,” which are the words of the statute of Anne, *but that was merely adopting the true construction of the statute of Will. 3*, because it had been decided in that statute, that the word *trial* meant *arraignment*. It is so laid down by Mr. Justice FOSTER;<sup>(a)</sup> and Mr. Justice BLACKSTONE<sup>(b)</sup> cites Mr. Justice FOSTER, and adopts what he says. The first case which occurred on the statute of Anne, was that of Lord George Gordon,<sup>(c)</sup> and there the attorney-general applied “for a rule upon the sheriff to deliver to the prosecutor a list of the jurymen *he intended to return* on the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner, according to the provisions of the statute of Queen Anne, *at the same time with the copy of the indictment*.” This was granted, and the form of the rule is given in a note both in the report in Douglas and in the State Trials.

(a) Fost. Cr. Law, 230.

(b) 4 Com. Ch. 27.

(c) 21 St. Tr. 648; Doug. 569, 1st ed., and 591, 2d ed.

TINDAL, C. J.—That was not the list of witnesses.

Sir *F. Pollock*.—The attorney-general had got that; and I only cite the case to show that the copy of the indictment and the lists are to be delivered at the same *time*, and not at the same *interval*. Since the trial of Lord George Gordon, the copy of the indictment and the list of jurors and the list of witnesses have always been delivered all together and at the same time. This was so in the case of *Hardy v. Horne Tooke*, in 1794, 24 St. Tr. 199; in *Crossfield's case*, in 1796, 26 Id. 1; in *McLean's case*, tried at Quebec in 1797, Ib. 721; in *O'Coigley's case*, tried in 1798, Ib. 1191; in *Watson's case*, tried in 1817, 32 Ib. 1; in *Brandreth's case*, in the same year, Ib. 755; and *Thistlewood's case*, in 1820, 33 Ib. 68; and in *Col. Despard's case*, in 1803, 28 Ib. 345: in all these the delivery was simultaneous. It has been said that we can produce no authority to show that a delivery of the lists at different times was bad, but the reason is that no one before now has thought that the words "at the same time" meant, at a different time. There may be important points in which a prisoner may be injured by the lists and the copy of the indictment not being delivered together. The list of the witnesses delivered in this case was headed "A list of witnesses to be produced on the trial of John Frost, upon an indictment found against him and others for high treason, for proving the said indictment." There might be two indictments, and there is nothing to show which indictment this list might refer to.

ALDERSON, B.—Can the inconvenience alter the construction of the act of Parliament? Are not all acts of Parliament to be construed according to the exact meaning of their words, unless that construction would lead to some manifest absurdity?

Sir *F. Pollock*.—If a statute prescribes a state of things for the benefit of a prisoner, no one can deprive him of it. Two witnesses are required as to the delivery of the list of witnesses: would the evidence of one witness be sufficient, coupled with finding the list on the prisoner, with an endorsement in his handwriting, that he had received it ten days before the trial? I should say that it would not, the words of the statute being express. I come now to the second head of my argument, as to the construction to be put on acts of Parliament, and from the cases it appears, that where a statute has directed a particular mode of proceeding, or a particular form to be observed, that mode of proceeding, and that form must be observed, and no other will be sufficient. [In support of this part of his argument, Sir *F. Pollock* cited the cases of *Lovelace v. Curry*, 7 T. R. 631; *Taylor v. Fenwick*, 3 B. & P. 553 n.; *Faux v. Vollans*, 1 N. & M. 307; *Rex v. Harvey*, 1 Wils. 164; *Spears v. Smith*, 6 Esp. 138; *Eicke v. Nokes*, 1 M. & M. 303; *Wadsworth v. Marshall*, 3 Tyr. 228; *Stunnell v. Tower*, 4 Tyr. 862; *Akehead v. Stocks*, 1 M. & P. 346.] From the case of *Jones v. Lake*, 2 Atk. 176 (n), and 6 Cruise Dig. 69, it appears, that under the Statute of Frauds, 29 Cha. 2, c. 3, it was not necessary that all the three witnesses to a will of lands should have been present at the same time; but now by the stat. 1 Vict. c. 26, it is necessary that the two witnesses to a will must be present "together." [Sir *F. Pollock* also cited the cases of *Goss v. Jackson*, 3 Esp. 198; *Rex v. Rickets*, A. & E. 537, and 1 N. & P. 680; *Jones v. Smart*, 1 T. R. 44; *Rex v. Inhabitants of Barham*, 8 B. & C. 99; *Notley v. Buck*, Id. 160, and 2 M. & R. 68; *Brandling v. Barrington*, 6 B. & C. 467; *Vaux v. Ansell*, 1 B. & P.

224; *Bates v. Pilling*, 4 Tyr. 231; *Wagget v. Shaw*, 3 Camp. 316; *Richards v. Stuart*, 10 Bing. 319, and 3 M. & S. 774; *Smith v. Crump*, 1 Dowl. P. C. 519; *Rex v. Justices of Kent*, 3 B. & Ad. 250; *Rex v. Justices of Cambridgeshire*, Ib. 887, and in the matter of *Flounders*, 4 Id. 865.] I now come to the authorities on the law of Scotland, from which it appears, that in that country the law respecting the list of witnesses and the copy of the indictment is at least as old as the reign of Charles the Second, as by an act of the Scottish Parliament, passed in the year 1679, regulations were made on this subject. Baron Hume, in his work on Crimes,<sup>(a)</sup> says, "In addition to the copy of the libel,<sup>(b)</sup> the statute of Charles the Second orders that the panel<sup>(c)</sup> be at the same time served with a copy of the list of the witnesses to be called against him, and of the persons of assize<sup>(d)</sup> who are to be cited for his trial." These very expressions are copied into the statute of Anne, with the addition of ten days, and the words being copied from the one statute into the other, they must have the same meaning in both; and in the Scottish act, the words "at the same time" can bear no other meaning than that which I contend for, as in that act no number of days is mentioned. In Scotland, the period of service of these documents was not specified in the statute of Charles, but was regulated by an act of adjournment, which is an order of court similar to the acts of *sederunt* in civil cases, and to the recent general rules of practice in this country. They were equivalent to law, but would not contravene an act of Parliament. [He cited several cases from the same chapter of Hume on Crimes, in which for informalities in the list of witnesses the public prosecutor "deserted the diet."]

ALDERSON, B.—Is not deserting the diet something similar to quashing the indictment?

*Campbell*, A. G.—I am speaking in the presence of the Lord Advocate and Sir William Rae; and I believe I am correct in saying, that if the public prosecutor deserts the diet, *loco et tempore*, he may begin again and commence another prosecution for the same offence, but, if he deserts it *simpliciter*, he cannot.

Sir *F. Pollock*.—There are several cases referred to by Baron Hume. [He cited from the same chapter of Baron Hume's work, the cases of *David Stogeld*, *Philip Mackenzie*, *Gabriel Hyatt*, and *Margaret Buckstone*; but in all these cases, except that of *Hyatt*, the objection was taken before the jury were sworn. In *Hyatt's case* the objection was, that the list of witnesses was not signed by the public prosecutor. The objection was taken after the jury were sworn, and it prevailed.] In *Alison's Practice* most of these cases will be found, and it is there stated that "statutory provisions cannot be supplied by equipollents." I am far from making an admission that the objection to the delivery of the copy of the indictment cannot be made after plea. The *case of Rookwood*, 13 St. Tr. 154, does not go to that extent; it merely decides that a prisoner charged with high treason could not, under the statute of Will. 3, demand a copy of the indictment during his trial, but, under that statute, he was only entitled to it if he demanded it, and on paying for it. The good sense of the matter certainly seems to be, that the prisoner should object to the non-delivery of the copy of the indictment

(a) Ch. 8 of the 3d ed., published in 1829.

(b) The libel is the accusation.

(c) The panel is the accused party.

(d) The persons of assize are the jurors.

when he is called on to plead—to the non-delivery of the list of the jurors when the jury is about to be called, and to the non-delivery of the list of witnesses when the first witness is called. A prisoner is not an actor in any of these proceedings, and is he to be called upon to decide, and to decide against himself, a thing so difficult that learned judges have adjourned it from Monmouth to London?

LORD ABINGER, C.B.—You are in the same situation as if the prisoner had just pleaded, and the jury had just been charged.

SIR F. POLLOCK.—There was a work published in 1709, which Mr. Justice FOSTER says (Fost. Cr. Law, 230) was published by order of the House of Lords, and which was referred to by Mr. Baron GURNEY in *Brandreth's case*, 32 St. Tr. 778. This work is “A form and method of Trial of Commoners in cases of high treason and misprision of treason” (it has bound up with it a collection of statutes relating to high treason); and it is there laid down, at p. 17, that the clerk of arraigns “must call to the keeper of the prison to bring such prisoner for high treason to the bar of the court, and the clerk of arraignments, to distinguish his person, must bid him hold up his hand,” &c., “and tell him, if he require a copy of the indictment (paying for it) he shall have it delivered to him five days at least before he be tried for the same, to advise with counsel to plead for him and make his defence;” and at another part of the same book, at p. 29, there is the following direction to the clerk of arraigns:—“Ask the court which prisoner they intend shall be tried first, and the keeper to set him to the bar and call to know if the witnesses against him are all ready, and take away the other prisoners from the bar. Ask him who is to be tried if he have had a copy of the panel of the jury delivered to him two days (or more) since? If he should deny it, some witness for the queen, who delivered the copy to him, must prove the delivery thereof.”(a)

TINDAL, C. J.—The book from which you are citing was published by order of the house of lords.(b)

SIR F. POLLOCK.—This furnishes a powerful argument that the time for objecting to the indictment is at the time of pleading, and that, there-

(a) In this work, at p. 20, will be found the following note:—“A caption of an indictment for high treason or misprision of treason, with the true copy of the indictment itself as incident thereto, to be delivered to the party indicted five days at least before he plead, and a witness must attend the court at the time of the prisoner's pleading to prove the delivery of the copy of the indictment to the prisoner, if there should be occasion.” The entire caption, and so much of the indictment as is set out, are in the Latin language, with abbreviations.

(b) At the commencement of the collection of statutes is the following order of the House of Lords:—

“Die Mercurii, 20 Aprilis, 1709. It is ordered by the lords spiritual and temporal in Parliament assembled, that when the several transcripts or collections of the statutes now in force relating to high treason and misprision of treason, and the methods of trial for those crimes shall be subscribed by all the judges, they shall be forthwith printed and published by her majesty's printers for the better information of the people of Great Britain in relation to those laws.

“MATT. JOHNSON, Cler. Parliamentor.”

And at the beginning of the forms to be observed on the trials is an approval in the following form:—

“We do approve of this method of trials:

“J. HOLT.  
“THOS. TREVOR.  
“EDW. WARD.  
“JOHN POWELL.  
“LITTLETON POWYS.  
“JO. BLENCOWE.

H. GOULDE.  
R. TRACY.  
THOS. BRET  
RO. PRICE.  
ROBERT DORMER.  
S. LOVELL.”



fore, the time for objecting to the list of witnesses is when the first witness is called. Indeed where is the distinction between objecting to a single witness or to the whole list? The prisoner (as is conceded) might object to the want of addition to the name of a single witness, and his objection is to an incorrect compliance with the statute, being in effect no compliance at all.

ALDERSON, B.—You will not suppose that I wish you to admit that the objection to the non-delivery of the indictment must be taken before plea, but if that be so, and the copy and the lists must be delivered together, would not the waiving of that objection by pleading also waive it as to the lists, as being an admission that the copy of the indictment was duly delivered with the lists of jurors and witnesses?

PARKER, B.—The answer to that question given at Monmouth was that, by pleading, the prisoner waived the objection so far as it related to the copy of the indictment; and that he waived the objection so far as it related to the list of jurors, by not objecting to the swearing of the jury; but that he still might object to a want of a due delivery of the list of witnesses, when the first witness was called: whether that is a good answer is another question.

Sir F. Pollock.—Upon what principle of law is it to be said, that a prisoner, by pleading to an indictment, admits the jury list to be correct? If in the list of witnesses the principal witness is mis-described, and notwithstanding that the prisoner found him out, would it be enough to say that you found the witness and pleaded to the indictment? The law has said, that the prisoner shall have a correct list of witnesses, and he is entitled to it. If no list of witnesses is delivered, the prisoner may conclude that the crown intends either to enter a *nolle prosequi*, or that he is to be admitted as a witness. Is the prisoner who is to be fired at, to be bound to inquire whether the guns are loaded with powder only, or with powder and ball? Is he to send to the other party to know what their intentions are? I say that it is the duty of the persons who conduct the prosecution to attend to these things; and if there had been no list at all delivered, could the crown have said, "We are free to do as we please, because you have pleaded to the indictment?"

TINDAL, C. J.—If there had been no list at all, they could have called no witnesses.

Sir F. Pollock.—A list not according to the act is, in effect, no list at all. We had, in fact, three lists.

TINDAL, C. J.—An irregular list may be different from no list at all.

Sir F. Pollock.—If a list were delivered only three days before the trial, would that irregularity be waived by the plea? If the list was delivered the night before the trial, could it be said that the prisoner submitted to be tried, and had thereby waived the objection? How far is the life of a prisoner to be sported with by the blunders of the prosecutors? If the list had been delivered less than ten days, I should not now have been arguing this case. I have been more than thirty years at the bar, and during the proceedings I have considered hour by hour when I ought to take the objection; and yet, the attorney-general knowing that the objection was to be taken, plays off a sort of *Nisi Prius* advantage over me, to get rid of it. I submit that the objection was taken at the proper time, and that the list of witnesses not being delivered according to the statute, the prisoner is in the same situation as if no list had been delivered at all.

*Campbell*, A. G.—No one can doubt that Sir *F. Pollock* did well to keep back this objection till the jury were charged with the prisoner. He might have made it when the prisoner was brought up to plead, or when I moved that Mr. Frost should be first tried; but if the objection had been taken at either of those times, the only effect of it, if it had prevailed, would have been to have caused the trial to be postponed for a few days. And whatever may be the result of this argument, Mr. Frost has already had an advantage, as he has had a longer opportunity of preparing for his trial than he was entitled to, and any irregularity that may have occurred was out of favour and indulgence to him. With respect to the construing of statutes, your lordships are, as I apprehend, to ascertain the meaning of the legislature, and having ascertained that you are bound by it; and if a form of proceeding is prescribed by the legislature it must be followed, and the doctrine of equivalents and of equipollents must be entirely dismissed: but in ascertaining what is the meaning of the legislature, it may be material to see what was their intention, and in that view it may be important to consider what would or what would not be of advantage to the prisoner as one way of arriving at their meaning. What was the object of the statutes of William 3 & Queen Anne? Was it for a prisoner to lie by and defeat the ends of justice? No:—To enable him to meet the charge, and to know who were to be the jurors to try him and the witnesses to be called against him. The two statutes being *in pari materia*, must be construed together; and the preamble of the statute of Will. 3 recites, that nothing is more reasonable than that persons prosecuted for high treason and misprision of treason “should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defence of their innocencies in such cases.” The Scottish statute of 1672 requires simultaneous service, but the statute of Anne is framed in a different manner; and as I submit, the words of it admit of two constructions—your lordships will say which is the right. One construction is, that the services must be simultaneous; but if I show that that construction is calculated to defeat the ends of justice, and that the other construction is calculated to carry into effect the intention of the legislature, your lordships will not hesitate as to which construction you should adopt. By the statute of Anne, it is enacted that when any person is indicted for high treason, “a list of the witnesses that shall be produced on the trial for proving the said indictment and of the jury, mentioning the names, profession, and place of abode of the said jurors and witnesses, be also given *at the same time* that the copy of the indictment is delivered.” Sir *F. Pollock* wishes to stop there; but it proceeds, “and that copies of all indictments for the offences aforesaid, *with* such lists, shall be delivered to the party indicted *ten days before the trial*,” in the presence of two credible witnesses. This gives the time, ten days, and the words, “*at the same time*,” may mean at the same instant of time, or they may mean at the same interval of time; and if the latter be the meaning, these words would designate that the same period of time should apply to the one and to the other, and would import that the delivery was not to be at the same instant of time, but at the same interval of time. If the words admit of two constructions, your lordships will put on them that construction which carries the intention of the legislature into effect. There is no advantage in having all the three papers delivered together, and it is plain that the legislature thought so,

as by the stat. 6 Geo. 4, c. 50, they are dissevered. Indeed, it is manifest, that it is better for the prisoner to have the copy of the indictment first, then the jury list, and then the list of witnesses, the last being ten days before the trial, than to have the whole of them together, only ten days before his trial; and if there can be no good service except it be simultaneous, prisoners will be prevented from having information which could otherwise be given to them, and in the present case Mr. Frost would have lost five days, which he had to consult counsel on the indictment, and five days for his agents to make inquiries as to the jurors, and his present objection, therefore, resolves itself into this—that he was allowed too much time to make his defence—and a decision in his favour on this point would injure every person that is tried for high treason hereafter. Upon the statute of Anne, I submit, that the word “with,” is used cumulatively. I may say A. and B., *with* C. and D. and other letters, from the alphabet; the word *with*, there, merely meaning that one is added to the other.

Lord ABINGER, C. B.—“With” may mean no more than “and.”

Campbell, A. G.—The word “but” sometimes means “without”—of which the saying, “Touch not a cat *but* a glove”—meaning without a glove—is an example. Suppose that your lordships decided that the services must be simultaneous, justice would be defeated in many cases. Mr. Justice Foster (Fost. Cr. L. 63) gives instances where the challenges by the prisoners, both peremptory and for cause, exhausted the jury panel; and the court in each instance ordered a new panel, and adjourned for the fresh jurors to be summoned. If that were to occur now, and the service of the copy of the jury list must be simultaneous with the copy of the indictment, justice would be defeated, as the jury are not called till after the prisoner has pleaded to the indictment.

PARKE, B.—That would be so unless the plea were struck out.

Campbell, A. G.—On the construction I contend for, nothing would be required but a postponement of the trial to give time to serve a copy of the new list of jurors. With respect to the construing of acts of Parliament, I respectfully bow to the canon of construction laid down by one of your lordships; but I would add that that does not apply to cases where the words admit of two constructions. If the statute of Anne were to be construed literally, it might be said, that if one witness's name or abode, or one juror's name or abode, were without an addition, it would vitiate the whole list, because the list is to be a list of all, with abodes and additions; but it is well settled that an objection of that sort goes to the poll, and not to the array. The words of the statute of Anne are “ten days.” It might be plausibly argued, that the service was bad if it was made fifteen days before trial, instead of ten; and the statute of Will. 3 might be called in aid, because the words there are “five days, *at the least*,” and “two days, *at the least*,” which words do not occur in the statute of Anne; and it might be argued, that from this, it appeared that the legislature meant ten days exactly. So the statute of Anne says, “ten days before the trial.” On the mere words, the prisoner might be called on to *plead* to the indictment on the next day after that on which he received it; but it has been held, that, on the correct construction of this act, the word “trial” means arraignment. In East's P. C. p. 113, it is said, that, “though the words of the statute of Will. are, “that the prisoner shall have a copy of the panel duly returned by the sheriff;

yet if the copy be delivered before the return of the precept it will be sufficient, within the words and intent of the act, if the prisoner have the advantage of it in the time allowed by law before his trial, the intent of which was to give him an opportunity of preparing his challenges;" and for this, *Rookwood's case*, 13 State Trials, 154, and *Greg's case*, 1 East, P. C. 113,(a) are cited. So it might be said, that a copy of the list of jurors could not be given till they were summoned; and so in East's P. C. p. 110, it is said, that certain formal objections, such as miswriting and false Latin, must be taken before plea; "and in the cases of *Vaughan*, *Sullivan*, and *Layer*, the court refused to hear such objections after plea, though it is still open to the prisoner afterwards to move in arrest of judgment." These are the various instances in which the courts, to effectuate the real intentions of the legislature, have put a construction different from the mere literal construction of the clauses of acts of parliament. Mr. Justice FOSTER, Mr. Justice BLACKSTONE, and Mr. Serjeant Stephen, all say that the copy of the indictment and the two lists must be served ten days before the trial, but do not say that the service must be simultaneous. The cases of *Lovelace v. Curry*, *Vaux v. Vollans*, and many other cases, have been cited as to the construction of statutes. I do not impugn those decisions, or the doctrines contained in them; neither do I dispute the cases which decide that service of an original subpoena at a different time is not a service at the same time, for, if in this case the service of the copy of the indictment and the two lists must be simultaneous, cadet questio; but I am contending that the other is the correct meaning of the statute. It is also said that your lordships must construe the statute of Anne according to the Scotch Act of Charles the Second, but on that I will observe, that the forms of the Scotch law are very different from ours. In Scotland there is a public prosecutor and no grand jury. The libel is prepared by the public prosecutor. The accused, if not in custody, must be cited, and there must be fifteen days between the citation and the trial. In cases of high treason the English law was by the statute of Anne introduced into Scotland, and not the Scotch law into England. In cases of treason in Scotland there is by that statute a grand jury, and the accused are tried under a royal commission, in the same way as in England; (b) and this being so, it is supposed that the bar of both countries might attend and plead there. If it had been intended to have introduced the Scotch law into England, the act of adjournal would have been introduced, by which it is ordained that the list of the witnesses shall be endorsed on the copy of the indictment. The jury act (6 Geo. 4, c. 50, s. 21) leaves the list of witnesses as it stood on the statute of Anne, and, on trials for treason in the Court of King's Bench, it points out different times for the delivery of the list of the jurors and the copy of the indictment. Was it intended that a person tried in the Court of King's Bench should be in a worse situation than if he were tried elsewhere? and yet in the King's Bench the list of witnesses stands on the statute of Anne, the copy of the indictment is to be delivered ten days before the arraignment, and the list of witnesses ten days before the trial. I now come to the second point, which is that the objection came

(a) It is there laid down that, after pleading, it is too late to object either to the want of a copy of the indictment or to any insufficiency, for that admits it to be sufficient.

(b) This is provided by the stat. 7 Anne, c. 21, ss. 1 & 3.

too late. It is not to be assumed that there was no list at all. A list *de facto* was served on the 17th of December, and was *bonâ fide* served in pursuance of the statute, the only objection being, that it was not served at the same time as the copy of the indictment. Is that more than irregularity? Is that a nullity? I am now assuming that simultaneous service is directed by the act; and the question is, whether, if it was irregularity only, it is an objection that can be brought forward as a substantive defence, even after all the evidence is gone through. The objection might have been taken before plea. When Mr. Frost was arraigned, why did he not take the objection? Why not before the jury were charged with him? and can he afterwards make an objection to an irregularity which he might have made before? The objection might have been made earlier, and public justice required that it should be. It is a general rule, both in civil and criminal proceedings, that any objection to an irregularity must be taken in the earliest stage in which it can be taken, or it is waived. In this very case, an objection was taken in arrest of judgment by Mr. Geech (Mr. Frost's attorney) after the counsel were gone, that one of the jurors was misdescribed, and the objection was overruled, as being too late.

ALDERSON, B.—If by the statute certain things are to be done before trial, and the party is tried and does not object, can he object to them afterwards? he might have prevented the trial if he had chosen, but he did not do so. (a)

Campbell, A. G.—Mr. Justice Foster (b) gives the following heads:—“what privileges the prisoner is entitled to;—what is incumbent on him *previous* to his trial;—what *during* the trial;” and I take it to be a well-established principle, that, if a party by plea or otherwise waives an objection that he might have taken, he cannot take it afterwards. After plea a defendant cannot move to quash the indictment; a prisoner could not, even before the statute 7 & 8 Geo. 4, c. 28, plead misnomer after pleading in bar. Where a prisoner challenges for cause, he must show all his causes together. (c) If a witness answer that which may criminate himself, he must answer throughout. In the case of *Rex v. Stone*, 1 East, 649, it was held, that the presence of a party at the time of a proceeding dispensed with a summons. So in the case of *Rex v. Watson*, 2 Stark. N. P. C. 158, for high treason, a witness was examined who was, in the list of witnesses, called Heyward. He was examined without objection. It was afterwards discovered that his name was Heywood, and it was sought to strike out his evidence, but the court held, that the objection came too late, and ought to have been taken in the first instance. So in the case of *Brunskill v. Giles*, 9 Bing. 13, the court would not grant a new trial because the jury had been summoned by the partner of the plaintiff's attorney, because the proper time for taking this objection was when the jury came to the book to be sworn. So in the case of *Hill v. Yates*, 12 East, 229, where the son of a jurymen answered for, and served instead of, his father, and the cases there cited

(a) If an indictment for felony be removed into the Queen's Bench, and be tried as a *nisi prius* record, and the record be brought down by the prosecutor, the accused party would be entitled to notice of trial. But if, when the case comes on at *Nisi Prius*, the accused party appear by counsel and call witnesses, it would seem that if convicted, he would not be entitled to set aside the verdict, because the notice of trial was given too late, even if such were the fact.

(b) Fost. Cr. L. 227.

(c) 2 H. P. C. 274.

of persons serving on juries under wrong names, the courts have uniformly held, that if the objection is not made before the jury are sworn, it cannot be made afterwards. And with respect to witnesses in cases of high treason, the judges at Monmouth laid down this rule, that any objection to the description of any particular witness must be taken on the *voire dire*, and that it comes too late after the witness is sworn in chief; and if this objection to the list of witnesses might be taken when the first witness is called, it might equally be taken when the tenth was called, or might be set up as a substantive defence; and so might the objection, that one of the persons in whose presence the list was delivered was not a credible witness. I say, therefore, that if there is such an objection to be taken at all, it should be taken at such a time as to give the prisoner a postponement of the trial if he wishes it, but not go to an acquittal.

GURNEY, B.—In the case of *Rex v. O'Coigly and others*, 26 St. Tr. 1198, the prisoner's counsel before the arraignment objected that there were several variations in the copies of the indictments which had been delivered to the prisoners, and stated that they made the objection with a view to postpone the trials, but the Attorney-General consenting to a postponement of the trials, the objections were waived.

Campbell, A. G.—I will now draw your lordship's attention to the Scotch law.

Lord DENMAN, C. J.—I now state the opinions of my learned brothers, that your observations on the Scotch law ought to be brought into a very narrow compass, its bearing on the present case being so very remote.

Campbell, A. G.—I will only observe, that, in all the cases cited by Baron HUME, except *Hyatt's*, the objection was taken before the jury were sworn, and that the authority of that case is a little doubtful, as Baron HUME appears to disapprove of it. There, indeed, there was no authenticated list, as it was unsigned, and all the other cases, which are those of lists irregularly served, go to show that the objection must be taken before the jury are sworn.

PARKE, B.—If the prisoner says that he has had no list at all, at what time do you say the crown must prove the delivery of the list?

Campbell, A. G.—The crown might be called on to prove it when the prisoner was tried.

TINDAL, C. J.—The book of 1709 (a) says, that the witness is to be called to prove the service, under the statute of Will. 3, before the trial begins.

ALDERSON, B.—If the prisoner by pleading admits a service of a cotemporaneous list, how do you show that your list is the same as that which he must be taken to have admitted by his plea?

Campbell, A. G.—I put it that pleading admits the delivery of a regular list, and the crown must identify their list as the one served. We show the list that we served, and the plea admits that it was well served.

Sir F. Pollock, in reply.—With respect to the construction of statutes, I submit that your lordships must look at what the statute has said; and I have cited cases to show what have in modern times, been the views of the judges in construing acts of Parliament, and there has evidently

been a feeling on the bench that too loose a construction should not creep in; and I put it that even on the statute 6 Geo. 4, c. 50, s. 21, the delivery of the copy of the indictment and the lists of jurors and witnesses must be simul et semel, in all cases of treason where the trial is not in the Court of Queen's Bench, although where the trial is in that court, it is otherwise under the provisions of that statute. Mr. Petyt, in his *Jus Parliamentarium*, p. 66, (a) gives some rules of construction which are laid down by Lord ELLESMERE, who says that words are taken and construed sometimes by extension, sometimes by restriction, sometimes a disjunctive for a copulative, and the like; upon which it is observed, how easy it is to baffle and elude any law, and wrest it from its genuine and native sense.

Lord ABINGER, C. B.—I do not know whether you cite Lord ELLESMERE as a reflection upon the judges who construed the statutes, or on the legislators who made them. It is a very common error to blame judges for their construing of statutes, but some of the blame belongs to the framers of them. You say that we now construe them more literally than judges did formerly, and perhaps that is so; but still some of them, if construed literally, would lead to much absurdity.

Sir F. Pollock.—I only say that judges do not now take those liberties with acts of Parliament which they did more than a hundred years ago.

Lord ABINGER, C. B.—One reason for that is, that more than a hundred years ago acts of Parliament were very short, and were to be applied to a variety of cases; but now they are very long, and some of them are framed with all the beauties of style to be gathered from the office of the special pleader, and the office of the conveyancer also.

Sir F. Pollock.—The prisoner's being willing to plead has nothing to do with the list of the jury or the list of witnesses. In the book of 1709 there is a direction to have the prisoner asked, if he has had the copy of the indictment. Here the officers of the crown made a mistake, and lie by in hopes that the prisoner may let it slip and pass over. If it was meant to insist that the objection should have been taken earlier, the prosecutors should, in the form given in the book of 1709, have asked the prisoner if he had got the copies of the indictment and the lists.

Lord ABINGER, C. B.—The old form was for the court to do it.

Campbell, A. G.—It has not been done for half a century.

ALDERSON, B.—There is a direction in the book of 1709 for asking the prisoner as to his name.

Sir F. Pollock.—That is probably altered by the stat. 7 & 8 Geo. 4, c. 28, s. 1. On the whole case I have to contend, that when an act of

(a) The passage is as follows:—"The Lord Chancellor Ellesmere's rule, laid down for construction of words in that grand case of the *post nati* of Scotland in King James the First's time, is this: 'Words are to be taken and construed,' saith he—'1. Sometimes by extension; 2. Sometimes by restriction; 3. Sometimes by implication; 4. Sometimes a disjunctive for a copulative; 5. A copulative for a disjunctive; 6. The present tense for the future; 7. The future for the present; 8. Sometimes by equity out of the reach of the words; 9. Sometimes words taken in a contrary sense; 10. Sometimes figuratively, as *continens pro contentis*; 11. And many other like.' And of all these, he says, examples be infinite as well in the civil law as common law. Now any one that reads this will easily judge what the scope and consequence of the chancellor's rule may be, and he may as easily discern how far it is capable of improving, to baffle and elude any law whatsoever, and wrest it from its genuine and native sense to what you please."

Parliament says the *same* time, it means the same time, and that the proper time for objecting to the list of witnesses is when a witness is called, and that if some irregularities cannot be cured—none can.

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The case having been considered by the judges, a majority of their lordships, in the proportion of nine to six, were of opinion that the delivery of the list of witnesses was not a good delivery in point of law; but a majority of their lordships, in the proportion of nine to six, were of opinion that the objection to the delivery of the list of witnesses was not taken in due time, and the judges agreed, that if the objection had been made in due time the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list, and their lordships held the conviction right. (a)

(a) We believe that Lord DENMAN, C. J., TINDAL, C. J., Lord ABINGER, C. B., BOSANQUET, J., GURNEY, B., and MAULE, J., were of opinion that the objection to the delivery of the list of witnesses was wholly unfounded; and that ALDERSON, B., COLTMAN, J., and ROLFE, B., were of opinion that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection was made too late: LITLEDALE, J., PARKE, B., PATTESON, J., WILLIAMS, J., COLERIDGE, J., and ERSKINE, J., being of opinion that the delivery of the list was not a good delivery, and that the objection was taken at the proper time. Mr. Frost's sentence was commuted to transportation for life.

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### PROMOTIONS.

In Michaelmas Term, 1839, the Hon. Mr. Baron *Maule* was appointed one of the judges of the Court of Common Pleas, *vice* the Right Hon. Sir *John Vaughan*, Knight, deceased.

In the same Term, Sir *R. M. Rolfe*, Knight, her majesty's solicitor-general, was appointed one of the barons of the exchequer, *vice* the Hon. Mr. Baron *Maule*.

In the Vacation after Michaelmas Term, 1839, *Thos. Wilde*, Esq., one of her majesty's serjeants at law, was appointed her majesty's solicitor-general, *vice* Sir *R. M. Rolfe*, Knight.

In the Vacation after Hilary Term, 1840, *R. B. Armstrong*, Esq., *G. J. Turner*, Esq., *David Dundas*, Esq., and *Richard Bethell*, Esq., were appointed her majesty's counsel learned in the law.

In the same Vacation, *J. Manning*, Esq., *J. Halcomb*, Esq., *W. F. Channel*, Esq., *W. Shee*, Esq., and *D. C. Wrangham*, Esq., were called to the degree of serjeant at law.



## COURT OF EXCHEQUER.

*Sittings at Westminster after Michaelmas Term.*

BEFORE LORD ABINGER, C. B.

The ATTORNEY-GENERAL v. BOND.—p. 189.

On the trial of an information by the attorney-general for penalties, the defendant (who had been held to bail) had subpoenaed the officer from the Queen's Remembrancer's office to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him, the defendant's counsel wished to put in the affidavit:—*Held*, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way; but that if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by the witness, and as related to the defendant himself.

INFORMATION by the attorney-general against the defendant for penalties under the statute 3 & 4 Will. 4, c. 53, s. 44. The information stated, that certain merchants, to the attorney-general unknown, had imported certain goods, to wit, two hundred and thirty gallons of foreign brandy, of the value of 310*l.* 10*s.*, which goods were liable to the payment of duties of customs, and were deposited by a certain officer of customs, to wit, one J. D., for security of such duties in certain places of security in the United Kingdom; that is to say, in the queen's warehouse; and that the goods were, without payment of the duties, removed by persons unknown from the said place of security; and that the defendant did assist in the removal, whereby he had forfeited treble the value of the goods, which the commissioners of her majesty's customs had elected to be sued for in this behalf. There were also six other counts for knowingly concealing the goods, and for assisting in unshipping them, &c. Plea—Not guilty.

On the part of the crown, a witness named Collins was called; and, with a view to cross-examine him, it was proposed by *Humfrey*, for the defendant, to put into witness's hand the affidavit made by the witness, and deposited in the office of the queen's remembrancer, upon which the writ of *capias* had issued, to hold the defendant to bail in this case, and which the proper officer was subpoenaed to produce.

*Jervis* and *Kaye*, for the crown, objected to the production of the

affidavit, on the ground that the production of such affidavits would lead to great inconvenience. They also stated, that there was no instance of such an affidavit ever having been used in this way on any former occasion.

Lord ABINGER, C. B.—I am clearly of opinion, that the defendant is entitled to use it in the manner proposed by his counsel.

*Jervis*.—The affidavit is the joint affidavit of the witness Collins and another, and it relates to other persons besides the defendant.

Lord ABINGER, C. B.—The defendant will be only entitled to use so much of the affidavit as is sworn by the witness Collins, and which relates to the defendant himself. Any thing which relates to other persons, or which is sworn by any other deponent, cannot be made use of by the present defendant on this trial. Let me see the affidavit.

The affidavit was handed to his lordship, who observed, that he did not see any thing in it which would be of any use to the defendant.

The affidavit was given back to the officer.

The jury could not agree, and were discharged by the consent of the counsel for the crown.

*Jervis* and *Kaye*, for the crown.

*Humfrey* and *Mellor*, for the defendant.

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#### HOLT v. MIERS.—p. 191.

A notice to produce a letter from the defendant to the plaintiff was served on the plaintiff's attorney at a quarter before nine on the night before the trial. It was a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject:—*Held*, that the notice to produce was served too late.

In a former action between the same parties, in which the plaintiff sued in person, certain statements were made in the defendant's plea which were not denied by the replication, which only denied other parts of the plea; there had been a trial, but no judgment:—*Held*, that neither the issue delivered by the plaintiff himself, nor the nisi prius record in the former action, was admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, and not denied by the replication.

In an action on a promissory note the defendant pleaded, that the note was given under a parol agreement that the defendant should renew it when due, by paying discount and giving another note, and that he offered to do so; the plaintiff took issue on this plea:—the judge at the trial would not prevent the defendant from going into evidence in support of this plea, although it was suggested that the plea was bad, as setting up a parol agreement to vary a written instrument, because the plaintiff had taken issue on the plea.

Where a defendant pleaded that a promissory note, on which the plaintiff sued as payee, was given to the plaintiff as trustee for W., and that W. had made a bargain for its renewal on certain terms stated in the plea, and the plaintiff took issue on this plea:—*Held*, that evidence of the actual bargain made by an agent of the defendant with W. might be given in evidence, but that evidence of any thing that W. said at any other time was not receivable.

ASSUMPSIT by the plaintiff as payee against the defendant as maker, of a promissory note for £30, dated on the 28th of September, 1838, and payable one month after date to the plaintiff or his order, for value received. Second count, upon an account stated. Pleas—1st, to the second count, non assumpsit; 2d, that a person named Whitmarsh had agreed to lend the plaintiff a sum of £200, as a continuing loan, at the rate of £60 per cent. discount, on notes renewable every month, and that this was one of the notes, given in pursuance of that agreement to

the plaintiff as attorney and trustee for Whitmarsh; (a) 3d plea, that on the 28th of April, 1838, it was agreed between the defendant and Whitmarsh, that Whitmarsh should lend the defendant £200, or such part thereof as the defendant should require, and that it should be a continuing loan for a long space of time, to wit, for more than twelve months, and so long as the defendant should pay interest as hereafter mentioned; and that it was further agreed, that the defendant should pay Whitmarsh one shilling in the pound per month for such sums as Whitmarsh should lend the defendant, and that at the time any part of the £200 was advanced, the defendant should make and deliver his promissory note to Whitmarsh, which notes were to be renewable every month, on payment by the defendant to Whitmarsh of one shilling in the pound as discount on each renewal. The plea then went on to state an advance of £30 in April, 1838, and renewals and payments of discount according to the agreement, till the making of the present note, which was stated on the plea to have been given to the plaintiff as the attorney and trustee of Whitmarsh; and in this plea it was further averred, that when the note became due the defendant was ready and willing to renew it, and also to pay the discount according to the agreement, but that Whitmarsh did not nor would, nor did nor would the plaintiff renew it, (concluding with a verification.)

Replication to the 2d and 3d pleas: that the defendant of his own wrong, and without the causes or cause by him in those pleas or either of them alleged, broke his promise on the 1st count alleged.

It was opened by *Carrington*, for the defendant, that Mr. Whitmarsh had agreed to advance money to the defendant to the extent of £200, at the rate of £60 per cent., and this was to be secured by promissory notes payable at one month, but which notes were to be renewed from month to month, on the defendant paying one shilling in the pound as interest for each month, on the monthly renewal of each note; and that in pursuance of this bargain money was advanced by Whitmarsh to the defendant in April, 1838, the promissory notes being given and regularly renewed down to the time of the giving of the note which was the subject of the present action, which was given to the plaintiff and in his name as a trustee for Whitmarsh, but which when due had not been renewed, as the plaintiff had brought the present action on the 1st of November, and before the defendant had had an opportunity of getting it renewed. (b)

*Erle*, for the plaintiff.—Supposing all that has been stated in the opening to be proved, it would be no defence to the present action. By the note, which is a written instrument, the defendant is to pay the plaintiff £30 at the end of a month, and this written contract is sought to be varied by a parol bargain, which cannot be allowed. This point was decided in the case of *Hoare v. Graham*, 3 Camp. 57. (c)

*Carrington*.—If the facts which are stated in the 3d plea do not amount to a defence, the plaintiff should have demurred.

(a) A precisely similar plea was held to be bad in the case of *Holt v. Miers*, 5 M. & W. 168, and judgment was given for the plaintiff, non obstante veredicto, after a verdict had been found for the defendant upon it.

(b) The second plea was abandoned, in consequence of the decision of the case of *Holt v. Miers*, 5 Mee. & W. 168.

(c) In that case it was held, that in an action on a bill of exchange or promissory note, the defendant cannot give in evidence a parol agreement, entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due.

LORD ABINGER, C. B.—I must try the case on the 3d plea. The plaintiff has taken issue upon it, and it comes before me as a specific issue of fact, whether that which is stated in that plea is, in point of fact, true or not.

To prove the bargain for the loan of money, Mr. Eicke was called. He stated that, being a friend of the defendant and of Mr. Whitmarsh he, by the desire of the defendant, went to Mr. Whitmarsh to ask if he would advance money.

*Erle*.—I submit that we must not hear what Mr. Whitmarsh said. That is no evidence against the plaintiff.

*Carrington*.—The first allegation in the plea is, that the defendant made a bargain with Mr. Whitmarsh, which is denied by the replication and I am now going to prove it.

LORD ABINGER, C. B., (to the witness).—Did you make the bargain or did the defendant make it himself?

The witness.—I made the bargain.

LORD ABINGER, C. B.—The actual making of the bargain with Whitmarsh is evidence, but not any thing that Whitmarsh said afterwards.

The witness stated, that Mr. Whitmarsh agreed to advance to the extent of £200, for either twelve or eighteen months, on bills at a month, renewable on payment of a shilling in the pound per month.

*Carrington*.—Does your lordship think that I cannot ask what Mr. Whitmarsh said afterwards on this subject?

LORD ABINGER, C. B.—I think it is not evidence against the plaintiff.

The question was not put.

To show that the plaintiff was a trustee for Mr. Whitmarsh, a paper in his handwriting, in which interest at the rate of £60 per cent. on two other notes, payable at a month, and stated to be drawn in the plaintiff's favour, one for £30, dated the 26th of August, and the other for £20, dated the 4th of September, was put in. This paper also contained an item of "charges 1*l.* 1*s.*" It was also proved that the plaintiff had said to the defendant's son that it was very wrong of the defendant to say that he (the plaintiff) charged interest at the rate of £60 per cent., for that he had never received a shilling of it.

A letter from the plaintiff to the defendant was put in, dated August 30th, 1838; and it was proposed by the defendant's counsel to give in evidence the contents of the defendant's answer to it, dated September 1st, 1838, which was called for under a notice to produce.

*Erle*, for the plaintiff, objected that the notice to produce it had been served too late.

It was proved that the notice to produce was left at the office of the plaintiff's attorney at a quarter before nine on the evening before the trial. The witness stated that he was sure it was before nine o'clock, because, after serving the notice, he had arrived at home before the clocks struck nine; and he also stated that the plaintiff's attorneys had left their office, and he was told by the housekeeper that if he placed the notice on the table in the office, they would be sure to have it the first thing in the morning.

LORD ABINGER, C. B.—In reality this is only notice to the attorneys on the morning of the trial.

*Carrington*.—I submit that a letter from the opposite party is a document that must be presumed to be in the hands of the attorneys, and that, as by the rules of the court service before nine o'clock in the even

ing is good service, it is their own fault if they leave their office before that time.

Lord ABINGER, C. B.—I think it is too late. There is no reason why the notice could not have been served earlier; persons should not be so tardy in serving notices.

With a view of further proving the bargain between Mr. Whitmarsh and the defendant, and also to prove the renewal of the different promissory notes, it was proposed to put in the *Nisi Prius* record and postea in the former action of *Holt v. Miers*. In that action the defendant had, in his plea, which was a plea of usury, stated the bargain between Mr. Whitmarsh and himself, and also the renewal of the different bills, and that the plaintiff was the attorney and trustee for Mr. Whitmarsh, as they were stated in the present plea, and the plaintiff, in his replication, had merely denied that he was attorney and trustee. The verdict was for the defendant, but there had been no judgment. It was also proposed to put in the issue delivered in that case by the present plaintiff, who then sued in person.

*Erle*.—I submit that neither of these is evidence. As there is no judgment, the *Nisi Prius* record is not evidence, even between the same parties; and the undenied statements of a plea are not evidence against the party, even to prove another issue in the same cause. Admissions in pleading are now no more than admissions for the purposes of that particular cause.

*Carrington*.—These are admissions between both the same parties; and as, in the former case, the plaintiff sued in person, the issue is, I submit, the same as any other paper in which he sets forth several statements of the opposite party, and denies only one of them.

Lord ABINGER, C. B.—If there had been a judgment between the same parties touching the same matter, I am not prepared to say that I should have rejected the evidence. Here it appears that the only question in the former cause was, whether the plaintiff was a trustee, and on that point it is conceded that this record is not receivable, because there is no judgment. I think I ought to reject the evidence.

The evidence was rejected.

*Erle*.—There is no evidence of the original bargain as stated in the plea, nor of the renewal of the notes. Neither is there any evidence of a refusal by Mr. Whitmarsh to renew.

Lord ABINGER, C. B., was of opinion that the 3d plea was not proved, and directed a verdict for the plaintiff.

Verdict for the plaintiff.

*Erle* and *Wordsworth*, for the plaintiff.

*Carrington*, for the defendant.

In the ensuing term *Carrington* applied for a new trial, but the court refused a rule.

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CRONK v. FRITH.—p. 197.

If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if *non est factum* be pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness.

DEBT on a bond.—Pleas, 1st, non est factum; 2d, that the defendant was persuaded to execute the bond while he was drunk, and that he did so; 3d, fraud.

Replication, denying the second and third pleas.

It was opened by *Jervis* for the plaintiff, that, since the execution of the bond, Mr. Crundwell, the subscribing witness to it, had become blind, and he therefore proposed to prove the execution of the bond in the same way as if the witness were dead.

Evidence was given that the signature to the bond was of the defendant's handwriting, and that the signature to the attestation was of the handwriting of Mr. Crundwell; and it was also proved that since the date of the bond Mr. Crundwell had become blind; but the witness who proved these facts stated, in answer to a question put by *Humfrey* for the defendant, that Mr. Crundwell was in court.

*Humfrey*, for the defendant.—I submit that the bond cannot be read without calling the subscribing witness. It is said that he is blind; but one great object in having the subscribing witness called is to hear his evidence as to the circumstances attendant on the making of the instrument; and he may remember those circumstances though he cannot see, and his evidence may be of the greatest importance on a plea like the second.

*Jervis* and *Erskine Perry*, for the plaintiff, cited *Wood v. Drury*, 1 Ld. Raym. 734; (a) *Pedler v. Paige*, 1 M. & Rob. 258; (b) *Starkie's Law of Evidence*, vol. 1, p. 325, and *Roscoe's Law of Evidence*, 5th ed. p. 88.

LORD ABINGER, C. B.—I am decidedly of opinion that the bond cannot be read without calling the subscribing witness. He might from his recollection of the transaction give most important evidence respecting it.

*Jervis* called the subscribing witness.

Verdict for the plaintiff.

*Jervis* and *Erskine Perry*, for the plaintiff.

*Humfrey*, for the defendant.

(a) The report of that case is as follows:—"At the Summer Assizes of Warwick, 1699, a deed was produced to which there were two witnesses, one of whom was blind. It was ruled by Holt, C. J., that such deed might be proved by the other witness and read, or might be proved without proving that this blind witness is dead, or without having him at the trial, proving only his hand; and so it was done in this case."

(b) This was an action of debt on bond, with pleas of non est factum, and a release by a lost deed: for the defendant it was proposed to put in an instrument attested by a witness, who was proved to be blind, on proving his handwriting. The evidence was objected to on the ground that the witness might recollect the facts of this transaction; and in support of its reception the case of *Wood v. Drury*, and the works of Mr. Starkie and Mr. Roscoe on the Law of Evidence, were cited. Mr. Justice Park said, "There is great weight in the reasons urged for calling the witness, but under the authority of the case cited I shall receive the evidence;" and his lordship received the evidence.

### *Sittings in London after Michaelmas Term, 1839*

BEFORE MR. BARON ALDERSON.

BETTS v. JONES and Others.—p. 199.

A butcher sued three of the directors of a Zoological Society for goods supplied for the animals. For the defence a witness was called to prove that the plaintiff was a shareholder in the society

The witness was himself a shareholder, and had been released by one of the defendants:—*Held*, that the witness was not competent without being released by all the three defendants, but that he would be so, if released by all three defendants, without being released by the other shareholders.

DEBT for goods sold. Plea, *nunquam indebitatus*.

It appeared that the defendants were three of the directors of the Kent Zoological and Botanical Institution; and the present action was brought by the plaintiff, who was a butcher at Gravesend, to recover the price of meat supplied by him for the animals in the society's gardens at Rosherville.

The defence was, that the plaintiff was a shareholder in the institution, and, to prove this, another shareholder was called.

It appeared that the witness had been released by one of the defendants only.

*Crowder*, for the plaintiff, objected that the witness was not competent, as either of the two defendants, who had not released him, might sue him for contribution in case the plaintiff succeeded against them in this action. He further submitted, that to make the witness competent he should be released by all the other shareholders, as any of them might sue him hereafter for contribution.

ALDERSON, B.—I think that the witness is not competent unless all the three defendants release him; but if he be released by each of the defendants, he would be a competent witness without being released by all the other shareholders.

The witness was not examined.

The case was compromised.

*Crowder* and *Ogle*, for the plaintiff.

Sir *F. Pollock* and *E. J. James*, for the defendant.

### KERRIDGE v. HESSE.—p. 200.

Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons who are liable to pay the salaries of their secretary, &c., unless it be shown that the secretary, &c., agreed to look to some other fund for payment.

And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became so while the plaintiff continued secretary, it will be for the jury to say whether the defendant did not continue to employ the plaintiff on the same terms in which he was originally engaged.

ASSUMPSIT for work and labour. Plea, *non assumpsit*.

It appeared that a railway was proposed to be constructed from Nottingham to London, to be called the Midland Grand Junction Railway, and that the plaintiff was, on the 3d of June, 1838, appointed secretary to the local committee, who were engaged in trying to form a company, the defendant becoming one of that committee in October, 1838, and while the plaintiff's services continued. The company was never formed, and the projected railway was given up.

The defence was, that the plaintiff was only to be paid from the funds of the company when formed; but that it had been agreed between him and the committee, that the committee were not to be personally liable.

With a view of showing this, *Hill*, for the defendant, proposed to call Mr. *W. Jell*, a member of the committee.

*Jervis*, for the plaintiff.—I submit that he is not a competent witness

*ALDERSON, B.*—As he is a member of their committee he is not a competent witness, unless you release him.

The witness was not examined.

For the defendant, the minute-book of the committee was put in, containing a resolution of the committee, dated on the 3d of June, 1838, in the plaintiff's handwriting, by which it was resolved that the whole of the resolutions of the committee were to be without personal liability, and that all remunerations were to be paid from deposits or instalments.

*ALDERSON, B.*, (in summing up.)—It appears that a company was proposed for a railway from Nottingham to London, and that a committee was formed for the purpose of forwarding the project. The members of this committee would be the persons liable to pay the salaries of those who were employed like the plaintiff, unless the plaintiff contracted only to be paid from some particular fund, and not to look to the committee for payment for his services. It seems to be made out that the defendant was a member of the committee from October, 1838. He was not so when the plaintiff first became secretary; but if he continued to employ the plaintiff as secretary, it will be for you to say, whether he did not continue to employ him on the terms upon which he was originally appointed. Still the real question in this cause is, whether the plaintiff agreed that he was not to look for payment from the members of the committee individually, but was only to be paid from the deposits and instalments, in case the company was formed.

Verdict for the defendant.

*Jervis and Crompton*, for the plaintiff.

*Hill* and —, for the defendant.

# PONTIFEX and Others v. JOLLY.—p. 202.

In an action on a bill of exchange by endorsee against acceptor, the defendant pleaded pleas denying the acceptance and the endorsement, and also two pleas of payment, upon all which issue was joined. The defendant's counsel, at the trial, offered to admit the acceptance and endorsement, and wished to begin:—*Held*, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin.

*ASSUMPSIT* on a bill of exchange, dated the 16th of February, 1839, drawn by James Jolly on the defendant for £25, payable three months after date, and by James Jolly endorsed to the plaintiff. Pleas, 1st, a denial of the acceptance; 2d, a denial of the endorsement; 3d, payment before the bringing of the action; 4th, that the bill was given as a security for the payment of a sum of 26*l.* 5*s.*, due from James Jolly to the plaintiffs, and that that sum had been paid to the plaintiffs before the bringing of the action. Replication, to the 3d and 4th pleas, *de injuriâ*.

*R. V. Richards*, for the defendant.—I will admit the acceptance and the endorsement, and open my case on the 3d and 4th pleas.

*Kelly*, for the plaintiffs.—The defendant admitting that the plaintiffs must have a verdict on the first two issues does not deprive me of my right to begin.

*R. V. Richards*.—I submit that this is like the case of an ejectment by heir against devisee; where, if the defendant admits the heir's *primâ facie* title, he is entitled to begin.



ALDERSON, B.—I think Mr. Richards' now admitting the acceptance and endorsement will not entitle him to begin. On this record the plaintiff is entitled to begin.

*Kelly*, for the plaintiffs, opened his case.

Verdict for the plaintiffs.

*Kelly* and *Bayley* for the plaintiffs.

*R. V. Richards* and *Arnold* for the defendant.

In the ensuing term *R. V. Richards* applied for a new trial, on the ground that the verdict was against evidence; but the court refused a rule.

### BROWN v. NAIRNE.—p. 204.

*Semble*, that the broker's commission on the freight of a ship is five per cent., unless there be a special agreement or the ship be chartered upon a tender.

ASSUMPSIT for work and labour as an agent and broker, for money paid, and on an account stated. Plea, as to all but 70*l.* 10*s.* 1*d.*, non assumpsit; and as to that sum, payment of it into court. (a) Replication, joining issue on the plea of non assumpsit, and accepting the 70*l.* 10*s.* 1*d.* in satisfaction of so much of the plaintiff's demand.

This was an action brought by the plaintiff to recover commission as a broker for obtaining a charter for the *Anna Robertson*, from London to South Australia and back, at a sum of £2000; the real question in the case being, what amount per cent. a broker is entitled to receive on a chartered ship when there is no special agreement.

On the part of the plaintiff it was contended that the rate of brokerage on all ships was £5 per cent. unless there was a special agreement, or unless the ship was chartered upon a tender; and fourteen witnesses were examined in support of this amount.

For the defendant it was contended, that if there was no special agreement the brokerage on a general ship was £5 per cent., and 2½ per cent. on a chartered ship, and eight witnesses were examined in support of this scale of charge, who stated that the trouble with a chartered ship was much less than with a general ship; but these witnesses had, several of them, paid the 2½ per cent. only upon ships chartered for troops, emigrants, and convicts.

ALDERSON, B., (in summing up.)—The question is, what is the proper remuneration for a broker for obtaining a charter for freight amounting to £2000? The amount at 2½ per cent. has been paid into court; but it is contended on the part of the plaintiff, that the brokerage should be calculated at £5 per cent., which would be £50 more, and the plaintiff has called several witnesses who speak to having been uniformly paid at that rate on chartered ships. For the defendant, witnesses are called to give another view of the case; but you will consider whether they are ad idem, or whether they speak of particular transactions only. It is much to be desired that there should be a general definite rule, well known and well understood, which should govern every case unless

(a) A sum of 70*l.* 10*s.* 1*d.* was paid into court, but only £50 of it was applicable to the matter really in dispute, the remaining 20*l.* 10*s.* 1*d.* applying to disbursements made by the plaintiff for the defendant, on which no question arose.

there was a special agreement. The rule contended for by one party would be just as definite as the rule contended for by the other, and either might be varied to suit a particular case. I do not think that the amount of the trouble in each case is to be a criterion, because, if it were, the payment would not be by a per-centage, which is what both parties contend for, though they differ as to its amount. If you are satisfied that in point of fact it is the practice for brokers to be paid £5 per cent. on such a charter as this, you will find for the plaintiff for £50 more than has been paid into court. If you think that the practice is to pay 2½ per cent. on all charters, you will find for the defendant. If you think that there is no practice on the subject, you will find what is the amount that you think a reasonable remuneration to the broker in this case for his services; and if that amount exceeds 2½ per cent., you will find for the plaintiff for the excess.

Verdict for the plaintiff—Damages £50.(a)

*C. Cresswell* and *Wollaston*, for the plaintiff.

*Thesiger* and *Whateley*, for the defendant.

(a) From the case of *Read v. Rann*, 10 B. & C. 438, (21 E. C. L. R. 106,) it appears, that a shipbroker, who has procured a bargain for the hire of a vessel, is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise; and it was held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the shipowner to recover the commission, or a compensation for his work and labour

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*Sittings at Westminster after Easter Term, 1840.*

BEFORE MR. BARON ROLFE.

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HARNETT *v.* JOHNSON.—p. 206.

In *assumpsit* for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a special plea justifying the dismissal, upon which issue was taken:—

*Held*, that on this issue the defendant was entitled to begin.

ASSUMPSIT for having discharged the plaintiff, an assistant teacher in a school, before the expiration of the year for which he had been engaged. Second count upon an account stated. Pleas, as to all but the first count, non assumpsit, and as to the first count a justification of the discharge. Replication, taking issue on the special plea.

*Stammers*, for the defendant, submitted that on these pleadings the defendant was entitled to begin.

ROLFE, B.—Is there not an issue joined on the account stated?

*Stammers*.—There is; but that makes no difference unless the plaintiff's counsel will undertake to give evidence on that count. That was held in the case of *Smart v. Rayner*, ante, vol. 6, p. 721, (25 E. C. L. R. 616,) and that case has been acted on ever since.

*Platt*, for the plaintiff.—Before the case of *Cooper v. Wakley*, ante, vol. 3, p. 474, (14 E. C. L. R. 395,) and indeed in that case, it was held that where there was an affirmative justification without any general

issue, the defendant had a right to begin. That rule was altered at a conference of all the judges, and in case the amount of damages is to be proved, I submit that the plaintiff should begin.

*Stammers.*—The rule which was laid down by the judges after the case of *Cooper v. Wakley*, was, that in future, in all cases of libel, slander, and personal injuries, the plaintiff should begin, although the general issue was not pleaded, but only an affirmative justification. That rule, however, does not apply to an action upon a contract like the present, nor does it make any difference that the damages are in some degree unliquidated. That appears from the case of *Reeve v. Underhill*, ante, vol. 6, p. 773, (25 E. C. L. R. 644,) (a) and other authorities. Besides, the defendant here will admit that if the plaintiff is entitled to any damages, he is entitled to the amount claimed in the particular. (b)

ROLFE, B.—The defendant must begin.

The defendant's counsel began.

Verdict for the plaintiff.

*Platt* and *Bayley*, for the plaintiff.

*Erle* and *Stammers* for the defendant.

(a) See the case of *Aston v. Perkes*, post, p. 231.

(b) It seems that an admission of this sort made at the trial, will not alter the right to begin. See the case of *Pontifex v. Jolly*, ante, p. 79.

### *Second Sitting at Westminster in Trinity Term, 1840.*

BEFORE MR. BARON PARKE.

BINNS v. PIGOT.—p. 208.

An innkeeper has no lien on a horse placed in his stable for the amount of its keep, unless it be placed there by a guest.

If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse.

**TROVER** for a horse.—Pleas, 1st, not guilty; 2d, that the plaintiff was not possessed of the horse as of his own property; 3d, that a person named Furze was an innkeeper and livery-stable-keeper, and that the horse was placed with him at livery by a person named Miller, the apparent owner thereof, upon the terms that it was to be sold if the keep was not paid for; and that the keep not being paid for by Miller, the defendant, as an auctioneer, sold the horse by the direction of Furze, who had no notice that the horse belonged to the plaintiff. Replication to the third plea, *de injuriâ*.

It was opened by *Platt*, for the plaintiff, that on the 10th of June, 1839, the plaintiff, who lived in London, had given the horse into the charge of a bricklayer in his employ to take to Elvetham, in Hampshire, where the plaintiff also had a house; but although the bricklayer had started from London at seven o'clock in the evening, he was stopped with the horse by the police at Richmond at almost one o'clock the next morning, he being taken into custody, and the horse placed at Mr

Furze's inn. In the month of July the horse was sold by the defendant for the keep. He submitted that the innkeeper could have no lien for the keep of the horse, as it was placed in his hands against the will of the owner.

It was proved that the horse was stopped by the police, as before stated; and that on the 25th of July, 1839, Mr. Thorn, a friend of the plaintiff, went to the defendant and Mr. Furze, and told them that he came by the authority of the plaintiff to forbid the sale, and that Mr. Furze asked Mr. Thorn if he would pay for the keep of the horse, which he refused to do; and that Furze then directed the defendant to sell the horse, which he did.

PARKE, B.—The plaintiff is in this case entitled to a verdict, as the innkeeper had no lien upon the horse. How the horse got into the innkeeper's hands does not very distinctly appear. It was probably taken to him by the police. It is proved that the friend of the plaintiff refused to pay for the keep of the horse, but the plaintiff was not bound in point of law to pay for the keep, as the horse was not brought to the inn by a guest; and an innkeeper has no lien upon an animal put into his stable unless it be brought by a guest.

Verdict for the plaintiff.

*Platt and G. T. White*, for the plaintiff.

*Thesiger and Montague Chambers*, for the defendant.

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### BUCKET v. CHURCH.—p. 209.

The acknowledgment in writing to take a case out of the statute of limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due.

*Semble*, that there is some doubt whether it is a question for the judge or for the jury to determine, whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled, the learned judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury.

DEBT for money lent, for interest, and on an account stated. Pleas, *nunquam indebitatus*, and the statute of limitations.

It was opened by *Thesiger*, for the plaintiff, that the plaintiff was a person of advanced age and very penurious habits, who had for many years worked in market gardens, but had amassed a property, of which she had placed £650 in the funds, and had lent £120 to the defendant, who had married her niece, the defendant having also prevailed on her to transfer her stock into the joint names of herself, the defendant, and his wife.

It was proved, that, in the year 1832, the plaintiff had placed £100 and afterwards £20 more in the hands of the defendant, who had been very kind to the plaintiff for some years, and had sent her Sunday dinners, cakes, tarts, &c., and that when she asked him for the money, which she repeatedly did, he on some occasions said she should have it, and on others that she should not.

To take the case out of the statute of limitations, a letter, written by the plaintiff's attorney to the defendant, and the defendant's answer, were relied on.

The letter of the plaintiff's attorney was as follows:

"23d November, 1838.

"Sir,—A Mrs. Susannah Bucket has instructed me to take proceedings against you to compel the payment of £120 she has placed in your hands, and a retransfer of £650  $3\frac{1}{4}$  per cent. stock she has placed in your name and your wife's jointly with her own. As she is a very old lady, I do not like to take any steps in the matter without giving you an opportunity of stating whether the charges she makes against you are correct, especially as she wishes me to prepare a will in which your wife and yourself are to have no interest. Unless, however, I hear from you on the matter, I shall treat her statement that you have forcibly deprived her of this money as true, which I cannot believe to be the case. She says you have not even paid her the interest on the £100; is this true?

I am, sir, yours obediently,

"To Mr. Levi Church.

H. F. PHILLIPS."

The letter of the defendant in answer was as follows:

"Brentford, 25th November, 1838.

"Dr. Sir,—I received your letter, and I can assure you that every thing was done in an upright and fair manner, and before witnesses; it was Mrs. Bucket's own proposing and particular wish, so that when she died it should be no trouble nor expense. The £650 she has been receiving dividend for. The £100 she has been receiving double and treble for, believe me, sir, and if you will refer to Mr. Peake, broker, he will tell you the same; the transferring was done by Mr. Peake, and I have a bill and receipt for the same; and I fully expect to be in London in a few days at Mr. Branston's, and I will call on you.

"I am, sir, your most obedient,

"H. Phillips, Esq.

L. CHURCH."

*Crowder*, for the defendant. I submit that the letter of the defendant does not take the case out of the statute of limitations. I apprehend that that is a question for the judge and not for the jury. It was so considered in the case of *Morrell v. Frith*, 3 M. & W. 402.

PARKE, B.—From the case of *Lloyd v. Maund*, 2 T. R. 760, it would appear to be a question for the jury. What I have always done is, to express my own opinion, and also take the opinion of the jury. If the two agree, it is well—if they differ, it will be for the Court to decide.

*Crowder* addressed the jury for the defendant, and contended that this was a gift and not a loan, and that the letter of the defendant did not take the case out of the statute of limitations, as the real meaning of the expression, "The £100 she has been receiving double and treble for" was, that she had received more than an equivalent twice or thrice over, in what the defendant and his wife had done for her.

PARKE, B., (in summing up.)—The first question is, whether this £100 was a loan or a gift. That it was put into the hands of the defendant as one or the other is conceded. Mr. Phillips, in his letter, says that it was a loan, and the defendant does not, by his answer, deny that it was so. We now come to the statute of limitations—and, to take the case out of the operation of the statute, the party must either make a distinct promise to pay or else make a distinct acknowledgments that the sum is due; and I think, on the true construction of the defendant's letter, he admits the loan, and says, that so far from not having

paid the interest, he asserts that he has paid double and treble interest. As there is some little difficulty whether it is a question for the judge or a question for the jury, I shall leave it to you to say whether the defendant, by his letter, meant to say that the plaintiff had received double and treble the £100, or had received double and treble the interest only. The expression is not that she has "received double and treble," but has "received double and treble *for*." The Sunday dinners and cakes would very likely double and treble the interest, but would not double and treble the capital. I think there is no evidence to take the case out of the statute of limitations beyond £100. You will say also whether you will allow the defendant to deduct the interest up to the date of his letter, as he, in effect, asserts that it has been satisfied up to that time. Still you may, if you think proper, disbelieve one part of his statement and believe another, or it may be that he may only mean that, having had the various articles that have been mentioned, the plaintiff ought not to charge interest.

Verdict for the plaintiff—the foreman of the jury saying, "We find for the plaintiff for £100, and interest since the date of the defendant's letter."

*Thesiger and Montagu Chambers*, for the plaintiff.

*Crowder and Fish*, for the defendant.

## OXFORD SUMMER CIRCUIT, 1839.

BEFORE MR. BARON ALDERSON AND MR. JUSTICE WILLIAMS.

### WORCESTER ASSIZES.

(*Crown Side*.)

BEFORE MR. BARON ALDERSON.

### REGINA *v.* THOMAS MARTIN.—p. 213. (a)

Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor.

The person making such an attempt with the consent of the girl, is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her.

**MISDEMEANOR.** The 1st count of the indictment charged the prisoner with having carnally known and abused Esther Ricketts, a girl above ten and under twelve years of age.

(a) This case and that of *Rex v. Yorkhill* were omitted in their proper order of date, as the decisions in both were postponed.

The 2d count was for an assault on Esther Ricketts, with intent carnally to know and abuse her.

3d count for a common assault.

It was proved by the prosecutrix, who was between ten and eleven years old, that the prisoner had laid her down in a field, and had applied his private parts to hers, and hurt her much. Emission was proved, but there was no proof of penetration. From the cross-examination of the prosecutrix, it appeared that the prisoner had been with her in this way by her own consent, five times before, and that little boys had likewise done something of this kind, also by her own consent.

ALDERSON, B.—The first count is not proved.

Godson, for the prisoner.—I submit that if the fact occurred by the consent of the prosecutrix, there can be no conviction either on the 2d or the 3d count.

ALDERSON, B.—The difficulty as to that is, whether she can properly be said to consent to that which is a misdemeanor by statute.

Godson cited the cases of *Regina v. Banks*, ante, vol. 8, p. 574, (34 E. C. L. R. 531;) and *Regina v. Meredith*, ante, vol. 8, p. 589, (34 E. C. L. R. 539.)

ALDERSON, B.—I will take the opinion of the jury as to whether that which was done was, in fact, by the consent of the prosecutrix, and if they find that it was so, I will reserve the case for the consideration of the fifteen judges. If the indictment had charged the prisoner with having attempted to commit the statutable misdemeanor, I am of opinion that the prisoner would have been liable to conviction; but as it is here charged as an assault, there may be some doubt upon it.

The jury found that the prosecutrix consented to all that the prisoner did.

ALDERSON, B.—I shall direct a verdict of guilty to be entered on the 2d and 3d counts, on the ground that the prosecutrix was by law incapable of consenting to that which an act of Parliament has made a misdemeanor, and I shall reserve the point.

Verdict accordingly.

Beadon, for the prosecution.

Godson, for the prisoner.

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In Hilary Term, 1840, the case was considered by the judges; and at the Spring Assizes of 1840, PATTESON, J., delivered the judgment of the fifteen judges:—"Thomas Martin, at the last assizes for this county you were found guilty of an assault upon a child between ten and twelve years old. The learned baron before whom you were tried did not pass any sentence on you, but reserved the point for the consideration of the judges, whether it was proper that you should have been convicted of an assault. The case has since been considered by the judges, and inasmuch as it appeared that the child consented, the judges are of opinion that the charge was not properly laid, and that as the child consented it was not an assault. The judges have directed that no judgment is to be pronounced against you upon the indictment upon which you have already been tried. You are still liable to be indicted for the attempt to commit a misdemeanor, and will be so indicted at these assizes, although your offence is not an assault."

BEFORE MR. JUSTICE PATTESON.

## REGINA v. MARTIN.—p. 215.

An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M., against the private parts of her *the said* E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said* E. R."

*Held*, that the second count was bad, as it did not allege that E. R. was between the ages of ten and twelve:—*Held*, also, that the words "*the said* E. R.," merely meant that she was the same person as was mentioned in the first count, but that those words did not import unto the second count the description of E. R. with respect to her age.

Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor.

**MISDEMEANOR.**—The defendant, who was the defendant in the last case, was again indicted. The 1st count of the indictment charged him with having *assaulted* "Esther Ricketts, an infant above the age of ten and under the age of twelve years," with intent to carnally know and abuse her. The 2d count was as follows:—"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Thomas Martin, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully did put and place the private parts of him the said Thomas Martin against the private parts of her *the said* Esther Ricketts, and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse *the said* Esther Ricketts, against the peace of our lady the queen, her crown and dignity."

*Godson*, for the defendant.—This is the same case that was tried at the last assizes, and as the former prosecution failed because there was no assault, the 1st count is out of the question; and, with respect to the 2d count, I submit that it is bad. The offence intended to be charged by the 2d count was an attempt to have carnal knowledge of a child between ten and twelve years old, but it is not so charged—in that count Esther Ricketts is not charged to be between ten and twelve years old. All that is charged in that count is an attempt to commit fornication. It is true that the 2d count refers to Esther Ricketts as "*the said* Esther Ricketts," but that merely means that she is the same person. The word "said" does not incorporate into the second count the description of between ten and twelve. In pleading, a character is frequently given to a person in a first count, and in a general count the person is again referred to as the said A. B., but that does not reassert his particular character, nor compel the prosecutor to give proof of it. If a first count charged that the defendant assaulted A. B., a constable, in the execution of his duty, and the second count was for an assault on *the said* A. B., it is quite clear that to warrant a conviction on the second count, it would not be necessary to prove that A. B. was a constable, and it therefore follows, that the expression "*the said* A. B." does not import the character and description of constable into the second count.

PATTESON, J.—I did not intend that the first count should have been inserted in this indictment.



*Beadon*, for the prosecution.—We cannot support the first count.

PATTESON, J.—The second count taken by itself is bad. The only question is, whether the word “said” will help it, and I think that it does not. The count ought to have gone on to aver that Esther Ricketts was between the ages of ten and twelve. The ground on which the judges went in the former case was, that although a child between ten and twelve cannot by law consent to have connexion, so as to make that connexion no offence, yet where the essence of the offence charged is an assault, (and there can be in law no assault unless it be against consent,) this attempt, though a criminal offence, is not an assault; and the indictment must be for an *attempt* to commit the felony, if the child is under ten years old, and for an *attempt* to commit a misdemeanor if the child is between the ages of ten and twelve; for it is perfectly clear, that every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. There was a case at Liverpool similar to the present, and there Baron PARKE ruled that it was no assault, and directed a new indictment; but that indictment by a mistake charged the assault, which was the very thing that he intended to have been omitted, and the party escaped. If the second count here had contained the words “the said Esther Ricketts, then and there being above the age of ten years and under the age of twelve years,” it would have been sufficient. The indictment must be quashed.

Indictment quashed.

*Beadon*, for the prosecution.

*Godson*, for the defendant.

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## HEREFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE WILLIAMS.

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### REGINA v. THE INHABITANTS OF YARKHILL.—p. 218.

A prosecutor had obtained a summons under the 94th section of the Highway Act, 5 & 6 Will. 6, c. 50, calling on the parish surveyors to show cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates (under the 95th section) ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the crown side of the assizes, and the defendants found guilty. *Held*, that the prosecutor was entitled to an order, under the 95th section, to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the judge.

INDICTMENT for not repairing a highway. In this case the indictment had been preferred at a former assize, and came on to be tried as a traverse on the crown side of these assizes. It appeared that the prosecutor had obtained a summons under the 94th section of the highway act, 5 & 6 Will. 4, c. 50,<sup>(a)</sup> calling on the surveyors of the highways of the parish of Yarkhill to show cause why the road should not be repaired. On the hearing of that summons before the magistrates, the surveyors, on behalf of the parish, denied the liability of the parish to repair, whereupon the magistrates, under the 95th section, ordered the present indictment to be preferred.

The jury found the defendants guilty.

*Greaves*, for the prosecution, applied for an order for the costs, and submitted that, under the 95th section of the act, the judge had no discretion, but was obliged by that section to order the costs to be paid out of the highway rate of the parish.

WILLIAMS, J., said that he would consider of the point; and on the 22d of February, 1840 (after conferring with the other learned judges), his lordship granted an order for the costs of the prosecution to be paid out of the highway rate, on the ground that the words of the statute were imperative, and left no discretion whatever in the judge.

*Greaves* and *W. H. Cooke*, for the prosecution.

*Whateley* and *W. J. Alexander*, for the defendants.

(a) The different sections of the stat. 5 & 6 Will. 4, c. 50, here referred to, will be found in Burn's Justice, tit. *Highways*.

See the case of *Reg. v. The Inhabitants of Chetworth*, post.

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## OXFORD SPRING CIRCUIT, 1840.

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BEFORE MR. JUSTICE PATTESON AND MR. BARON GURNEY.

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### READING ASSIZES.

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BEFORE MR. BARON GURNEY.

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### REGINA v. CROFTS.—p. 219.

In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate.

HOUSEBREAKING.—The indictment, besides the ordinary count for housebreaking, charged that the prisoner had been previously convicted of felony at the Newbury Borough Sessions, holden on the 31st of October, 1 Vict.

The housebreaking was proved.

To prove the previous conviction, a certificate of Mr. Vines, the clerk of the peace of the borough of Newbury, was put in: it certified that at the sessions of that borough, holden on the 31st of October, 1 Vict., the prisoner had been convicted of stealing cotton print, and had been sentenced to be imprisoned four months.

To prove the identity of the prisoner, Mr. Hackett, the governor of Reading gaol, was called: he said, "The prisoner was in my custody before the Newbury Borough Sessions in October, 1837; I sent him to Newbury at that time; I was not at the trial, but I received him back with an order from the Newbury Sessions; and he remained in my custody for four months under that sentence."

GURNEY, B.—That is sufficient. (a)

Verdict.—Guilty.—Sentence—Transportation for life.

*Tyrwhitt*, for the prosecution.

(a) Precisely similar evidence was acted upon in several other cases in the course of the circuit.

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## OXFORD ASSIZES.

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BEFORE MR. BARON GURNEY.

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RICHARDS v. FRANKUM.—p. 221.

A letter written by a party is not admissible in evidence in his own favour, except as a notice or a demand.

On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum:—

"This draft was signed in my presence, on the date within named. (Signed) N. D.:"—

*Held*, that the plaintiff must call N. D. to prove the making of the note:—*Held*, also, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an endorsement on the note as well as what was written on the face of it.

The note was endorsed by the plaintiff as follows:—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of, &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:—*Held*, that this endorsement did not require a stamp.

DETINUE "for a certain promissory note in writing of great value, to wit, of the value of £50, made by Thomas Fox Hitchcock, payable to the said plaintiff." Pleas, 1st, non detinet; 2d, that the plaintiff "was not lawfully possessed, as of his own property, of the said promissory note;" 3d, that after the note was made, and before the commencement of the action, the plaintiff assigned the note to John Grainger, who delivered it to the defendant, and that the defendant as his servant and by his command detained it. Replication to the last plea, denying that the plaintiff had assigned the note to Grainger, and that Grainger had delivered it to the defendant in manner and form, &c.

It was proposed, on the part of the plaintiff, to put in two letters,

written by the plaintiff's attorney, Mr. Dickenson, without putting in the defendant's answer to the first of them.

*Ludlow*, Serjt., for the defendant.—I must object to these letters being put in without the answers.

*F. V. Lee*, for the plaintiff.—The other letters may be put in by the defendant as his evidence. In the case of *Lord Barrymore v. Taylor*, 1 Esp. N. P. C. 326, (a) it was held that it was not necessary to give in evidence the whole of the correspondence.

GURNEY, B.—In that case it was held, that the letters of the opposite party were receivable in evidence without putting in your own letters to which they were answers. What the defendant writes is evidence for the plaintiff; but the plaintiff cannot make evidence for himself by his attorney writing to the defendant. That can be done only for the purpose of showing either notice or a demand.

The following letters were then put in; the first was from the plaintiff's attorney to the defendant.

"3, Lincoln's Inn, New Square,  
"29th Aug., 1839.

"Sir,—I am instructed by Mr. Grainger, as well as Mr. Richards, for whom I am professionally concerned, to apply to you for the delivering up to me, as their attorney, *a £50 bill of exchange now in your hands*, belonging to Mr. Richards, which latter gentleman will sustain considerable loss by your withholding. If you have any professional claim, be good enough to send it to me, and, if correct, I will, on delivering up of the before alluded to bill, forthwith discharge it.

"Your obedient servant,

"To Mr. Frankum.

E. A. DICKENSON."

The following answer, written by Mr. Frankum's managing clerk, was also read:

"Abingdon, 31st August, 1839.

"Sir,—I am directed by Mr. Frankum to acknowledge the receipt of your letter, and to inform you that he conceives, under the circumstances, that he shall not be justified in delivering up *the document you refer to*, nor any papers belonging to those parties, without the authority of a judge's order.

"I am, sir, yours obediently,

"Mr. E. A. Dickenson.

THOMAS J. WAGNER."

The following from the plaintiff's attorney to the defendant was also read:

"3, Lincoln's Inn New Square,  
"2d Sept., 1839.

"*Richards v. Yourself.*

"Sir,—Having been duly authorized by Mr. Richards to apply to you for the delivering up to me of the *£50 promissory note*, and had the concurrence of Mr. Grainger for so doing, I had hoped that you

(a) In the case of *Sturge v. Buchanan*, 2 M. & Rob. 90, it was held, that where the plaintiff gave in evidence letters of the defendant, selected out of a correspondence, the defendant was not thereby entitled to put in letters of intermediate date, written by his agent to the plaintiff on the same subject-matter, unless the letters already in evidence refer to those proposed to be put in. See the cases of *Roe, Bart., v. Day*, ante, vol. 7, p. 705, (32 E. C. L. R. 698;) *Healey v. Thatcher*, ante, vol. 8, p. 388, (34 E. C. L. R. 442.)

would have restored the note without further trouble; but as you object to doing so, except by an unnecessary and expensive process, I have no remedy but to issue the present writ; and have to add, that every day's delay works an additional injury to the plaintiff, who is prevented getting out of custody owing to the want of this document.

"I am, sir, yours obediently,

"To Mr. Frankum.

E. A. DICKENSON."

To disprove the allegation in the 3d plea, that the note was delivered by John Grainger to the defendant, John Grainger was called: he stated, that he had not delivered the note to the defendant, and did not know him, but that he understood his (Grainger's) wife had taken the note somewhere; he also stated that he had agreed to buy some houses of the plaintiff, and had advanced £90 of the purchase-money, and that the plaintiff had deposited this note with him as a security, and that he was to hold it till he had the houses; he further stated, that he had been let into possession of the houses, but had never had any rent, or any conveyance, or any title-deeds delivered to him.

The plaintiff was resting his case here.

GURNEY, B.—There is no evidence that the defendant ever had any promissory note for £50 payable to the plaintiff. You have demanded a bill of exchange in the only letter to which you put in the defendant's answer. In the second letter you demand a note, but you have given no evidence that the defendant ever had any note.

On the part of the plaintiff Mrs. Grainger was then called: she said, that she went with the plaintiff to the defendant's office, and some papers were given to the defendant, and that the defendant said to her, "If you have the houses, the £50 note will belong to Richards; if not, it will belong to you."

*F. V. Lee*, for the plaintiff, called for the note.

It was produced by *Ludlow*, Serjt., who objected that it could not be read without calling the subscribing witness.

On the back of it was the following attestation:

"This draft was signed in my presence, on the date within named.

"NATHANIEL DODSON."

GURNEY, B.—You must call the subscribing witness.

The Rev. Nathaniel Dodson, the subscribing witness, proved the making of the note, which was read, and was a promissory note for £50, as described in the declaration.

*Ludlow*, Serjt., asked that the endorsement should be read.

*F. V. Lee*.—I want the note itself only; if any thing else is written on the back, I apprehend that I am not bound to give it in evidence.

GURNEY, B.—If you call for a note, and it is given to you, I am of opinion that if it is required by the other side, you are bound to read the endorsement if there be one, as well as that which is on the front of the note.

*F. V. Lee*.—I submit that the endorsement cannot be read without being stamped.

The endorsement was in the following form:

"29th April, 1839.

"I hereby assign this draft, and all benefit of the money secured

thereby, to John Grainger, of Bessilsleigh, in the county of Berks, labourer; and order the within named Thomas Fox Hitchcock to pay him the amount thereof, and all interest in respect thereof.

“HENRY OWEN RICHARDS.”

GURNEY, B.—What stamp do you say it requires?

*F. V. Lee*.—An agreement stamp.

GURNEY, B.—It is no agreement; it amounts to nothing more than an ordinary endorsement of the note, but it is in a very elaborate form.

*Ludlow*, Serjt., addressed the jury, and submitted that on the evidence it was manifest that the defendant was to hold this for Grainger till the plaintiff had conveyed him the houses, and that the defendant would not have been justified in delivering it up to the plaintiff, he holding the note as he did for the benefit of Grainger.

GURNEY, B., (in summing up).—I think that on the first issue, on the plea that the defendant does not detain the note, the verdict ought to be for the plaintiff, but I will give leave to move on that point. With respect to the second issue, on the property of the note, I am clearly of opinion that the verdict must be for the defendant. If you look at the endorsement only, the note, so far from being the plaintiff's, is absolutely assigned to Grainger; but even taking the parol evidence, the note is to be Grainger's till the purchase of the houses is completed; and upon that part of the case it is proved, that, although Grainger has been let into possession, he has had no conveyance, and received no rent, neither has he any title-deeds delivered to him. Therefore, even taking it in that view, the plaintiff is not entitled to recover the note. With respect to the third plea, you will have to say on the evidence, whether it is made out to your satisfaction that the plaintiff assigned the note to Grainger, which it is quite clear that he did, and that Grainger's wife, acting as his agent, and the plaintiff, deposited it with the defendant to keep for Grainger.

Verdict for the plaintiff on the first issue; and for the defendant on the second and third issues.

*F. V. Lee*, and *Pyke*, for the plaintiff.

*Ludlow*, Serjt., and *Carrington*, for the defendant.

In the ensuing Term, *Ludlow*, Serjt., applied to the Court of Exchequer to enter a verdict for the defendant on the first issue, in pursuance of the leave given at the trial, but the court refused a rule. On a subsequent day *Pyke* moved for a new trial, but the court refused a rule.

## REGINA v. TULLY.—p. 227.

An indictment for false pretences charged, in the first count, that the defendant “unlawfully did falsely pretend to one J. K., that he, the said J. T., was sent by W. P. for an order to go to J. B. for a pair of shoes,” by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the moneys of J. L. The second count charged, that he falsely pretended to J. L., that W. P. had said that J. L. was to give him, the said J. T. (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—*Held*, that both these counts were bad, in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53.

FALSE pretences.—The first count of the indictment stated that the defendant, on, &c., at &c., “unlawfully did falsely pretend to one James Lovelock, that he, the said John Tully, was sent by William Perkins for an order to go to Bracey’s (meaning Joseph Bracey, a shoe factor) for a pair of high shoes. By means of which false pretence, he, the said John Tully, did then and there unlawfully obtain of and from the said Joseph Bracey one pair of shoes, of the value of nine shillings, of the goods and chattels of the said Joseph Bracey, with intent then and there to cheat and defraud the said James Lovelock of the price and value of the said shoes, to wit, of the sum of nine shillings of the moneys of the said James Lovelock.” The count then went on to negative the false pretence, concluding against the form of the statute, &c.

Second count.—That the defendant, on, &c., at, &c., “unlawfully did falsely pretend to the said James Lovelock, that William (meaning William Perkins) had said that the said James Lovelock was to give him (meaning the said John Tully) an order to go to Bracey’s (meaning the said Joseph Bracey’s), for a pair of high shoes. By means of which last-mentioned false pretence, he, the said John Tully, did then and there unlawfully obtain from the said Joseph Bracey, in the name of the said James Lovelock, one pair of shoes of the value of nine shillings, of the goods and chattels of Joseph Bracey, with intent then and there to cheat and defraud the said James Lovelock of the same.” This count went on to negative the false pretence, and concluded against the statute, &c.

The defendant pleaded guilty.

GURNEY, B. (having read the indictment).—I am of opinion, that neither of these counts charges any offence against the act of Parliament.(a) The judgment must be arrested.

Judgment arrested.

*Keating*, for the prosecution.

(a) The stat. 7 & 8 Geo. 4, c. 29, s. 53.

## WORCESTER ASSIZES.

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

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REGINA v. W. GUTTRIDGE, H. GUTTRIDGE, GOODWIN, and  
FELLOWS.—p. 228.

A true bill was found against several prisoners for a rape. The prisoners had been on bail, and the prosecutrix did not appear either before the Grand Jury, or to give evidence on the trial; and an application being made to the judge to postpone the trial, founded on affidavit, stating, that, in the belief of the deponent, the prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the judge postponed the trial, and would not admit the prisoners to bail.

RAPE.—The prisoners Guttridge had been on bail.

The bill being found by the Grand Jury,

*Huddleston*, for the prosecution, applied to postpone the trial till the next assizes, upon an affidavit, which stated that the deponent had reason to believe that the person alleged to have been ravished had been induced to keep out of the way, in consideration of a sum of money which had been given to her by the prisoners Guttridge, who had been out on bail.

*F. V. Lee*, for the prisoners Guttridge, proposed that the recognisances of their bail should be enlarged, and mentioned a case in which his lordship had adopted a similar course at Stafford.

PATTESON, J.—I recollect the case; but I have since reason to believe that I acted incorrectly. In cases of this serious nature, where the Grand Jury have found the bill, I cannot allow the prisoners to be admitted to bail. There was a case of *Regina v. Chapman*, ante, vol. 8, p. 558, (34 E. C. L. R. 523,) (a) in which Lord ABINGER would not allow bail to be given.

The prisoners were ordered to be detained in custody till the next assizes.

*Huddleston*, for the prosecution.

*F. V. Lee*, for the prisoners Guttridge.

(a) In several of the cases in which learned judges have admitted parties to bail, there was no bill found.



## STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PATTESON.

GRAINGER *v.* RAYBOULD and Another.—p. 229.

Where a plaintiff sues on a quantum meruit for work and labour, the defendant may (without pleading a set-off) give in evidence, that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less, because his men had their beer provided for them by the defendant.

DEBT for work and labour.—Plea, as to all but £10, nunquam indebtedtatis, and, as to that sum, payment into court.

For the plaintiff, evidence was given that his workmen put up a boiler and tub at the defendant's mine, and 4s. a-day was stated to be a fair price for each man so employed.

*Talfourd*, Serjt., for the defendant, proposed to show that, during the time the men were at work, the defendants provided them with beer.

*Carrington*, for the plaintiff.—I submit that the evidence is not admissible, as no set-off is pleaded for beer supplied to the plaintiff.

*Talfourd*, Serjt.—I put it, that if a party provide the men's beer, he ought not to pay at so large a rate per day as if no beer was supplied by him.

PATTESON, J.—I think that the evidence is receivable. The plaintiff goes on a quantum meruit, and it may be that he will deserve to have less if the defendant supplied his men with beer, than if the plaintiff himself had supplied the beer.

The evidence was received.

Verdict for the plaintiff for the amount of his claim, after deducting the value of the beer supplied by the defendants.

*Carrington* and *F. V. Lee*, for the plaintiff.

*Talfourd*, Serjt., and *Whately*, for the defendants.

ASTON *v.* PERKES.—p. 231.

In an action of trespass for taking the plaintiff's goods, the defendant pleaded—1st, as to part of the goods, that he took them as a distress for an annuity, payable to M. A.; and 2dly, as to the residue, he justified the taking as a distress for rent due to J. A. Replication to the 1st plea, that the annuity was not in arrear; and to the 2d, non tenuit:—*Held*, that, on these pleadings, the defendant was entitled to begin.

TRESPASS for taking the plaintiff's goods.—Plea—1st, as to taking certain of the articles, to wit, one cow, one pig, &c., that Margaret Aston was seised in fee of an undivided moiety of certain premises, and made her will, and thereby devised that moiety of the premises to the plaintiff, subject to an annuity of £18 to Mary Aston for her life, payable half-yearly; the first payment to be made at the expiration of six ca-

lendar months after her decease, with a power of distress. This plea then went on to aver that Margaret Aston died without altering her will, and that the sum of £63 for 3½ years of the annuity was in arrear, and that the defendant, as the bailiff of Mary Aston, took the goods as a distress for those arrears, (concluding with a verification :) 2d plea, as to the taking of the residue of the goods, that the plaintiff held one undivided moiety of messuage, &c., as tenant of John Aston, at the rent of £66, payable half-yearly; that £208 was in arrear for 3½ years' rent, and that the defendant, as bailiff of John Aston, entered the said messuage, the outer door being open, and took the goods as a distress for those arrears of rent.

Replication to the 1st plea, that no part of the annuity was in arrear, (concluding to the country;) and to the 2d plea, that the plaintiff did not hold the premises as tenant to John Aston, (also concluding to the country.)

*Talfourd*, Serjt., for the defendant, claimed the right to begin, as the issues lay on the defendant.

*R. V. Richards*, for the plaintiff.—I go for substantial damages, and I am, therefore, entitled to begin. I must prove the value of the goods taken; and where a plaintiff goes for uncertain damages, he is entitled to begin, though the issues are all on the defendant.

*PATTESON*, J.—That is only in cases of assault, libel, and the like.

*Talfourd*, Serjt., cited the case of *Carter v. Jones*, ante, vol. 6, p. 64, (25 E. C. L. R. 283.)

*PATTESON*, J.—There was a case where a party brought an action of trespass against the defendant for taking his goods, and the defendant justified under a warrant of distress for a poor's rate.(a) There the plaintiff must, as in the present case, have had to prove the value of the

(a) The case of *Burrell v. Nicholson*, ante, vol. 6, p. 202, (25 E. C. L. R. 356.)

The case of *Carter v. Jones* is differently reported, ante, vol. 6, p. 64, and in 1 M. & Rob. 281. According to our report of the case, the Lord Chief Justice Tindal said, that the judges had come to a resolution that "in future the plaintiff should begin in all actions for *personal injuries*, and also in *slander and libel*, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant;" but in the other report of the case, the observations of his lordship are stated to be, that, "in cases of *slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount*, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant." We have every reason to believe that our report of the case of *Carter v. Jones* is correct; and it will be seen that, if the rule was, that the plaintiff should begin in all cases where he seeks to recover "*actual damages of an unascertained amount*," the plaintiff should have begun in the following cases, in all of which, it was held that the defendant should begin: viz. *Burrell v. Nicholson*, ante, vol. 6, p. 202, and 1 M. and Rob. 304, which was an action for taking the plaintiff's goods, and the defendant justified under a distress warrant for a poor rate; *Bastard v. Smith*, 2 M. & Rob. 129, an action of trespass on land, with an affirmative justification; *Kerve v. Underhill*, ante, vol. 6, p. 773, (25 E. C. L. R. 614,) and 1 M. & Rob. 440, an action of covenant for not assigning a lease, and taking fixtures, to which there was a plea of fraud; *Lewis v. Wells*, ante, vol. 7, p. 221 (32 E. C. L. R. 497,) an action of covenant for non-repair, with affirmative pleas; *Harnett v. Johnson*, ante, p. 206, and the foregoing case of *Aston v. Perkes*. In the case of *Woolton v. Barton*, 1 M. & Rob. 518, which was an action on a covenant to repurchase stock at the end of a term, to which the defendant pleaded that the plaintiff had removed all the valuable part of the stock, and left nothing but worthless goods, on which plea issue was joined—Thesiger, for the defendant, claimed the right to begin, and cited the case of *Carter v. Jones*, from ante, vol. 6, p. 64.—*Bompas*, Serjt., for the plaintiff, said, that Lord Denman, Lord Chief Justice Tindal, and Lord Abinger, had all decided, that where damages were the object of the action, and these damages were unascertained, the plaintiff should begin; and he referred to the case of *Carter v. Jones*, 1 M. & Rob. 281. Baron Parke said,—"The only rule laid down by the judges was, that, in actions for *personal injuries*, where damages are sought as in actions of assault, &c.,

goods; but there, it was held that the defendant should begin, the real question in the cause not being the value of the goods, but whether the plaintiff was rateable or not. I shall act upon that case. I shall hold that the plaintiff is entitled to begin.

*Tulfourd*, Serjt., opened his case.

The trial lasted a great part of two days; and the jury found a

Verdict for the defendant on the 1st issue, and for the plaintiff on the 2d issue, with £250 damages.

*R. V. Richards* and *Whateley*, for the plaintiff.

*Tulfourd*, Serjt., and *Whitmore*, for the defendant.

*and in libel and slander*, the plaintiff should begin. The general rule is, that the party on whom the issue is shall begin. This was not altered by the resolution of the judges referred to in *Carter v. Jones*. I shall rule that the defendant is entitled to begin." From these authorities, it would appear that the resolution of the judges is correctly stated in the report of *Carter v. Jones*, ante, vol. 6, p. 64, (25 E. C. L. R. 283.) In the case of *Abalom v. Beaumont*, tried before Lord Denman, C. J., in 1837, and which is shortly reported in a note, 1 M. & Rob. 441, which was an action on a fire policy, with affirmative pleas, Lord Denman held, that the plaintiff was entitled to begin; and in *Harrison v. Gould*, ante, vol. 7, p. 580, (32 E. C. L. R. 639,) which was an action for a breach of promise of marriage, with an affirmative plea, Lord Abinger and Mr. Justice Gaselee held, that the plaintiff was entitled to begin; but, with respect to this last case, it may be observed, that a breach of promise of marriage is a personal injury, and was so held in the case of *Chamberlain v. Williamson*, 2 M. & S. 408. See also the cases of *Huggett v. Exley*, and *Osborn v. Thompson*, post.

#### REGINA v. WHITTINGHAM and DANIEL.—p. 234.

The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal which was on a level with the scaffold:—

*Held*, that this scaffold was an "erection used in the conducting the business" of a "mine," within the stat. 7 & 8 Geo. 4, c. 30, s. 7, and that the damaging it with intent to destroy it, or to render it useless, was felony.

A coal mine was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine:—

*Held*, that proof of damaging the drum would not support an indictment which charged the damaging of a steam-engine used in working a mine.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 7. The first count of the indictment charged the prisoners with damaging a steam-engine employed in working a mine with intent to destroy it; 2d count—the like, but laying the intent to be to render it useless; 3d count—for damaging a certain erection used in the working of a mine with intent to destroy it; 4th count—the like, but laying the intent to be to render it useless.

It appeared that the mine, which was a coal mine at Woolstanton, was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine. At the other end of this rope was a heavy weight called a bull, which the prisoners threw into the shaft of the mine, and by the sudden jerk caused the drum to be strained and injured. It further appeared that the bottom of the shaft was filled with water, and that Mr. Williamson, the owner of the mine, had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal that was on a level with the scaffold; and it further appeared

that the prisoners took a sort of wagon called a corve and threw it down the shaft, whereby the scaffold was much injured.

*Godson* and *E. Yurdley*, for the prisoners, objected that as the drum was no part of the steam-engine, the first and second counts could not be supported.

*PATTESON, J.*—I think that is so.

*Godson* and *E. Yurdley* submitted that this scaffolding was not an "erection used in conducting the business of a mine" within the stat. 7 & 8 Geo. 4, c. 29, s. 7, the words of which were, "any staith, building, or erection used in conducting the business of any mine," and that the word "erection" being used in conjunction with the words "staith or building," must be taken to be an erection ejusdem generis.

*F. V. Lee*, for the prosecution.—As the statute uses the word "erection" as well as the word "building," it is manifest that something more than buildings were intended to be included within its provisions. This scaffolding is absolutely necessary to enable the prosecutor to work his mine, and is therefore an erection "used in conducting the business" of the mine.

*PATTESON, J.*—I think that this is a case within the act of Parliament. The word "erection" is clearly meant to denote something different from a "building."

Verdict—Guilty.

*F. V. Lee* and *Allen*, for the prosecution.

*Godson* and *E. Yurdley*, for the prisoners.

See the case of *Reg. v. Norris*, post, p. 241.

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(Crown Side.)

BEFORE MR. BARON GURNEY.

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REGINA *v.* ASHMALL and TAY.—p. 236.

A was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessory before the fact. A. did not appear to take his trial, but B., who was on bail, appeared.

*Held*, that, under these circumstances, B. was not compellable to plead to the indictment, and the judge allowed B. to be admitted to bail.

**ABORTION.**—The indictment was in the following form:—"Staffordshire to wit.—The jurors for our lady the queen, upon their oath present, that Thomas Ashmall, late of, &c., on, &c., at, &c., feloniously, unlawfully, and maliciously, did use a certain instrument, the name of which instrument is to the jurors unknown, by then and there forcing, thrusting, and inserting the said instrument into the private parts of Hannah Lear, now known by the name of Hannah Evans, with intent in so doing then and there and thereby to procure the miscarriage of the said Hannah Lear, now known by the name of Hannah Evans, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity; and the jurors aforesaid, upon their oath aforesaid, do further present, that Thomas Josiah Tay, late of, &c., before the committing of the felony by the said

Thomas Ashmall as aforesaid, to wit, on, &c., at, &c., feloniously did procure, counsel, and command the said Thomas Ashmall, the felony aforesaid, in manner and form aforesaid, to commit, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.”

At the sitting of the court Mr. Ashmall was called, but did not appear. Mr. Tay, who had been on bail, appeared. The indictment was read to him.

*Godson*, for the defendant Tay.—I submit that my client is not compellable to plead to this indictment. He is indicted as an accessory, and as an accessory only. Formerly an accessory before the fact could, in no case, be brought to trial without his principal, except after the conviction of his principal, or by his own consent. But now, by the stat. 7 Geo. 4, c. 64, s. 9, accessories before the fact may be tried in either one of three modes:—1st, with the principal; 2d, after the conviction of the principal felon; or 3d, for a substantive felony. This indictment is not for a substantive felony, because every thing charged against Mr. Tay is charged as having been done accessorially to Ashmall; and what shows decisively that Mr. Tay is charged as an accessory only, is, that if Mr. Ashmall was acquitted on this indictment, Tay must be acquitted also as a legal consequence.

*Carrington*, on the same side.—At the time of the passing of the act 7 Geo. 4, c. 64, I had occasion to compare it with all the previous enactments on the subject, and I believe I am correct in stating that the only alteration in the law then made, as to the trial of accessories without and before the conviction of the principal, was by the provisions relating to the accessory being indicted for a substantive felony. I submit, also, that an indictment for a substantive felony must be so framed as not to depend on the conviction or acquittal of any person, except the party who is charged with the substantive felony; indeed, the ordinary counts for the substantive felony of being accessory, do not even name the principal, but merely state him to be “a certain evil-disposed person.”(a)

GURNEY, B., (after conferring with PATTESON, J.)—My learned brother PATTESON concurs with me in opinion, that Mr. Tay is not compellable to plead to this indictment at present. There might have been an indictment against him for a substantive felony, but this is not so.

Mr. Tay did not plead to the indictment.

*Godson* applied that Mr. Tay should be admitted to bail, and bail was taken.(b)

*Corbett* for the prosecution.

*Godson* and *Carrington* for the defendant Tay.

(a) See the cases of *Rez v. Jervis*, ante, vol. 6, p. 156, (25 E. C. L. R. 330,) and *Rez v. Wheeler*, ante, vol. 7, p. 170, (32 E. C. L. R. 483.) In the case of *Reg. v. Caspar*, in which the indictment was held by the fifteen judges to be good as an indictment against the receivers for a substantive felony, it was charged that “a certain evil-disposed person” stole 102 lb. of gold-dust, and that the receivers the said gold-dust “before then feloniously stolen, taken, and carried away in manner and form aforesaid, feloniously did receive,” &c.

(b) As to the practice respecting bail in cases where the party is charged with a capital offence, see the case of *Reg. v. Guttridge*, ante, p. 228.

## REGINA v. OWEN, ELLIS, and THOMAS.—p. 238.

On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence.

**MURDER.**—The prisoners were charged with the murder of Christina, the wife of Robert Collins, by drowning her.

This case had been postponed from the last assizes.(a)

On the part of the prosecution, *Ludlow*, Serjt., proposed to give in evidence the depositions of the prisoners taken on oath, on the coroner's inquest held on the body of the deceased.

**GURNEY, B.**—Can you cite any instance where a deposition of this kind taken on oath has been received in evidence against a prisoner?

*Ludlow*, Serjt.—These very depositions were received in evidence by Mr. Justice WILLIAMS, on the trial of these prisoners for a rape at the last assizes, and that learned judge said, that he would receive the evidence and reserve the question for the opinion of the fifteen judges, if it should become necessary.(b)

**GURNEY, B.**—If the evidence be necessary and it is doubtful whether it be receivable in a criminal case, the judge will receive the evidence, because that is the only way to have the point considered by the judges. In civil cases the judge may reject the evidence, and there may be a new trial. I am not aware of any instance in which an examination on oath before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.

*Ludlow*, Serjt.—Mr. Roscoe says, *Rosc. Crim. Ev.* p. 45, "A question sometimes arises, whether a statement which has been made by a party upon his examination as a witness, can be given in evidence against him, if he should himself be put upon his trial for the same offence. The general rule is, that admissions made under compulsory process are evidence against the party." So it is said by Mr. Starkie, 2 *Stark. Ev.* 2d edit., p. 28, that "when a witness answers questions on his examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes."

*Godson*, for the prisoners.—In the case of *Regina v. Wheeley*, ante, vol. 8, p. 250, (34 E. C. L. R. 375,) the prisoner, who was tried for the murder of his wife, had made a deposition before the coroner which purported to have been taken on oath, and Baron ALDERSON would not allow it to be given in evidence, and also would not admit evidence to be given to show that the deposition was, in point of fact, not taken upon oath.

**GURNEY, B.**—I think that I ought not to receive it.

*E. Yardley*, for the prisoners, referred to the case of *Rex v. Lewis*, ante, vol. 6, p. 161, (25 E. C. L. R. 333.)

**GURNEY, B.**—There was a case before my brother COLERIDGE on the Northern Circuit, where a person was indicted for forgery, and my brother COLERIDGE allowed his deposition before the Commissioners of Bankrupts to be read in evidence against him. *Wheater's Case*, 2

(a) See the case of *Reg. v. Owen*, ante, p. 88.

(b) See ante, p. 26.

Lewin's C. C. 157.(a) I confess that I do not, on principle, see the distinction between that and some of the other cases. Still I am of opinion that, in the present case, I ought to reject the evidence.

Evidence rejected.

The jury found all the three prisoners guilty; and two of them (Owen and Thomas) were executed, the sentence of the other prisoner being commuted for transportation for life.

*Ludlow*, Serjt., and *F. V. Lee*, for the prosecution.

*Godson*, *E. Yurdley*, and *Beadon*, for the prisoners.

(a) In that case, which was tried at the York Spring Assizes, 1838, the prisoner was indicted for forgery, and it was proposed to give in evidence against him his deposition taken *on oath* before commissioners of bankrupts. It was objected that the deposition was inadmissible as not being a voluntary statement; but to this it was answered, that when before the commissioners the prisoner was not charged with any crime, and the case of *Rex v. Mercer*, 2 Stark. N. P. C. 366, was relied on. The evidence was received, and the prisoner was convicted, and Mr. Justice Coleridge reserved the point, and the judges, after argument by Mr. Starkie, for the crown, and Mr. Dundas, for the prisoner, were of opinion that the evidence was admissible. But in the case of *Rex v. Britton*, tried on the Western Circuit in the year 1833, 1 M. & Rob. 297, on an indictment against a bankrupt for concealing his effects, it was proposed to prove the petitioning creditor's debt, by putting in the bankrupt's balance sheet, which he delivered in upon oath. It was objected for the defendant, that the proceedings under the commission could not in any way be given in evidence to affect the defendant, until the validity of the commission was established. At all events, that the defendant's examination, under which the balance sheet was given in, being compulsory and on oath, could not be brought forward to affect him criminally, as it was obtained from him under a sort of duress. "Patteson, J., after consulting with Alderson, J., said he was clearly of opinion, that the balance sheet could not be evidence against the defendant to prove the petitioning creditor's debt."

### REGINA v. NORRIS and Others.—p. 241.

A steam-engine used in draining and working a mine, had been stopped and locked up for the night. The prisoners got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity and received damage:—*Held*, that this was a damaging of the engine within the stat. 7 & 8 Geo. 4, c. 30, s. 7.

THE prisoners were indicted on the 7 & 8 Geo. 4, c. 30, s. 7, for feloniously, unlawfully, and maliciously damaging, with intent to destroy it, a certain steam-engine used in the draining and working of a mine; 2d count, for damaging the engine with intent to render it useless.

It appeared that the steam-engine was used to bring up coals from one shaft of the mine, and water from another, and that it was stopped and locked up on the evening of the 3d of March, and that the prisoners on that night got into the engine-house and set the engine going, and from its having no machinery attached to it, the engine worked with greater velocity, and the wheels were some of them thrown out of cog, so that the engine was damaged to the amount of £10, and would have been injured to a much greater extent, if the mischief had not been discovered and the engine stopped.

GURNEY, B., left it to the jury to say, whether the intent of the prisoners was to destroy the engine, or to render it useless; and held, that, if the prisoners had either of those intents, the case came within the provisions of the statute.(a)

The jury found the prisoners guilty.

*F. V. Lee*, for the prosecution.

(a) See the case of *Rex v. Whittingham*, ante, p. 234.

## SHREWSBURY ASSIZES.

(Civil Side.)

BEFORE MR. BARON GURNEY.

The MAYOR, ALDERMEN, and BURGESSES of LUDLOW, v.  
CHARLTON, Esq.—p. 242.

*Prima facie*, it must be presumed that the books of a corporation, which existed before the municipal reform act, are in the possession of the new corporation which succeeded them under that act; but if it be shown that the old corporation, before their dissolution, deposited them with a banker, and that from his hands they passed into the master's office of the Court of Chancery, this rebuts the presumption.

In an action brought by the new corporation, it appeared that the defendant had presented a petition to the Vice-Chancellor to allow the production of these books on the present trial, which petition was opposed by the present plaintiffs, and dismissed, with costs.

*Held*, that under these circumstances the defendant was entitled to give parol evidence of the contents of the books.

The document delivered out by the registrar of the Court of Chancery, as the order of the court, is the original order, and to make it evidence, it is not necessary that it should be compared with any book of the orders of the court.

A corporation came to a vote that if C. would alter the site of a house, the corporation would pay him £500.—This resolution was entered in the corporation book, and C. altered the site of the house:—*Held*, that the resolution was not valid, as it was not under the corporate seal.

An old corporation, before the municipal reform act, were trustees of a charity, and a tenant of the charity had paid rent to the secretary to the old corporation up to Lady-day, 1836:—*Held*, that this was a good payment, and might be taken advantage of in an action brought by the new corporation for the rent.

**COVENANT.**—The declaration stated, that on the 25th of March, 1820, the bailiffs, burgesses, and commonalty of the borough of Ludlow, demised certain lands, called the Foldgate Farm, to the defendant for a term of twenty-one years, at a rent of £150 a year, which rent the defendant covenanted to pay. Breach, that a sum of 375*l.* 13*s.* 5*d.* was unpaid. Pleas, 1st, payment; 2d, a set-off of £600, agreed to be paid to the defendant for pulling down and altering the site of a house, called the Charlton Arms, and for altering a roadway, and also for work, labour, and materials, and for money lent; 3d, a special plea, which stated in substance, that it was agreed between the old corporation of Ludlow and the defendant, that he should alter the situation of the Charlton Arms, and be paid £500 for making the alterations; and that it was agreed that these sums should be set against the rent, and the plea went on to aver that the defendant had made the alterations. Replication, taking issue on each of the pleas.

The defendant's counsel began.

It was opened by *Talfourd*, Serjt., for the defendant, that the Foldgate Farm had been demised to the defendant by the old corporation of Ludlow, as trustees of a charity, the rights of the old corporation having been transferred to the new corporation by the stat. 5 & 6 Will. 4, c. 76, and that the present claim was for rent due for three and a half years up to Michaelmas, 1835. He stated also, that the defendant had paid the half-year's rent due at Lady-day, 1836, to Mr. Morris, the secretary of the old corporation, and that would raise a presumption that the



earlier rent had been paid; but the case would not rest on presumption only; as it would be shown that, in the year 1835, the road from Ludlow to Hereford had been changed, which was a great public improvement, but the public did not get the full benefit of it in consequence of the Charlton Arms, an inn belonging to the defendant, being inconveniently placed in respect of the new road; and it would be proved, that, at a meeting of the old corporation, on the 28th of October, 1835, they came to a resolution to offer the defendant five hundred pounds, if he would alter the site of the Charlton arms, and also alter a road near it, so as to complete the improvement made by the new Hereford road. This proposal was acceded to by the defendant, who took down a part of the inn, and rebuilt it on a different site, and also altered the road according to the plan proposed.

It was proved by Mr. Sankey, who was high bailiff of Ludlow, in 1834 and 1835, that the alteration of the Hereford road had been made, and that at the meeting of the old corporation, on the 28th of October, 1835, (the 28th of October being the charter-day,) a resolution was come to respecting the Charlton Arms.

*Tufourd*, Serjt., called for the book in which this resolution was entered.

*Ludlow*, Serjt., for the plaintiffs.—We admit the notice to produce, but it must be shown that the books are with us.

GURNEY, B.—I think that *primâ facie* the present corporation must be presumed to have the possession of the books of the old corporation.

Mr. Sankey, in answer to questions put by *Ludlow*, Serjt., said, “The books are in Chancery; the old corporation lodged them at a banker’s in Ludlow, just before our civil death; we did it to keep them under our control.”

GURNEY, B.—This puts them out of the possession of the plaintiffs.

*R. V. Richards*, for the defendant.—The rights of the old corporation are transferred to the new corporation; and is not the present like the case of a partner, who is not a party in the action, having removed the books? in which case I submit, that notice to produce given to the partners who were parties to the action would be sufficient.

GURNEY, B.—It strikes me that that is hardly so; you call on the new corporation to produce something which they not only have not got, but which your witness says was kept out of their power. Show me that the plaintiffs have a control over these books, and can produce them, and I shall have no difficulty.

Mr. George Smith was called. He said, “I am the agent of the defendant’s attorney. I produce a petition to the Lord Chancellor respecting the production of these books. It was opposed on behalf of the corporation of Ludlow.”

*Ludlow*, Serjt.—This petition is *res inter alios*.

GURNEY, B., (having looked at the petition.)—The petition states that the books are in the master’s office. The defendant asks their production and the plaintiffs oppose it.

*Ludlow*, Serjt.—This is not a petition between the defendant and the corporation.

GURNEY, B.—The defendant is endeavouring to give secondary evidence, because he cannot give primary evidence; and with this view he wishes to show that he cannot give primary evidence, because you prevent him from having the books here.

*Ludlow, Serjt.*—The petition is presented—In the matter of certain charities.

*Whately*, for the plaintiffs.—The petition is entitled—In the matter of certain charities, and in the matter of the 5 & 6 Will. 4, c. 76, (the municipal corporation act;) and it states that the clerk of the master declines to produce the books on this trial, without an order of the court, or the consent of the new corporation. This is all that is alleged in the petition. Mr. Smith says the petition was opposed, but that is no proof that it was opposed by us.

*GURNEY, B.*—Mr. Smith said that it was opposed on the part of the corporation of Ludlow—I must receive the petition in evidence.

In answer to further questions, Mr. George Smith said, “I was in court when the petition was heard before the Vice-Chancellor, on the 14th of March. Mr. Kindersley appeared, and opposed it for the corporation.”

The petition was received. It was entitled—In the matter of several of the Ludlow charities, (naming them,) and in the matter of the 5 & 6 Will. 4, c. 76, (setting out its title.) It stated that this cause was at issue, and stood for trial at the present assizes; and that these books were material evidence for the defendant, and prayed that the clerk of the master should attend with them at these assizes.

The order was put in: it recited the petition, and “counsel for the petitioners and counsel for the corporation of Ludlow attending,” it ordered that the petition should be dismissed with costs.

*R. V. Richards* proposed to ask Mr. Smith what the Vice-Chancellor said in giving judgment, but afterwards withdrew the question.

*Ludlow, Serjt.*—Is the paper put in as the Vice-Chancellor’s order—the original order?

Mr. George Smith.—“I obtained it myself from the registrar’s office. It is an order in the usual form, obtained in the usual manner. I received it from the registrar as the Vice-Chancellor’s order.”

*Ludlow, Serjt.*—The order should have been examined with the original book.

*GURNEY, B.*—No: what the registrar delivers out is the order.

*Ludlow, Serjt.*—Does your lordship consider this as sufficient proof of the order?

*GURNEY, B.*—Certainly.

*Talfourd, Serjt.*—I propose to ask the contents of the resolutions of the corporation of the 28th of October.

*Ludlow, Serjt.*—I submit that that evidence is not receivable. The old corporation deposit the books with a banker—they then get to the Court of Chancery, and are lodged in the master’s office—the master’s clerk declines to produce them without the consent of the corporation or an order of the Court of Chancery, and a petition is presented, which is dismissed.

*GURNEY, B.*—The counsel for the corporation resisting it.

*Ludlow, Serjt.*—That evidence was withdrawn.

*GURNEY, B.*—The fact, that the counsel for the corporation appeared and resisted the petition, is proved. That is quite different from hearing all that was said.

*Ludlow, Serjt.*—From the order it does not appear that Mr. Kindersley did more than appear and refer himself to the court. How can we be said to be in any default from the non-production of the books, when

a court of competent jurisdiction has said they should not be produced? The most that can be said is, that the corporation would not consent to a production which the Vice-Chancellor would not order. And why did the defendant not subpœna the master's clerk to produce the books? and if the master's clerk had produced the books on a subpœna duces tecum, no secondary evidence would have been necessary.

*Whateley.*—These books never were in the possession of the plaintiffs; and it might be, that they would not consent to the prayer of the petition without the defendant's undertaking to pay the costs of bringing them down. If a subpœna had been served on the master's clerk, the judge at the trial would have decided whether the books ought to have been produced or not. It is clear from the dismissal of the petition with costs, that the Vice-Chancellor thought that the plaintiffs were not to blame.

GURNEY, B.—In this case the defendant has done all that he can to obtain the books. I do not think it is for a plaintiff to go into the Court of Chancery to oppose the production of books, and then come to the Assizes and oppose the reception of secondary evidence because the books are not produced. I shall receive secondary evidence.

Mr. Sankey was recalled to prove the contents of the resolutions. He stated that there was no stamp on the book.

*Ludlow, Serjt.*, objected that the book should have been stamped.

GURNEY, B.—I will receive the evidence, subject to the objection as to the stamp.

It appearing afterwards that Mr. Sankey had never seen the original book, it was proved by Mr. Downes, the present town clerk of Ludlow, that the resolution was in the following terms: (he asking for a printed copy of the entry in the book, which was given to him by *Tulfourd, Serjt.*, instead of his stating the contents of the resolutions from memory.) The resolution was as follows:—

“28th October, 1835.

“Resolved—That £500 be paid to Mr. Charlton to alter the Charlton Arms Inn according to the plan produced by Mr. Atkins, if he will give his consent to the alteration.

“Mr. Charlton then addressed the meeting, and stated that he had no objection to the Charlton Arms Inn being altered according to the plan produced, and on receiving £50 to alter the present road to the stables, if Mr. Stead thought that such sum would be necessary to make a convenient approach to the stables.

“The thanks of the meeting were then given to Mr. Charlton for the readiness he has shown to accommodate the public.”

It was proved that the defendant had made the alterations at the Charlton Arms and at the road, which were finished early in the year 1836, the expense being above £500.

With respect to the payment of 75*l.* 13*s.* 5*d.* for the half-year's rent, paid on the 31st of March, 1836, Mr. Morris was called. He said: “I was secretary to the late corporation as charity trustees; I was appointed on the 27th January, 1836; the old corporation continued to act as charity trustees till October, 1836.(a) In March, 1836, Mr. Charlton paid me rent, and I gave him a receipt. The new corporation had come into office on the 26th of December, 1835, but those who had been the

(a) Under sect 71 of the Municipal Corporation act, 5 & 6 Will. 4, c. 76.

old corporation continued to act as charity trustees till the October following; the Foldgate Farm is a charity estate."

*Ludlow*, Serjt.—The receipt of the charity trustees is no evidence against the new corporation. They were not then the old corporation, as that was defunct. They are not the new corporation, but quite a distinct body.

*Talfourd*, Serjt.—The present plaintiffs are now the representatives of the old corporation, and in that character only can they sue here at all. The old corporation were to continue trustees of the charities after they ceased to be the corporation.

GURNEY, B.—This was a lease granted by the old corporation. It was a grant of charity land. It is rather a nice point; but, as the legislature continued the old corporation as charity trustees, I think that during the time that they were so continued trustees, they had a right to receive the rents of the charity estates.

*Ludlow*, Serjt., addressed the jury for the plaintiffs.

GURNEY, B. (to the jury).—The only question I can leave to you is, whether there was a contract between the old corporation and Mr. Charlton, which he has performed on his part. You will therefore say whether the corporation agreed to pay the defendant £500 to alter the Charlton Arms, and whether he has done so. The third plea is not proved. The defence, therefore, rests on the set-off as to all but the 7*5*l. 13*s.* 5*d.*, and the question is, whether, if Mr. Charlton had brought an action, he could have recovered.

The foreman of the jury—"We find that the agreement was made, and that Mr. Charlton performed it."

GURNEY, B., directed a verdict to be entered for the plaintiffs for £300, being the balance of the rent after deducting the 7*5*l. 13*s.* 5*d.* paid to Mr. Morris; his lordship giving *Talfourd*, Serjt., leave to move to enter a verdict for the defendant, if the Court of Exchequer should be of opinion that the resolutions contained in the corporation book did not require a stamp.

*Ludlow*, Serjt., and *Whateley*, for the plaintiffs.

*Talfourd*, Serjt., *R. V. Richards*, and *F. V. Lee*, for the defendant.

In the ensuing term, *Talfourd*, Serjt., applied to the Court of Exchequer, in pursuance of the leave given, for a rule to show cause why the verdict should not be entered for the defendant, or why there should not be a new trial on payment of costs, to give the defendant an opportunity of getting the resolution stamped. The Court granted a rule to show cause, which after argument was discharged, upon the ground that the resolution of the corporation was not valid, it not being under the corporate seal—the court gave no opinion on the question of the stamp.

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#### DAVIES v. DAVIES.—p. 252.

On an application for a new trial, one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office-copy of her affidavit, which was ordered by a judge's order (in the usual form) to be admitted as a true copy:—*Held*, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon.

THIS was a new trial of the case reported ante, p. 47.

One of the witnesses for the defendant was his sister Eliza, who was

examined on the former trial, and also made an affidavit for the defendant, in showing cause against the rule for a new trial in the Court of Exchequer.

*Tulfourd*, Serjt., for the plaintiff, put an office copy of the affidavit made by the witness in the Exchequer into her hand, and proposed to cross-examine her upon it.

*R. V. Richards*, for the defendant.—To entitle the other party to cross-examine upon an affidavit, the original affidavit must be put into the hand of the witness.

*Tulfourd*, Serjt., put in the following order to admit, made by the Lord Chief Justice TINDAL:—

*“ Davies v. Davies.*

“ Upon hearing the attorneys or agents on both sides, and by consent, I do order that the defendant at the trial of this cause hereby make the admissions specified in the notice, served by the plaintiff’s attorney or agent upon the defendant’s attorney or agent, dated the 7th of March, 1840.

“ Dated the 12th of March, 1840.

N. C. TINDAL.”

To this order was annexed a notice to admit, which was dated the 7th of March, and was in the following form:—“ Take notice, that the plaintiff in this cause proposes to adduce in evidence the following documents hereunder specified, and that the same may be inspected by the defendant, his attorney or agent, at my office, &c., on, &c., and that the defendant will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies, and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.” Dated, &c.

<i>Description of Documents.</i>	<i>Date.</i>	<i>Original or Duplicate served, sent, or delivered, when, how, and to whom.</i>
Affidavit of Elizabeth Howells, sworn in this cause, and filed in the Court of Exchequer of Pleas.	1839. 14th Nov.	Office copy.
Affidavit of Eliza Davies, sworn in this cause, and filed in same court.	15th Nov.	Office copy.

*R. V. Richards*.—This is only an order to admit the copy, “ saving all just exceptions to the admissibility of all documents as evidence in this cause.” Those are the very words of the notice to admit.

*Tulfourd*, Serjt., for the plaintiff.—But the notice also states that the defendant will be required to admit “ that such as are specified as copies are true copies.” In the case of *Highfield v. Peake*, M. & M. 109, on the trial of an issue out of Chancery, an examined copy of the deposition of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue ;

and if an examined copy of the deposition was receivable in that case, I submit that an office copy admitted to be a true copy under the judge's order would be receivable here.

GURNEY, B.—I think that I ought to allow the cross-examination from the office-copy.

*Tulfourd*, Serjt., cross-examined from the office-copy of the witness's affidavit.

Verdict for the defendant.

*Tulfourd*, Serjt., *Carrington*, and *Thomas*, for the plaintiff.

*R. V. Richards* and *Whateley*, for the defendant.

DOE, on the Demise of HADEN and Another, *v.* BURTON.—p. 254.

In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of the defendant.

If A. be put into possession of a cottage by parish officers, and the lord of the manor prevail on A. to give up the possession of the cottage to him, and the lord of the manor put B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as under these circumstances neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it.

EJECTMENT to recover a cottage situate at Donnington.

It was opened by *R. V. Richards*, for the plaintiffs, that the cottage in question was a parish-house, which had belonged for many years to the parish of Donnington, and had been repaired by them; and that the parish officers had put a pauper family, named Burchall, into the cottage; and that Mr. Bishton, who claimed to be lord of the manor, had prevailed on them to go to another cottage, and he had put the present defendant into this cottage. Upon this state of facts he submitted, that Mr. Bishton, coming in under a person put in by the parish officers, could not dispute the title of the parish officers, and that the defendant coming in under Mr. Bishton could not set up any defence which Mr. Bishton could not set up. He cited the cases of *Doe*, on the demise of *Bullen v. Mills*, (a) and *Doe*, on the demise of *Knight v. Lady Smythe*. (b)

It was proved that the parish officers had put paupers into the cottage, and removed them from it, and had done repairs; and that in the year 1825 Burchall and his family were put in by the overseers. It was also

(a) 2 Ad. & El. 17. In that case, premises, being in possession of a tenant under a lease, a party claiming them by an alleged title adverse to that of the lessor, and prior to the lease, demanded them of the lessee, and obtained possession by paying him £20. The lessor brought ejectment against the person so in possession, the term having been forfeited, and it was held that the defendant could not set up his adverse title against the landlord.

(b) 4 M. & S. 347. In that case the person in possession had come in under an agreement with the lessor of the plaintiff, and had paid rent to him, and afterwards disclaimed: it was held, that a third person could not defend as landlord, and dispute the lessor of the plaintiff's title; and BAYLEY, J., said, "the tenant should have given up the possession to Knight, and the defendant, if she has title, might have maintained her ejectment."

proved by the widow of Burchall, that she gave up the cottage to Mr. Bishton, who put her into a cottage he had recently built.

It was opened by *Talfourd*, Serjt., for the defendant, that Burchall and his family were put in by the parish officers, and Mr. Bishton, as lord of the manor, jointly, and that the cottage was originally built by Mr. Bishton.

On the part of the defendant, Mr. Nicholson was called. He stated that his grandfather (now deceased) had been a builder, and he produced his grandfather's books.

*Talfourd*, Serjt., proposed to put in an entry in the deceased Mr. Nicholson's books, to show that he had built this cottage, and that Mr. Bishton had paid him for so doing. He cited the case of *Rex v. Inhabitants of Hendon*, in which Lord DENMAN allowed the books of a deceased person who repaired a bridge, to be given in evidence, to show that the parish had paid him for so doing.

*R. V. Richards*.—The principle on which entries of this kind are admitted is, that by making the entry the person charges himself to some other person; and the courts began by admitting the entries of deceased stewards and receivers who, by their entries, charged themselves to their employers. In later cases the courts have, under particular circumstances, gone further. In the case of *Higham v. Ridgway*, 10 East, 109, on a question as to the day on which a child was born, the books of a deceased accoucheur, with the entry marked "paid," were received as evidence of the time of the birth; and in the case of *Doe* on the demise of *Patteshall v. Turford*, 3 B. & Ad. 890, and *Poole v. Dicus*, ante, vol. 7, p. 79; and 1 Scott, 600, entries of deceased clerks of business done in attorneys' offices (in the one case the service of a notice to quit, and in the other the making of a tender) were received in evidence. But this is a mere entry of a tradesman in his own book that he has received this money; and if this entry were evidence, the books of every tradesman would be evidence for and against third persons as soon as he was dead.<sup>(a)</sup> In the case of *Doe*, on the demise of *Gallop, v. Vowles*, 1 M. & Rob. 261, it was held, that a deceased tradesman's bill for repairs, with his receipt thereon, was not evidence of the work having been done for the person charged, though the paper was found among the other papers of the person charged; and Mr. Justice LITLEDALE said, "The cases have gone quite far enough. There would be no limit if such a paper as this were admitted."

GURNEY, B.—I have great doubt about this being evidence. I think I ought not to receive it.

The evidence was rejected.

Evidence was given with a view of showing that Burchall and his family were put into the cottage by Mr. Bishton and the parish officers jointly, but upon this part of the case the evidence was contradictory.

GURNEY, B. (in summing up).—The plaintiffs, who are parish officers, seek to recover in this case, because, as they say, they have from time to time put paupers to reside in this cottage, and put in some persons of the name of Burchall, who continued to reside there till Mr. Bishton induced them to leave, and give up the cottage to him. If these persons

(a) As to the reception of entries in the books of deceased rectors and vicars, as evidence for their successors, see *Phill. on Evid.* ch. 7, s. 7.

were put into the cottage by the parish officers, they could give no better title than they themselves had, and Mr. Bishton could set up no defence which they could not; and if the defendant was let into possession by Mr. Bishton, the defendant can set up no title which Mr. Bishton could not. The case for the defendant is, that Mr. Bishton being in possession of the cottage, he and the parish officers jointly put in the Burchalls. Upon that part of the case the evidence is contradictory. If Mr. Bishton and the parish officers did jointly put the Burchall family into the house, Mr. Bishton and those who claim under him will be entitled to contest the right of the parish; but if the parish officers alone put in the Burchall family (and it is conceded that the parish officers repaired), and Mr. Bishton did not as a matter of right concur in the putting of them in, he cannot in this ejectment contest the title of the parish. However, it is still open to him to bring his ejectment against the parish officers and recover the cottage, if he has really a better title than they have.

Verdict for the plaintiffs.

*R. V. Richards, Whateley, and Browne*, for the plaintiffs.

*Talfourd, Serjt., and W. J. Alexander*, for the defendant.

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(Crown Side.)

BEFORE MR. JUSTICE PATTESON.

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REGINA v. THOMAS JONES.—p. 258.

Whether, on a count charging a shooting with intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued:—

*Quære?* But if it be necessary that the jury should be satisfied of the intent; the circumstance that it would have been a case of murder if death had ensued, would of itself be a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts.

A. was night-poaching in a wood belonging to B., and B. came up to A. and presented a pistol at him, saying, "Damn you, surrender;" A. said, "Now, don't you," and raised an air-gun, and discharged it, and wounded B.

*Seemle*, that if B. had died, it would not have been a case of murder.

SHOOTING.—The indictment charged the prisoner with having, on the 17th of December, 1839, shot at Robert Chambre Vaughan, Esq., with a certain air-gun, "charged and loaded with air and a leaden ball," with intent to murder him. The indictment also contained counts charging intents to disable, to disfigure, and to do grievous bodily harm.

On the part of the prosecution, Mr. Vaughan was called: he said—"I reside at Burlton Hall, in this county; I had a gamekeeper named Capp, I, on the night of the 17th of December, in consequence of information, went to a cover on my estate; it was about ten o'clock at night; I con-



cealed myself in some fern in the cover, and heard an air-gun discharged twice; there are pheasants in the cover; I sent Capp to the outside of the cover, and heard a noise of some one coming through the underwood; I looked out, it was a bright clear moonlight night, and I saw a man coming through the underwood at a distance of about 100 yards from me; he got into a path out of my sight; I left my place of hiding, and got into the path, and he was about twelve yards from me; he stopped, and I advanced towards him; I looked at him carefully, and got within a distance of from four to six yards from him; he had a dark velvet:en jacket and breeches, and leggings, or gaiters; I saw his face; I do not swear the prisoner is the man, but I firmly believe him to be so; I commanded him to surrender; my expression was, 'Damn your blood, surrender, Sir!' I presented my pistol at him; he said, 'Now, don't you;' and he raised his air-gun, and discharged it; the ball struck my left shoulder; I staggered, and my right arm dropped; I raised my pistol again, and fired at him; the path is a private path for me and my keepers; the nearest public path is nearly, but not quite, a quarter of a mile off; I was attended by Mr. Gwynne, the surgeon; I did not come down stairs till the 4th of January; I had not known the prisoner before; I saw him on the 4th of January; he was brought into my dining-room; he had then a rough blue coat on; he spoke, and his voice corresponded as well as his person with that of the man I saw in the wood."

In his cross-examination, Mr. Vaughan said—"The cover is about ten acres; I said, 'Damn your blood, Sir, surrender,' in a loud and angry tone, I believe; the place is a quarter of a mile from any house; I wore a shooting jacket.

Other evidence was also given to show the identity of the prisoner.

*J. G. Phillimore*, for the prisoner, submitted, with respect to the first count of the indictment, which charged an intent to murder, that, to support a count charging an intent to murder, the jury must be satisfied that a positive intention to murder existed in the mind of the prisoner at the time of the commission of the offence; and that it was not enough that the offence would have been murder if death had ensued.

PATTESON, J. (in summing up).—It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. Vaughan had died, this would have been a case of murder.(a) (On the other counts, his lordship left the case to the jury, as a mere question of identity.)

Verdict—Not Guilty.

*F. V. Lee*, for the prosecution.

*J. G. Phillimore*, for the prisoner.

(a) In the case of *Reg. v. Cruise*, ante, vol. 8, p. 541, which was an indictment against husband and wife, on the stat. 1 Vict. c. 85, s. 2, for inflicting an injury dangerous to

life, *with intent to murder*, Mr. Justice PATTESON said, "Before you can find the prisoner, Thomas Cruse, guilty of this felony, you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient unless he actually intended to commit murder." So in the case of *Reg. v. Hill*, ante, vol. 8, p. 274, which was a case of uttering a forged bill of exchange, Baron ALDERSON said, "A man must be taken to intend the consequences of his own acts, and must intend to defraud if he pays another a false note instead of a real one;" and the fifteen judges held that the direction of the learned Baron was right. In the case of *Reg. v. Beard*, ante, vol. 8, p. 143, which was a case of uttering a forged acceptance on a bill of exchange, Mr. Justice COLERIDGE said, "As to the intent, I must tell you, that every man is taken to intend the natural consequences of his own act;" and in the case of *Reg. v. Cooke*, ante, vol. 8, p. 582, which was also a case of uttering a forged acceptance, Mr. Justice PATTESON said, "If the prisoner, at the time he uttered this bill, knew that the acceptance was forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is, that he intended to defraud. That was the opinion of the judges in a late case [the case of *Reg. v. Hill*], reserved for their consideration."

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## HEREFORD ASSIZES.

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(Civil Side.)

BEFORE MR. JUSTICE PATTESON.

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### DELAMOTTE v. LANE.—p. 261.

In an action for a quarter's salary, for taking away a child from a school without a quarter's notice, evidence was given on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—

*Held*, that this evidence was not admissible: but that the witness might be asked, whether she had ever received any prospectus when her children came home for the holidays.

ASSUMPSIT by the plaintiff, who was a schoolmistress, to recover a quarter's salary for taking away the defendant's children without giving a quarter's notice.—Plea, non-assumpsit.

The plaintiff, in order to prove that the terms of the school were known to the defendant, gave evidence that a prospectus had been given to him when he called to inquire the terms of the school; and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays. On the part of the defendant, a witness was called, by whose evidence it was proposed to prove that *she* had taken away *her* children without notice, and without being called upon to pay the quarter's salary.

*Talfourd*, Serjt.—I submit that this is not evidence.

*Ludlow*, Serjt.—I put it, that it is evidence to show that the plaintiff did not contract *generally* in the way in which she says she did.

PATTESON, J.—I think the evidence is not admissible; but you may show that the witness never received any prospectus; because that goes to show that the usual course was not such as is set up on the part of the plaintiff.

The witness then stated that she had never received any prospectus.

Verdict for the plaintiff.

*Talfourd*, Serjt., *R. V. Richards*, and *W. H. Cooke*, for the plaintiff.

*Ludlow*, Serjt., and *Greaves*, for the defendant.

### WHEELER v. WHITING.—p. 262.

A. telling a policeman to take charge of B., is the same as his telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A.

*Semble*, that in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff was there making a great disturbance, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad.

ASSAULT and false imprisonment.—Pleas, 1st, to the whole declaration, not guilty; 2d, as to the assault and battery, that the defendant was possessed of a house, and that the plaintiff made a disturbance there, and refused to depart when requested so to do, wherefore the defendant laid hands on him and put him out; 3d, as to the assault and battery and part of the imprisonment, that the defendant was possessed of a house, and that the plaintiff was and continued in it making a great noise and disturbance, and refused to depart when requested so to do, “and was then in great heat and fury, ready and desirous to make an affray, and cause and commit a breach of the peace there, whereupon the defendant, in order to prevent such affray and preserve the peace, and restore good order and tranquillity in his said house, gave charge of the plaintiff to William Evans, then being a policeman and police constable of the town of Monmouth, and then requested the said W. E. to take the said plaintiff into his custody, to be dealt with according to law; and the said W. E. then being such policeman and police officer as aforesaid, then having view of such conduct and behaviour, and heat and fury of the plaintiff as aforesaid, then gently laid his hands on the plaintiff, and did then take the plaintiff into his custody,” &c.

On the part of the plaintiff, William Evans was called: he said, “I am a policeman at Monmouth; the defendant keeps the Beaufort Arms Hotel; on the 3d of October, between eight and nine in the evening,

Thomas Jones, the boots at the Beaufort Arms, came to fetch me; in the hall of the Beaufort Arms I found the plaintiff and defendant, and Mr. Lawrence; the defendant said, 'Policeman, take that man in charge,' pointing to the plaintiff; I said I thought I could not do so, as I had not seen him do anything; the plaintiff was claiming a debt from Mr. Lawrence, and said he would expose him; Mr. Lawrence was going up stairs, and the plaintiff followed him and said he would follow him into every room in the house; the defendant said, 'Policeman, do your duty;' Mr. Lawrence and the plaintiff had gone up the stairs about five steps, when boots pulled the plaintiff by the skirts of his coat, and got him down into the hall again; I said, 'If I take him I must claim assistance,' and the defendant ordered boots to assist me; boots and I took the plaintiff to the station-house, and I locked him in; the defendant afterwards said that the plaintiff had been knocking up a great row at his house, but if it was guaranteed that he would not disturb his house, he should be liberated; I then went to the station-house and let the plaintiff go; the plaintiff had been there thirty or thirty-five minutes."

*Ludlow*, Serjt., for the defendant, in addressing the jury, submitted, that with respect to the turning the plaintiff out of the house, the defendant was justified in doing it, as the plaintiff was making a disturbance, and would not depart when requested to do so; and with respect to the imprisonment, he stated that it had not been ordered by the defendant, and even if it had, the defendant would be justified, as it would be shown that the plaintiff was desirous of making an affray in view of the police officer, and was therefore given in charge.

For the defendant, Mr. Lawrence was called: he said, "I was dining at the Beaufort Arms on the 3d of October; it was the second race day; I received a note and a message from the plaintiff; I went down stairs, and said that if he would speak to me, we had better walk into another room; he said there was no need of that; we went into a room and he said, 'Do you mean to pay me for those empty sacks?' I said I did not owe for any, and referred him to Messrs. Sparkes and Bruffham, to whom I had let my mill; he said, 'I look to you;' I said, 'If you think you have a right against me, you can bring an action if you choose;' he said he would have the money before he left the room; he said this in a loud tone, and I said, 'Mr. Wheeler, you are conducting yourself like a black-guard;' 'Blackguard!' he replied in a loud voice, 'damn your eyes, I'll knock you down;' he held his fist over my head; he said I should not leave the room till I paid him; however, he let me pass him, and said, 'Very well, I will go with you, if you go to hell;' I was proceeding up stairs, and not wishing for a disturbance, I said to Mrs. Whiting, who was at the bar door, 'I appeal to you for protection;' the plaintiff then said, 'I will go and show you up before your grand friends, I don't care a damn for you nor them either;' I begged the servants who were there to send for a policeman; the defendant then came in at the front door, and asked what was the matter? I said, 'Mr. Wheeler is making a disturbance, and I appeal to you for protection;' the defendant said to the plaintiff, 'You must not make a disturbance, and you must not go up stairs;' the plaintiff said he would, and that I was a swindler and a robber, and he held his fist over me; the defendant said, 'You shall not go up stairs, Mr. Wheeler;' and the plaintiff replied, 'I will go into every

room in your house in defiance of you:' the policeman then came in, and I desired him to take the plaintiff in charge; a scuffle ensued, and the defendant said, 'If you don't go out of the house peaceably, I will turn you out,' and the defendant then ordered the policeman to do his duty; he said, 'Do your duty, I won't have a disturbance in this house;' the plaintiff was then taken from the house; the high sheriff, Sir Benjamin Hall, and the principal men of the county were dining up stairs; the defendant did not order the plaintiff to be taken to the station-house, and I never knew that he had been taken there till about a week ago; I do not consider that I owe the plaintiff anything, but he has brought an action against me."

PATTESON, J. (in summing up).—I think that the third plea is not good, and I certainly never saw such a plea before. The landlord of an inn or a public-house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did (even according to the evidence of his own witness), is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out by force, and may call in his servants to assist him in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law. But, although it would be no part of a policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do. I think that the defendant was quite justified in having the plaintiff turned out of the house; but to give him in charge to a policeman "to be dealt with according to law," is a very different thing. Telling a policeman to take charge of him is the same as telling the policeman to keep him in custody. Now as to the imprisonment, the defendant pleads that the plaintiff was making a disturbance in the house, and ready and desirous to commit a breach of the peace, whereupon he gave him in charge to the policeman, to be dealt with according to law; the policeman, however, was not justified in taking him, unless he saw some breach of the peace committed: on a charge of felony it would be different. There are several questions in this case:—1st. Did the defendant cause the plaintiff to be assaulted and turned out of the house? it is plain that he did; 2d. Was the plaintiff conducting himself in an improper manner and disturbing the quiet of the house, and did the defendant desire him to leave, and on his refusal to do so put him out? On this question it is proved by the plaintiff's own witness that the plaintiff was so conducting himself, for even if the plaintiff had been ill used by Mr. Lawrence, he was not justified in saying he would follow him into every room in the house, and if he did so say, the landlord had a right to tell him to leave the house and insist on his doing so. Then, did the defendant request the plaintiff to depart before force was used? It is essential to the defence that that should be shown, for although a person be in the house of another and misconducting himself, the owner has no right to turn him out by force, without first requesting him to depart. With respect to the imprisonment, you will consider whether the defendant ordered the policeman to take the plaintiff. The policeman says he did, but it is

said on the other side, that the defendant did not tell the policeman to take the plaintiff to the station-house. That may be; but if you give a person in charge to a policeman, you do not tell the policeman what he is to do with him; and you will also consider whether the plaintiff was intending to commit a breach of the peace, as stated in the last plea. I think that that plea is not good in point of law, but as the plaintiff has taken no objection to it in point of law, but has denied it to be true in point of fact, I shall take your opinion upon it in point of fact, leaving the Court of Queen's Bench to deal with it hereafter.

Verdict for the plaintiff on the general issue, and on the 3d plea with £5 damages, and for the defendant on the 2d plea.(a)

*C. Phillips* and *Greaves*, for the plaintiff.

*Ludlow*, Serjt., and *Whateley*, for the defendant.

(a) See the cases of *Moriarty v. Brooks*, ante, vol. 6, p. 684, (25 E. C. L. R. 597, Id. 617,) and *Howell v. Jackson*, Id. p. 723.

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(Crown Side.)

BEFORE MR. BARON GURNEY.

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REGINA v. NICHOLLS.—p. 267.

If a prisoner be indicted for any felony which includes an assault, he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad.

On a charge of feloniously cutting with intent to do grievous bodily harm, it is immaterial whether, if death had ensued, the crime would have been murder or manslaughter.

CUTTING.—The 1st count of the indictment charged the prisoner with cutting to intent to maim.

2d, to disfigure; 3d, to disable; 4th, to do some grievous bodily harm.

It appeared that the prosecutor having interfered to prevent the prisoner and another boy from fighting, the prisoner stabbed the prosecutor.

*Greaves*, in addressing the jury, submitted, that although it might have been the intention of the legislature to make stabbing an offence, where, if death had ensued, the crime would only have been manslaughter, still they had not carried their intent into effect, for as the word "maliciously" was in the new enactment, it must still appear that it would have been a case of murder if the party had died; and he referred to the cases decided on the Coventry act, (22 & 23 Car. 2, c. 21,) as authorities to show that the offence was still the same under the 9 Geo. 4, c. 31. He submitted, also, that at all events there was no evidence to prove the first three counts.

GURNEY, B., left the case to the jury upon the last count of the indictment, and said, "I am clearly of opinion that the act applies to all cases, whether, if death had ensued, it would have been murder or manslaughter. It was the very object of the legislature that it should do so, and all the judges are of opinion that it does."(b)

The jury found the prisoner guilty of an assault.

(b) See the case of *Reg. v. Griffiths*, ante, vol. 8, p. 248, (34 E. C. L. R. 374.)

*Greaves* then moved in arrest of judgment, and submitted that the last count was clearly bad, and being so, no judgment could be given upon it for the assault.

GURNEY, B.—If there is any one count good, and there is an acquittal upon all, still judgment may be given for an assault. If the record were drawn up, there would be no error on the face of it.

*Greaves*.—My point is, that there would—for that if the record were drawn up, it would state that the jury found that the prisoner was not guilty altogether on the first three counts, and not guilty of maliciously cutting, but guilty of an assault on the last count; and then, if the last count was bad, judgment would be reversed on error. It is just like the case of burglary, where the jury acquit of the burglary, but find guilty of larceny; and then, if the count be bad, no judgment can be given for the larceny.

GURNEY, B.—I am clearly of opinion the objection is not valid.

Sentence was passed on the prisoner for the assault.(a)

*Lee Warner*, for the prosecution.

*Greaves*, for the prisoner.

(a) It is worthy of observation, that in the stat. 1 Vict. c. 85, the different sections vary with respect to the words "unlawfully and maliciously;" s. 2 omits both "unlawfully" and "maliciously;" s. 3 also omits these words; s. 4 has them in the beginning of the clause, but omits them before the word "stab." They occur in s. 5, and the word "maliciously" is omitted in s. 6. If the different wording of the clauses is to have any different effect, the point might still arise in the case of shooting with intent to maim, &c., under s. 4.

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## MONMOUTH ASSIZES.

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(Civil Side.)

BEFORE MR. BARON GURNEY.

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EVANS v. PHILLPOTTS, Gent., one, &c.—p. 270.

A., an attorney, caused B. to be subpoenaed as a witness in a cause in which A. was attorney, and B., before he went to the Assizes, asked A. who was to pay him? and A. said he would do so. After the Assizes, at which B. attended and was examined, A.'s clerk, by the direction of A., gave B. an I O U for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party after the costs in the cause had been taxed:—*Held*, that B. might recover the amount from A. on a declaration containing counts for money had and received, and on an account stated.

An I O U which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relate to an amount under £20.

DEBT for money had and received, with a count upon an account stated. Pleas—1st, *nunquam indebitatus*; and 2d, to 15*l.* 3*s.*, parcel of the debt, payment.

It was opened by *Talfourd*, Serjt., for the plaintiff, that the plaintiff was a master tailor carrying on business at Newport, the defendant being an attorney in the same town, and that the present action was brought to recover the sum of 15*l.* 3*s.*, for the plaintiff's journey and

attendance as a witness in a cause of "*Barnard v. Jones*," which was tried at the Kent Summer Assizes of 1838. Mr. Frankis, the original attorney for the defendant in that cause, had died, and it being material to prove that the John Jones who was sued was not the John Jones who had given the bill on which the action was brought, the present plaintiff was subpœnaed by the defendant (who had succeeded to the business of Mr. Frankis) to prove that fact, and the defendant had promised to pay the plaintiff, and had been allowed the amount on taxation of costs against the opposite party, the jury having given a verdict for Mr. Jones, the defendant, at Maidstone, they being satisfied that the wrong person had been sued.

On the part of the plaintiff, Mr. W. Thomas Townsend, a late clerk of the defendant, was called. He said: "I am an accountant at Newport. The late Mr. Frankis was an attorney; I was clerk to him; at the time of his death there was a cause in the office of 'John Jones at the suit of Messrs. Barnard;' I know the defendant, who is an attorney; I introduced him to the late Mr. Frankis's clients; the subpœna is filled up as far as the names by me; the rest of the filling up is in the handwriting of Mr. Nicholls, of London, who was the agent of Mr. Frankis, and now of the defendant; an endorsement on it is by Mr. Phillpotts. [It was in these terms:—"3d August, 1838. Served W. A. Townsend personally, by J. G. Phillpotts, jun.""] I served this subpœna on the plaintiff, who is a tailor and draper at Newport; I was then Mr. Phillpotts' managing clerk; I served it by his direction. [The subpœna was read. It was a subpœna commanding the present plaintiff to attend the Kent Assizes at Maidstone as a witness for the defendant in a cause of "*Edward and William Barnard against John Jones*."] The defendant, Mr. Phillpotts, was attorney for Jones; the plaintiff came to my residence on the 3d of August, when Mr. Phillpotts was present; the plaintiff declined to go to Maidstone unless he was satisfied who was to pay his expenses; Mr. Phillpotts said he would pay him every thing that was fair and reasonable; the plaintiff said he would not go so far without money, or knowing who was to pay him; Mr. Phillpotts saw the plaintiff, myself, and Mr. Jones off by the packet to Bristol; the plaintiff said he could disprove the signature to the bill on which Messrs. Barnard sued; the plaintiff was told by Mr. Phillpotts that he would be entitled to his mileage, but no back carriage, and that it was not certain whether it would be 15s. or a guinea a day, and a shilling a mile; the plaintiff said he should be satisfied; as we took leave of the defendant on board the packet, the defendant said that as soon as we came back the plaintiff should be paid his mileage and the guinea a day if he could get it allowed; the plaintiff and myself were examined as witnesses at Maidstone, and the verdict was in favour of the defendant, Mr. Jones; in September the plaintiff applied to Mr. Phillpotts and me, and wished to be paid; Mr. Phillpotts asked him what he supposed he was going to get; the plaintiff said a guinea a day and his mileage; the defendant said he would give him all that was allowed. This paper was written by me; Mr. Phillpotts was present; I wrote it by his dictation; the part down to the signature was written first, in the presence and at the request of Mr. Phillpotts; we were all three drinking gin and water together; the residue of the writing was written down half an hour after; the plaintiff had borrowed a sovereign of me on going to Maidstone; the residue of the writing was added in Mr. Phillpotts's presence."



*Talfourd*, Serjt., proposed to give the paper in evidence. It was as follows:—

“3d Sept., 1838.

“*Jones ats. Barnard.*

	£	s.	d.
“Daniel Evans’s mileage 184 - - -	9	4	0
“Eight days’ time (master-tailor at 15s.) - -	6	0	0
	<hr/>		
	£	15	4 0

“I O U fifteen pounds four, for self and Phillpotts.

“W. M. TOWNSEND.”

“P. S. The above acknowledgment to be deemed as cash; but in case of taxation off, Daniel is to allow accordingly.

“Mr. Phillpotts to pay Townsend a sovereign out of the above, as proposed, leaving 14*l.* 4*s.*; and the odd four bob to be spent among us three.”

*Ludlow*, Serjt., for the defendant.—I submit that the paper is not receivable in evidence without a stamp. It has been held that a mere I O U does not require a stamp, as it is a mere admission of a debt. But this is a great deal more than a mere admission of a debt.

*Talfourd*, Serjt.—Even if it be an agreement, it relates to a sum under £20, and therefore would not require a stamp.

*Ludlow*, Serjt.—That would be so if it was an agreement; but I submit that it requires a promissory-note stamp.

GURNEY, B.—I think it is not a promissory note. I think it may be an agreement; but it is under £20 value.

The paper was received in evidence.

Mr. Townsend further said: “Mr. Phillpotts told me that he had received the money from the other side. This paper [a paper asked for by Mr. Serjt. *Talfourd*, and produced by Mr. Serjt. *Ludlow*] is the bill of costs, and the sums disallowed by the master are on it. A sum of 15*l.* 3*s.* is charged for the plaintiff’s attendance, and no part of it disallowed.”

The bill of costs taxed by the master was put in.

*Ludlow*, Serjt., for the defendant, submitted, that, in point of law, the attorney of a party was not personally liable to pay the witnesses whom he subpœnaed, the party for whom they were subpœnaed being the person liable; and that even if Mr. Phillpotts had received the costs from the opposite attorney, it was his duty to give credit for the whole amount of them to his own client, Mr. Jones; and that there was no privity of contract between the present plaintiff and the present defendant.

GURNEY, B., (in summing up.)—The plaintiff was not bound to go to Maidstone, in obedience to the subpœna, unless he was first paid his expenses; and it appears upon the evidence that before he started the present defendant undertook to pay him; and it also appears that the defendant has received it. That being so, the plaintiff is entitled to recover in this action.

*Ludlow*, Serjt.—Will your lordship allow me to ask, whether you have ruled that there was a privity of contract between the plaintiff and defendant?

GURNEY, B.—Yes; I think there was privity between them.

Verdict for the plaintiff for 15*l.* 3*s.*

*Tulfourd*, Serjt. and *F. V. Lee*, for the plaintiff.

*Ludlow*, Serjt., and *C. Phillips*, for the defendant.

In the ensuing term, *Ludlow*, Serjt., applied to the Court of Exchequer for a new trial, but the court refused a rule.

### REGINA v. VINCENT, FROST, and EDWARDS.—p. 275.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of her majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was a superintendent of police, whether persons complained to him of being alarmed by these meetings.—

*Held*, that the evidence was receivable, and that it was not necessary to call the persons who made the complaints.

**CONSPIRACY.**—The first count of the indictment charged, that, on the 1st of August, 1838, at Pontypool, the defendants, together with divers other evil-disposed persons, did conspire, &c., “to excite discontent and disaffection in the minds of the liege subjects of her majesty, and to excite the liege subjects of her majesty to hatred and contempt of the government and constitution of this realm, and to unlawful and seditious opposition to such government.” In this count four overt acts were charged, which were four meetings at which the defendants spoke, and violent language imputed to them was set out in stating these overt acts.

Second count, for a conspiracy to induce and procure divers large numbers of persons to assemble and meet together, for the purpose of exciting terror and alarm in the minds of the queen's subjects, and by force of such terror and alarm to procure great changes to be made in the constitution of the realm as by law established, and to annoy, alarm, disturb, and prejudice divers subjects of the queen in the peaceable enjoyment of their property. In this count no overt act was charged.

Third count, for an unlawful assembly.

It appeared that the three defendants had attended a series of Chartist meetings at Pontypool, and that at all of them speeches of a violent nature were delivered to large assemblies of persons.

On the part of the prosecution it was proposed to ask Mr. Roberts, the superintendent of police at Pontypool, who attended several of the meetings, whether persons complained to him of being alarmed by these meetings.

*Carrington*, for the defendant Edwards.—I submit that persons who were alarmed should be called to prove that fact, and that what they said to Mr. Roberts is not receivable.

GURNEY, B.—The fact that persons made complaint to the superintendent of police, of alarm occasioned by these meetings, is receivable.

The evidence was received; and Mr. Roberts stated that several per-

sons came to him, and complained that they were alarmed by these meetings, and requested him to send for military assistance.

The jury found the defendants Vincent and Edwards guilty. (*a*) *Talfourd*, Serjt., *R. V. Richards*, and *Whateley*, for the prosecution. *Currington*, for the defendant Edwards.  
The defendant Vincent in person.

See the case of *Regina v. Vincent*, ante, p. 48, and *Regina v. Shellard*, below.

(*a*) Frost was not tried, as he had been found guilty of high treason at the Monmouth Special Commission, ante, p. 129. This indictment had been found at the Summer Assizes, 1839, and was removed by certiorari, and now tried at Nisi Prius by a special jury.

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

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REGINA v. SHELLARD.—p. 277.

A. was charged with having conspired with W. J. and others unknown, to raise insurrection and obstruct the laws. It was proved that A. and W. J. were members of a Chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone:—

*Held*, that on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the race-course to the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction.

If it be shown that depositions were regularly returned by the magistrates to the proper officer, and it be proved by the latter that they cannot be found, after diligent search, the prisoner's counsel may cross-examine from copies of them, those copies being proved to be correct by the magistrate's clerk.

A prisoner's counsel has no right to ask a witness for the prosecution, whether he has *always* told the same story; the question ought to be—"Have you always said so except before the magistrates?"

MISDEMEANOR.—The indictment in this case had been found at the Monmouth Special Commission, when the defendant had pleaded not guilty, and had traversed and entered into recognisances to try at the present assizes, and the indictment was certified by Mr. Bellamy, the clerk of the crown of the Special Commission to the judges of the assizes.

The first count of the indictment charged, that the defendant, on the 1st of October, 1839, and on divers other days and times, at Pontypool, "did conspire, confederate, combine, and agree, together with William Jones, and divers other evil-disposed persons, to the jurors aforesaid unknown, to raise and make insurrections, riots, routs, and seditious and unlawful assemblies within this realm, and to obstruct the laws and government of this realm, and to oppose and prevent their due execution, and to procure and obtain arms for the more effectual carrying into effect their said conspiracy, confederacy, &c.; and in furtherance of the said conspiracy, confederacy, &c., the said W. S. during the time aforesaid, to wit, on the 3d day of November, in the year aforesaid, with force and arms, to wit, at, &c., together with the said W. J. and divers

other persons, to the said jurors unknown, to the number of 2000 and more, unlawfully, seditiously, riotously, and routously did assemble and meet together, armed with guns, &c., and remained and continued so unlawfully and seditiously assembled and met together, armed as aforesaid, for a long space of time, to wit, for the space of forty-eight hours then next following; and during that time made a great riot, rout, and unlawful assembly, and, during the time last aforesaid, attacked and broke open divers dwelling-houses of divers liege subjects of our said lady the queen, in the county aforesaid, and beat, bruised, wounded, and ill-treated divers of the liege subjects of our said lady the queen, then and there being in the county aforesaid, and seized and took from the said last-mentioned subjects and other subjects of our said lady the queen, then and there being in the county aforesaid, divers quantities of arms, to wit, one hundred guns, &c., and therewith then and there unlawfully and seditiously armed themselves, against the peace, &c."

The second count charged, that the defendant together with the said W. J. and the said other evil-disposed persons, did conspire, &c., "to raise and make insurrections, tumults, riots, routs, and unlawful assemblies within this realm, and to obstruct the due execution of the laws and government within this realm." In this count no overt act was charged.

The third count was for a riot.

It was proved that the defendant had been a member of the Chartist Association, and that Jones, the clock-maker, (who was convicted of high treason at the Monmouth Special Commission,) was also a member, and that on the 3d of November, 1839, in the evening, the defendant had been at Jones's house, which was a beer-house at Pontypool, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others. It was then proposed to prove a direction given by Jones in the forenoon of the same day.

*F. V. Lee*, for the defendant, objected that there was not sufficient to connect the defendant and Jones together.

PATTERSON, J.—I think there is, as to any direction respecting the race-course.

The witness then proved that Jones had directed certain parties to meet on the race-course; and the same witness also proved that he went to the race-course, where a number of persons were assembled, having arms, and that he went thence to the New Inn, which was on the road towards Newport from the race-course. It was proposed to prove what Jones said at the New Inn.

*F. V. Lee* and *Keating* objected that at all events any declaration should be confined to the race-course.

PATTERSON, J.—I think the evidence admissible, as it is all part of the same transaction.

It was proposed to cross-examine a witness for the prosecution as to what he said before the magistrates. Mr. Bellamy, the clerk of assize, and who was also clerk of the crown at the Monmouth Special Commission, proved that at the Special Commission the depositions of the witnesses taken before the magistrates had been frequently produced, and that they had been mislaid, and that diligent search had been made several times for them, and they could not be found; and that he had inquired for them since from Mr. Maule, the Solicitor of the Treasury, and could not get them. Mr. Edwards, the clerk of the magistrates, proved

that depositions were regularly taken and returned, and that a copy produced by the prisoner's attorney was a correct copy.

PATTESON, J.—I think the copy of the witness's deposition may be read.

The witness had been asked whether he had always told the same story.

PATTESON, J.—That is an irregular question. I have constantly said, and always mean to say, that is an irregular question, because it includes the time before the magistrates as well as other times. The question ought to be—Have you always said so except before the magistrates?(a)

Verdict—Guilty.

*Ludlow*, Serjt., and *Whateley*, for the prosecution.

*F. V. Lee* and *Keating*, for the defence.

(a) See the case of *Regina v. Holden*, ante, vol. 8, p. 606, (34 E. C. L. R. 547.)

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## GLOUCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

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### REGINA v. PULHAM, SMITH, WASLEY, THOMAS, and WHITE.—p. 280.

Three persons were charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods. The principals were acquitted:—*Held*, that the receivers might be convicted on the last two counts of the indictment.

**LARCENY.**—The indictment charged the first three prisoners with stealing a carpet-bag and a number of articles therein contained, the property of John Davenport, and charged the last two prisoners, Thomas and White, with receiving *separately* certain of the goods so stolen as aforesaid; and there were also two counts, one of them charging each of the last-mentioned prisoners with a substantive felony in *separately* receiving portions of the same goods.

The jury acquitted the three principals, but found the two receivers guilty on the last two counts.

*Keating*, for the prisoner Thomas, moved in arrest of judgment.—The principals being acquitted, the accessories cannot have judgment given against them; whatever might be the case if the receivers had been separately indicted, upon this indictment they cannot receive judgment, as all the principals have been acquitted. It is quite clear that a larceny committed by another person could not have been given in evidence upon the trial of this indictment, for that would be trying two felonies on the same indictment; and although it has been held, that a count for a substantive felony may be joined in the way in which these

counts are in this indictment,<sup>(a)</sup> still the receiving must be the receiving of stolen goods of which the principals were the stealers. The ordinary form of the count against a receiver used to allege the receiving to be *from* the principal, and the substantive count is introduced to prevent an acquittal, if it should turn out that the receipt was not from the principal but from some other person, but still the principal must be proved to have committed the felony.

GURNEY, B.—I do not think the objection ought to prevail. I am quite satisfied there is nothing to prevent judgment being given against the receivers.

They were sentenced accordingly.

*W. J. Alexander*, for the prosecution

*C. Wutson*, for the prisoner Pelham.

*Greaves*, for the prisoner Smith.

*Keating*, for the prisoner Thomas.

(a) See the cases of *Rex v. Wheeler*, 7 C. & P. 171, (32 E. C. L. R. 483;); *Rex v. Hartall*, 7 C. & P. 475, (32 E. C. L. R. 589;); *Rex v. Austin*, 7 C. & P. 796, (32 E. C. L. R. 740;); and the case of *Regina v. Caspar*, post, 289.

### REGINA v. WHITE.—p. 282.

A forged paper, in the following form,—“Please let the lad have a hat, and I will answer for the money. E. B.” is a forged request for the delivery of goods, and is not the less so because it may also be a forged undertaking for the payment of money.

FORGERY.—The prisoner was indicted for forging and uttering “a certain forged request for the delivery of goods,” which was as follows:—

“Mr. Turner,—Please to let the lad have a hat about 9s., and I will answer for the money.

“ED. BARRETT.”

*Greaves*, for the prisoner.—I submit that this is not a request for the delivery of goods. It is a guarantee for the payment of the price, and if it be the subject of forgery at all, it should have been charged to be an undertaking for the payment of money under sect. 3 of the stat. 1 Will. 4, c. 66. In the case of *Reg. v. Reed*, ante, vol. 8, p. 623, (34 E. C. L. R. 557,) it was held that a conditional undertaking for the payment of money came within that section of the statute. And if this be an undertaking for the payment of money, and comes within another enactment of the statute, the prisoner cannot be convicted on the present indictment. In the case of *Rex v. Puddifoot*, R. & M. C. C. 247, it was held that an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 25, for stealing a *sheep*, was not supported by proof of stealing a *ewe*, because the statute specifies both *ewe* and *sheep*. So in the case of *Rex v. Horwell*, Id. 405, it was held, that an indictment for uttering a forged bill of exchange was not supported by proof of the uttering of a bill of which the acceptance only was forged. In the stat. 1 Will. 4, c. 66, the word “request” seems to have been introduced to meet cases in which the instrument did not amount to an order, but the juxtaposition of the words “warrant, order, or request,” shows that the word “request,” which is for the first time used, applies to cases similar to those of “warrant and order.”

GURNEY, B.—I think that this instrument is not the less a request for the delivery of goods because it may be also an undertaking for the payment of money.

Verdict—Guilty.

*W. J. Alexander*, for the prosecution.

*Greaves*, for the prisoner.

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REGINA v. TRENFIELD.—p. 284.

A. was indicted at the assizes for perjury, he had neither been in custody nor on bail. After the bill was found, A.'s counsel applied to have the case tried at the same assizes at which the bill was found. The counsel for the prosecution objected, and stated that no notice had been given by the defendant to the prosecutor of his intention to try at these assizes, except the present application:—*Held*, that the prosecutor could not be compelled to try at these assizes, and the case, therefore, stood over to the next assizes.

PERJURY.—A true bill was found against the defendant at these assizes for perjury. The defendant had neither been in custody nor on bail.

*W. J. Alexander*, for the defendant, applied to the learned baron to have the case tried at these assizes.

*F. V. Lee*, for the prosecution.—I submit that the prosecutor cannot be compelled to try the case at these assizes. Before the stat. 60 Geo. 3 & 1 Geo. 4, c. 4, s. 3, a case of misdemeanor, where the defendant was not in custody, could not be tried at the same assizes at which the indictment was found, without the consent of the prosecutor, and that enactment applies only to cases where the defendant has been committed to custody, or has been on bail for twenty days. In the present case no notice has been given to the prosecutor of the defendant's intention to try at these assizes, except by the present application.

GURNEY, B.—This is a point of practice which is of some importance. I will confer with my brother PATTERSON upon it.

On the following day his lordship said, "I have conferred with my brother PATTERSON, and we are of opinion that the prosecutor cannot be compelled to try at these assizes; the case must, therefore, stand over to the next assizes."

*F. V. Lee*, for the prosecution.

*W. J. Alexander*, for the defendant.

(Civil Side.)

BEFORE MR. JUSTICE PATTESON.

## REGINA v. The Inhabitants of CHEDWORTH.—p. 285.

A complaint was made to magistrates, under the 94th sect. of the highway act, 5 & 6 Will. 4, c. 58, that a way alleged to be a highway was out of repair; the magistrates ordered an indictment against the inhabitants of the parish, which was found, and removed by *certiorari*, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected that this provision as to costs, only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by *certiorari*. The judge refused the order.

*Semble*, that the 95th sect. of the act as to payment of costs out of the highway rate, and the 98th sect. as to costs to be paid by any defendant where the defence is frivolous, are distinct in their operation, and are not to be connected.

*Semble*, that the magistrates are not bound to make their order in terms exactly following those contained in the information.

INDICTMENT preferred at the Gloucester Quarter Sessions for non-repair of a highway. The indictment was preferred under an order of four magistrates made in pursuance of the 94th section of the stat. 5 & 6 Will. 4, c. 50, and was removed by *certiorari*.

It appeared that the order of magistrates did not pursue the terms of the information in describing the road to be indicted; and it also appeared that it was admitted before the magistrates by the surveyor, that a part at each end of the road indicted was public road, but the surveyor denied that the portion of the road between those parts was so.

The jury found the defendants not guilty, on the ground that it was not a highway.

*R. V. Richards*, for the prosecution, applied for an order for the costs to be paid out of the highway rate under the 95th section of the act.

*Ludlow*, Serjt., and *Greaves*, for the defendants, submitted that this case was not within the statute, which only applied where the publicity of the road was admitted, and where the only question was, who was liable to repair it, and that the word "highway" in the statute meant a public highway, which was not disputed. 2d. That the justices had no jurisdiction to make the present order, because it did not follow the information, and as the surveyors could only be called on to answer the matters stated in the information and no others, the order must recite the information, and follow it; and as the order here was totally different from the information, it was therefore a nullity. 3d. That the 95th section applied only to trials in the ordinary course, and not to cases removed by *certiorari*, and that this was not a trial before a Judge of Assize: and 4th. That the 95th section of the statute was to be construed with reference to the 98th, and merely meant that where the defence appeared to be frivolous the costs were to be paid out of the fund there mentioned.

*R. V. Richards* and *Gray*, for the prosecution, submitted, 1st, that the 95th section of the act was imperative, and applied to all cases in which the liability to repair was denied. 2d. That as to the form of the order the only question was, whether it was good on the face of it. 3d, That the words "Judge of the Assize" must be taken in their ordinary



acceptation, and that, therefore, a Judge of Nisi Prius might order costs; and 4th, that the 95th and 98th sections were quite distinct in their operation, and could not be connected.

PATTESON, J.—I am not satisfied as to what the construction of this act ought to be; the words are very strong, and seem to be difficult to be got over; but to construe them as imperative will lead to great absurdity. With respect to the order I am inclined to think, that when the justices had the case before them they might make any order respecting it which they thought fit. As to connecting the 95th and 98th sections, I think that cannot be done, as they are introduced into the statute for different purposes. I will take time to consider of the case.

After taking time to consider, Mr. Justice PATTESON refused to make any order for costs.

*R. V. Richards and Gray*, for the prosecution. •

*Ludlow*, Serjt., and *Greaves*, for the defendant.

See the 94th, 95th, and 98th sections of the Highway Act, 5 & 6 Will. 4, c. 50, which are set out in Burn's Justice, tit. *Highways*. The 98th section appears to apply to *all* defendants, whether parishes or private individuals, and under it any defendant is liable to costs, where the defence is "frivolous or vexatious." The 95th section gives costs to be paid out of the highway rate, and that is not by its terms limited to cases where the defence is frivolous or vexatious. See the case of *Reg. v. Yarkhill*, ante, p. 218.

The case of *Reg. v. Inhabitants of Preston*, 2 M. & Rob. 137 (which seems to have gone on the 98th section), was an indictment preferred at the sessions by direction of the justices under the stat. 5 & 6 Will. 4, c. 50, s. 95, and the defendants had removed it by *certiorari* into the Queen's Bench. The defendants were found guilty, and *Cresswell*, for the prosecution, applied to ALDERSON, B. (who had tried the case) for an order on the defendants for costs, under the 98th section of the statute. "ALDERSON, B., expressed himself to be clearly of opinion, that the defence was 'frivolous and vexatious' within the meaning of the section cited, and a case in which, if the legislature had given him authority to do so, he should make an order on the defendants to pay the costs; but as the discretion over the costs was in terms given to the court at which the indictment was preferred, and not to the court before which it was tried, he entertained much doubt whether he could make the order;" and on the following morning his lordship said he had examined the different provisions of the act of Parliament, and was of opinion, that he had not any authority over the costs, and the motion for costs was refused. This case was tried at York, at the Summer Assizes of 1838, and in a subsequent term an application for these costs was made in the Court of Queen's Bench (reported 7 Dowl. P. C. 593); and, after argument, a rule for the payment of the costs was made absolute; Mr. Justice WILLIAMS being of opinion, on the authority of the case of *Re v. Inhabitants of Upper Papworth*, 2 East, 418, that "the court before whom such indictment shall be preferred," meant the Court of Queen's Bench, when the indictment was removed by *certiorari*. In that case the provisions of the 95th section, as to costs, do not appear to have been referred to. The case of *Regina v. Earl of Radnor* (in Q. B. May 12, 1840), was an application for a *mandamus* to magistrates, commanding them to convict the surveyors of the highways of a parish in a penalty not exceeding £5, for non-repair of a highway, and to order the repair of the road. It appeared that the magistrates had directed a surveyor to make a report on the state of the road, and that he made a report in writing that the road was out of repair, but that he was further orally examined by the magistrates, who refused to convict the surveyor or make any order. In support of the application it was contended, that if the justices appointed a viewer, they were bound by his report; and that if he reported the road to be out of repair, the office of the justices was merely ministerial, and they were bound to convict the surveyor in a penalty not exceeding £5, and to order the road to be repaired. Mr. Justice COLERIDGE, after observing, that the magistrates were called upon, not only to act ministerially in ordering the road to be repaired, but also to act ministerially in convicting the surveyor in a penalty, said, that the terms of the statute being in effect, that if it should appear to the magistrates that the road was out of repair, they should convict the surveyor; he could not but think that the magistrates were to exercise a discretion on the subject, and that the words "shall convict" would of themselves import a judicial act on the part of the magistrates; and the rule for the *mandamus* was discharged with costs.

## CENTRAL CRIMINAL COURT.

\* JUNE SESSION, 1839.

BEFORE MR JUSTICE LITLEDALE.

REGINA v. CASPAR and Others.—p. 289.

An indictment stated that *a certain evil-disposed person stole* certain goods; that L. C. *incited* him to do so; that E. C. did the same; that E. M. *received* a portion of the property knowing it to have been stolen; it also charged A. A. and the before mentioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all except L. C. who was merely charged as accessory before the fact, and judgment was given upon the charges of receiving only.

THE first count of the indictment stated that *a certain evil-disposed person*, on the 25th of March, *stole* 102 pounds weight of gold-dust of the value of £5000, two wooden boxes of the value of 2s., and two tin boxes of the value of 2s., of the goods of James Hartley and others—against the peace, &c.

The second count stated that Lewin Caspar, *before the said felony* and larceny was done and committed, to wit, on the 10th of March, feloniously and maliciously did *incite*, move, procure, counsel, and command *the said evil-disposed person* to commit the said felony, against the form of the statute, &c.

The third count charged Ellis Caspar with being an *accessary before* the fact, and was similar in form to the second.

The fourth count stated that Emanuel Moses, on the 30th of March, *received* the said 102 pounds weight of gold-dust, value, &c., of the goods, &c., “before then feloniously stolen, taken, and carried away in manner and form aforesaid,” well knowing them to have been stolen.

The fifth count contained a similar charge in a similar form against Isaac Isaacs, (a) except that it stated him to have received the wooden boxes and the tin boxes as well as the gold-dust.

The sixth count charged Alice Abrahams with receiving all the articles mentioned in the indictment, and was similar in form to the fifth count.

The seventh count stated that *the said* Ellis Caspar, (b) on the 30th of March, the said 102 pounds weight of gold-dust, &c., &c., before then feloniously stolen, taken, and carried away in manner and form

(a) This party was not in custody, and was not tried.

(b) This was the same person as in the third count was charged with being an accessary before the fact to the felony.

aforesaid, feloniously did receive and have, he the said Ellis Caspar, then and there well knowing the said goods and chattels to have been feloniously stolen, &c., against the statute, &c., &c.

There were seven other counts similar to the first seven, only stating the goods to be the property of George Hathorn; and there were fourteen other counts, which stated the property stolen to be gold instead of calling it gold-dust.

When *Clarkson*, for the prosecution, had stated the case to the jury, *Bompas*, Serjt., who was counsel for Emanuel Moses, submitted that *Clarkson* ought to elect which of the prisoners he would proceed against.

*Clarkson*, contrâ, contended that it was a case in which he was not bound to elect.

LITLEDALE, J., was of opinion that it was a case of principal and accessaries, and that what were called the first seven counts of the indictments were substantially only one count against one principal and several accessaries, and, therefore, that the prosecutor was not bound to elect.

The case proceeded, and a person named Henry Moss was called and examined, on the part of the prosecution, as the person who stole the gold-dust, or rather it was made a question for the jury, on the whole of the evidence, whether he or Lewin Caspar was the person who committed the robbery. His name was on the back of the indictment as a witness. (a)

When the evidence for the prosecution had closed,

On the part of the defence, generally, it was contended that there was no case to go to the jury. The substance of the argument was as follows:—There are two ways of framing an indictment against an accessory—either by indicting the principal with the accessory, or if the accessory be indicted alone, you must either show that the principal has been convicted, which you can only do by proving the record of his conviction, or you must show that the principal has been outlawed. Moses is charged as an accessory after the fact by receiving the stolen goods, and as the prosecutor has not proved that the principal has been convicted, the accessory is entitled to an acquittal. The accessory cannot be convicted until the principal has either been convicted or outlawed. If the principal be attainted, and the attainder be reversed, the accessory escapes; and the same doctrine applies to cases where the principal and accessory are tried together. If the principal pleads not guilty, and the accessory does so also, then the trial of both shall go on, and the jury are to inquire first of the guilt of the principal, and if they find him guilty, then they are to inquire as to the accessory; but if both are found guilty, the judgment must be first given against the principal; for if any thing obstruct judgment, as clergy, a pardon, &c., the accessory is to be discharged; and if the principal does not plead not guilty, but pleads a plea in bar or in abatement, or autre fois acquit, the accessory shall not be put to answer till that plea be determined. When the guilt of the principal is averred, it can only be proved by the principal being tried with the accessory, or if he be not, then by the record of conviction or outlawry of the principal. This was the rule of the common law, and though receivers are not at common law accessaries after the fact

(a) There was also another indictment against Moss by name, charging him with stealing the property in question, and charging the other prisoners with the same parts of the transaction as in the present indictment.

merely as receivers, yet they are made so by the statute 3 & 4 Will. 3, c. 9, s. 4. And the statute 7 & 8 Geo. 4, c. 29, s. 54, confirms the old law as far as it relates to accessaries, though it also gives another mode of proceeding, viz. for a substantive felony. But here the indictment is not framed against the receivers as for a substantive felony under the statute, but it is in the form of an indictment against principal and accessory, and must be governed by the rules of the common law. The indictment is also bad as far as relates to the description of the principal, for it ought to have been in such a form as that the principal could be legally convicted upon it. There is no principal felon properly charged; no process could issue upon it to bring in any principal to be tried, nor could any principal surrender himself upon such an indictment to take his trial. It should have been so framed, in order to make it good against the accessaries, as that either the principal could be tried and convicted with them, or that the record of the conviction of the principal could be put in. The indictment is too uncertain for it to be good either against the principal or accessaries. The principal ought to be named in a case like the present. If the indictment had said that the goods were stolen by a certain person to the jurors unknown, that would not be supported if it turned out that he was known. The indictment ought to show who stole the goods, for otherwise the accessaries do not know what is the felony against which they are to defend themselves. Supposing there were two indictments for the same offence, and there was an acquittal on the first, how could there be a plea of *autre fois acquit* to an indictment framed with such uncertainty? What evidence could the party acquitted give as to who was the evil-disposed person mentioned in the first indictment? The evil-disposed person might be John Thomas, or William Smith, or anybody else; and an indictment is bad to which you cannot plead *autre fois acquit*, or *autre fois convict*. There being two indictments in respect of this transaction, is a practical illustration of the extreme difficulty in which a prisoner is placed. It is true that these latter objections are rather upon the record. So far as Moses is concerned, it may be admitted that if the indictment had been for a substantive felony under the stat. 7 & 8 Geo. 4, c. 29, s. 54, merely for receiving the goods knowing them to have been stolen, it would not be necessary to state who stole the goods. But this indictment is not framed on the statute—it is an indictment against principal and accessaries, and not for a substantive felony. A substantive felony is a single felony against one or more individuals, whereas here there are five separate felonies, one of the prisoners being charged as accessory both before and after the fact. If it were a charge of a substantive felony, the prosecutor must elect against which of the prisoners and for which felony he would proceed. If it is a substantive felony, and not to be treated as an indictment against principal and accessory, then a great deal of evidence has been given against Moses and Abrahams which would not have been admissible if they had been separately tried for a substantive felony. Whether the prosecutor was compellable or not to make his election before the evidence was gone into, he is, at all events, now that it is closed, bound to elect against which of the prisoners singly the case shall be submitted to the jury.

*C. Phillips*, for Lewin and Ellis Caspar, in addition to the objections as to the charge of receiving, contended, that whatever might be the rule as to the necessity of naming the principal felon in the case of

receivers, it was essentially necessary that he should be named in the case of accessaries before the fact; for otherwise it would be quite impossible for them to know against what felony they were to defend themselves, and that even in the case of a substantive felony, either against one person for a felony, or more than one person for a joint felony, the principal ought to be named.

*Clarkson, Bodkin, and Doane*, for the prosecution.—All the objections are on the record. We admit that there is no instance of such an indictment having ever been used before, but the circumstances of the case are of a novel description, and it became necessary to adopt a novel form of indictment, in order to meet them. This is not an indictment against principal and accessaries, but it is for a substantive felony, and is inquirable into as to accessaries before the fact, under the 7 Geo. 4, c. 64, s. 9, and as to receivers under 7 & 8 Geo. 4, c. 29, s. 54; and it is one entire transaction, though the parts are done at different times. It is composed of the stealing by Moss; of the seduction by the two Caspars, and of the receiving by Moses and his daughter Abrahams, and by Ellis Caspar; and the whole relates to the stealing and disposing of the property. There has been no decision as to what is meant by a substantive felony, but there is no authority to show that this is not a substantive felony. There is no necessity to mention the name of the principal. Nor is there any necessity to prove any record of conviction, as no conviction is alleged, nor could any record of a conviction of an evil-disposed person be made up. It is sufficient to prove by parol evidence who stole the gold-dust, and the jury may decide upon his guilt just the same as if he had been put upon his trial with the accessaries. And, as to the difficulty alleged with respect to pleading *autre fois* acquit, or *autre fois* convict, there would be no difficulty in supporting such pleas, by introducing proper averments. There are many instances of separate felonies being included in the same indictment, and tried as substantive felonies. The proper interpretation of the words substantive felony is, that it has reference only to the transaction itself, merely for the purpose of stating the offences themselves, which are to be the subject of inquiry; that is, the whole transaction or *corpus delicti*, and under the meaning of the expression substantive felony, you may have an indictment without naming the principal. This is not a case in which the prosecutor is bound, either before the evidence is gone into or after it has been given, to elect which of the prisoners singly he will proceed against, inasmuch as it is all one transaction. If the prisoners meant to say that there ought to have been a previous conviction of the principal, they should have objected to being put upon their trial before the principal was convicted.

LITTLEDALE, J., was of the same opinion after the case for the prosecution had been closed, as he was after it was opened, and before any evidence was given—viz. that upon an indictment framed like the present, the prosecutor was not bound to elect as to which of the prisoners singly the case should be submitted to the jury.

The case went to the jury as against all the prisoners, and the jury found them all guilty.

LITTLEDALE, J., reserved the whole of the objections for the opinion of the judges, and the counsel for the prisoners were considered as having made in arrest of judgment such of them as were upon the record.

*Clarkson, Bodkin, and Doane*, for the prosecution.

*Bompas*, Serjt., *Adolphus*, *Prendergast*, *C. Phillips*, *Montague Chambers*, and *C. C. Jones*, for the respective prisoners.

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BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITLEDALE, J.; BOSANQUET, J.; PARKE, B.; PATTESON, J.; WILLIAMS, J.; GURNEY, B.; COLERIDGE, J.; COLTMAN, J.; MAULE, J.; ROLFE, B.

*Bompas*, Serjt., for the prisoners.—The proposition which it is necessary for me to support is, that this is an indictment against principal and accessaries, and the consequence is, that unless the principal be convicted, the accessaries are entitled to be discharged. The learned judge at the trial said that he thought it was an indictment against principal and accessaries, or he would have required the prosecutor to elect. It is of material consequence to a prisoner whether he is tried on an indictment as against principal and accessory, or as for a substantive felony; because in the latter case he would have the right to call on the prosecutor to elect, which would get rid of the effect of some evidence, and prevent the giving of other evidence by the rules of law.

LORD ABINGER, C. B.—Being an accessory, by the modern statute, he is subject to an indictment without the principal, and yet it would be the same offence.

*Bompas*, Serjt.—The form of the indictment is clearly an indictment against the prisoners as accessaries. There was also another indictment naming the principal, and in the indictment in question, the parties are indicted for different offences; by the 7 Geo. 4, c. 64, s. 9, it is enacted, that if any person shall counsel, procure, or command any other person to commit any felony, the person so counselling, &c., shall be deemed guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. This indictment may be taken as an indictment against the parties as accessaries *before*, and accessaries *after* the fact. They were so treated at the trial. Whether it is also a substantive felony is another question, which I will deal with presently. The indictment is the same, except that a *certain evil disposed person* is substituted for *Henry Moss*. How can this make it less or more an indictment against them as accessaries? If it makes it a bad indictment altogether, I cannot help that. There is no decided case against me at all. The first question is, what is the consequence of so treating it? The first consequence is, that we must inquire what is the effect of the conviction of an accessory, when the principal is not convicted. If the late statutes have not altered the matter, the general rules of law are quite clear. In Lord Sanchar's case, it was held that the attainder would be reversed after he was hanged: (9 Coke, 119). I will just cite the authorities. There is 1 Hale, P. C. p. 618. Before the statutes a party receiving could only be tried for a misdemeanor, he was not an accessory at all. The prisoners have not waived any right by being compelled to plead. If the principal were convicted, and not attainted, the accessory could not be tried: In 2 East, P. C. p. 446, it is so stated.

Lord ABINGER, C. B.—Is there any doubt that by the common law the accessory could not receive judgment unless the principal were attainted, and that he could not even be tried without his own consent?

*Clarkson*, for the prosecution.—There is not any doubt on that subject.

*Bompas*, Serjt.—Then the question will be, whether this is an indictment under the statute. The indictment certainly concludes against the form of the statute. All previous statutes are repealed, and therefore the 7 Geo. 4, c. 64, and the 7 & 8 Geo. 4, c. 29, are the statutes on which the court must decide. Without going through all the previous statutes which are set out in 2 East, P. C. p. 743, I will just call the attention of your lordships to the state of the law. By the statute of Anne, receiving was indictable as a misdemeanor. This was a distinct simple charge. The effect of the present statute is to make that a felony which before was a misdemeanor. There is some slight difference between the clauses in the two acts, but one illustrates the other; and it will be seen that the crime of an accessory, and the crime of committing a substantive felony, were intended to be kept just as distinct as when one was a misdemeanor and the other a felony. The material words are, “and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and *in the latter case*, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice.” According to the well known maxim “*expressio unius est exclusio alterius*,” it is the same as if the legislature had said, not in the former case, but only in the latter.

Lord ABINGER, C. B.—If you indict him as an accessory, you must follow the rules of the common law. How would you frame an indictment against him for the substantive felony?

*Bompas*, Serjt.—This would be the form:—one silver tankard, &c., by a certain evil-disposed person then before stolen, &c., of the said evil-disposed person, feloniously did receive, well knowing, &c.

Lord ABINGER, C. B.—The only difference then is, that the indictment in question is a little longer than the one you read.

*Bompas*, Serjt.—That is not exactly so. This indictment contains several distinct offences.

TINDAL, C. J.—You see it all relates to one transaction; it does not relate to separate transactions.

*Bompas*, Serjt.—The parties never saw each other, and yet evidence was given of what was said by each.

Lord ABINGER, C. B.—That is only a difficulty which arises in every case where more than one prisoner are charged in the same indictment.

*Bompas*, Serjt.—If they were tried as accessories when they were not accessories, then it will be wrong.

BOSANQUET, J.—The question must be, how were they indicted?

*Bompas*, Serjt.—If they were improperly tried, the question for the court will be the same, for they will have been improperly convicted. The argument on the other side must be (because it was so at the trial), that this is all one substantive felony, and that is what is meant by the statute. The term substantive means that if the whole put in the indictment is a substantive felony, that is sufficient.

PARKE, B.—It means an offence that does not depend upon the conviction of the principal.

*Bompas*, Serjt.—If the parties are to be tried for substantive felonies,

they must be indicted alone; and they can only be indicted together, if they are indicted as principal and accessaries.

Lord ABINGER, C. B.—Will it not come to this? Supposing my Brother LITLEDALE was wrong in trying all together and treating it as one indictment, are we not to interfere?

*Bompas*, Serjt.—If I had the right to call on the prosecutor to elect, it will be a mistrial. I now contend that the indictment is bad altogether. I refer, principally, to the case of Lewin Caspar, who is indicted as an accessory *before the fact*. The statute directs the attention to the goods, and you must state them in the indictment, but it is not necessary to state all the circumstances of the receiving. But as to Lewin Caspar, the case is totally different, because he is charged with inciting a certain person to commit a felony, and it cannot be contended that that person need not be named.

Lord ABINGER, C. B.—Suppose he was not known?

*Bompas*, Serjt.—Here he was known. It is clear that before the statute a man could not be indicted for inciting a person unknown. They ought to show who he was if they can, and if they cannot, they must set out an excuse for it. They should either name him, or say that he is a person unknown. I cannot find any case since the statutes; but in the cases which occurred when it was a misdemeanor, the name was set out. In *Rex v. Fuller*, 1 B. & P. 180, which was an indictment on the stat. 37 Geo. 3, s. 70, for endeavouring to incite and stir up a person serving in the army to commit an act of mutiny, and in which Mr. Baron Gurney was counsel for the prisoner, the name of the party was set out.

GURNEY, B.—The objection I took there was, that the mode of inciting was not set out.

*Bompas*, Serjt.—But if the man's name had been omitted too, would it not have been an objection?

Lord ABINGER, C. B.—We had a case reserved as to the murder of a child.(a)

GURNEY, B.—The situation of the prisoner is the same as if the indictment had added the words, "to the jurors unknown." It gives him as much information.

Lord ABINGER, C. B.—The difficulty would be in pleading *autre fois acquit* to a second indictment.

MAULE, J.—You must give as much information as you can.

*Bompas*, Serjt.—They are bound to insert the name if it is known.

• Lord DENMAN, C. J.—Otherwise, the prosecutor may reserve it in his own breast to select which he will prove of forty different offences.

*Bompas*, Serjt.—The difference is very material between an indictment as accessory, and for a substantive felony. These are the grounds on which it strikes me that the opinion of the learned judge at the trial was correct—viz. that the prisoners were indicted as accessaries, and therefore they could not legally be convicted without the principal.

*Clarkson*, for the prosecution.—The conviction is perfectly good. I take it that Mr. Serjt. *Bompas* has raised three objections: 1st, that the indictment is, in the ordinary sense of the term, against principal and accessaries, and, therefore, cannot be supported, because the principal is not convict, attaint, or outlawed; 2d, that we ought to have been

(a) *R. v. Biss*, ante, vol. 8, 778.



called on to elect against whom we intended to proceed, as there appeared several distinct charges against the different prisoners; 3dly, that the indictment cannot be supported as against the accessory *before* the fact. As to the first objection, supposing the indictment was strictly against principal and accessories, yet the conviction is good, as no objection was taken on the part of the accessories to their being tried before the principal was forthcoming. The prisoners should have objected before they were given in charge, and have no right to take the chance of being acquitted by the jury, and afterwards take the objection. The accessory can only object when called upon to plead. (a)

LORD DENMAN, C. J.—Does not that assume an indictment with a principal properly described?

CLARKSON.—It may be so; and if there had been no statute or authority on the subject, we might have had some difficulty. But there are the cases of *R. v. Jarvis*, 6 C. & P. 156, (b) and *R. v. Wheeler*, 7 C. & P. 170. (c) In the former of those cases the indictment in one count set out the name of the thief, and in another count merely mentioned “a certain evil-disposed person.”

GURNEY, B.—There was a case of a manufactory where servants were kept, and from the circumstance of the walls not being scaled, it was clear that the robbery must have been committed by a servant, and several persons were convicted of receiving the property, knowing it to have been stolen.

LORD DENMAN, C. J.—That is the sort of case to which the statute is more particularly directed.

COLTMAN, J.—There would be no difficulty in stating that the person was unknown.

LORD DENMAN, C. J.—But you do not want that here.

CLARKSON proceeded to read the case of *R. v. Wheeler*.

PATTESON.—That was for a substantive offence. There is no objection to such a count in case of the charge of a substantive offence. But in any of these cases was there any count charging a party as accessory, which did not mention the name of the principal?

CLARKSON.—There was not any such count: but I contend that the objection came too late; and as it is doubtful whether the words of the statute would not prevent any other trial after acquittal on this, they could have no right to lie by and take the chance of the verdict, and then raise the objection.

PATTESON, J.—It would only be a waiver of the objection to being tried before or without the principal, but no waiver of any objection to the indictment itself.

TINDAL, J.—According to my Brother LITLEDAL, the indictment alleges that a certain evil-disposed person stole certain goods, and that one person incited him to commit the offence, and others received different portions of the goods, and, therefore, it is contended, that the whole is only a history of the transaction.

CLARKSON.—According to my Lord Hale, “an indictment is nothing

(a) See the case of *Reg. v. Ashmall*, ante, p. 236.

(b) In that case it was held that a count was good, which charged the prisoner with receiving property which had been stolen by “a certain evil-disposed person,” without naming him.

(c) In this case a similar count was held good. See also the case of *Reg. v. Pulham*, ante, p. 280.

else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature;" and such is the present indictment. It is merely using the same substantive allegation with a greater copiousness of words. It has been the practice for the last twenty years to combine the principal and several accessaries without reference to time; and there are some instances, I believe, in which joint and several receivings have been combined in one indictment. Such an indictment is not for separate offences committed by them, but for separate acts committed by them in furtherance of the same felony. It is one transaction only, and the statement of the different parts of the same transaction are called counts; but it is all one charge in substance.

PATTESON, J.—Is there any case in which receivers of different goods at different times have been included in one indictment without the principal felon?

Clarkson.—There is not. But I shall show, from my learned friend's own argument, that this is a bad indictment as against principal and accessaries; but he has not shown any reason why it is not good as a charge of a substantive felony. In the report, in the case, of my friend's argument, it is said, "I admit these things were necessary to make a good indictment as against principal and accessory, but they were not necessary for the substantive felony." We, on the part of the prosecution, never considered it as a case of principal and accessaries. But my friend says, that if the indictment be for a substantive offence, then we cannot convict on it more than one person. The indictment is not new in principle. The true interpretation of the two statutes is, that, with the exception of the absence of the principal, there must be all the forms and incidents necessary to constitute the offence. As to the *accessary before the fact*, I feel myself much more pressed, for although I might say the statute looks to the incitement to the commission of a felony rather than to inciting any particular person, yet it may be said there is a distinction between the two cases.

PARKE, B.—Have you considered whether this is not cured by the statute 7 Geo. 4, c. 64, s. 21? In the case of the Polish notes that question arose. (a)

Clarkson.—But the statute provides that no person, however tried, shall be liable to be prosecuted for the same offence, and this makes it of very great importance to support this indictment. In conclusion, the object of the statute being to facilitate the bringing home of justice to accessaries, I submit that that object would be frustrated, or, at least, no benefit would be derived from the statute, if this indictment should be held not sufficient.

Lord DENMAN, C. J.—What difficulty would there have been in indicting each accessory alone?

Clarkson.—None, except that we must have had several trials; and I submit that we had the right to take them altogether.

Bompas, Serjt., commenced his reply.

PARKE, B.—What did you mean by election at the trial? to convict one and let off the others? In 8 East, 46, Lord ELLENBOROUGH says,

(a) See *R. v. Harris and Others*, vol. 7 of these Reports, p. 429. The statute 7 Geo. 4, c. 64, s. 21, provides, that where an offence has been created by statute, the indictment or information shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

that where to the offences charged in different counts there may be the same plea and the same judgment, there is no authority that such joinder in one indictment is bad in law. That seems to be the general rule; but in 3 T. R. 106, the alternative is stated thus: "If it appear, before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence: but these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed."

MAULE, J.—That refers to a case where there were several charges against one defendant, and there it might not be known; but where there are several defendants, it must be known.

PARKE, B.—It makes a very material difference to the justice of the case, whether the objection is taken at a time when it can be rectified, or not.

*Bompas*, Serjt.—The indictment is not the same in principle, unless it is an indictment against principal and accessory. As to the 21st section of the 7 Geo. 4, c. 64, that requires the offence to be described in the words of the statute, which has not been done here.

PARKE, B.—Only on the supposition that this may be taken as a bad count as against principal and accessory, and a good collection of charges as against substantive offenders.

*Bompas*, Serjt.—Then consider what is meant by describing "the offence." Can it mean that you may say that some person committed it?

PARKE, B.—It would be bad on demurrer; but if you plead, you cannot object to it afterwards.

MAULE, J.—The words are not pursued here, because the word "other" is not inserted in the indictment.

Lord ABINGER, C. B.—The sum of your argument is, that the statute does not describe the offence, but only provides that the accessory may be tried without the principal. It only gives a new mode of prosecution.

*Bompas*, Serjt.—Mr. Justice Buller says, that in criminal cases it is never too late to revise what has been done.

PATTESON, J.—Does that apply against the very words of an act of parliament?

*Bompas*, Serjt.—But I submit that this section does not apply to this particular case. As to the words substantive felony, Mr. *Clarkson* says, it means in one view, that it all relates to one transaction.

TINDAL, C. J.—The meaning was, that you should not charge an inciting to steal at different times different goods; that there must be only one substratum or corpus delicti.

*Bompas*, Serjt.—When you indict a party as accessory before the fact, the felony is the stealing the goods; when you indict for the substantive felony, the felony is the inciting. You cannot convert a count charging a person as accessory into a count for a substantive felony; but you must have two counts, and this brings it within the cases in *Carlington* and *Payne*. In those cases there were two separate counts, but here it is not so.

PATTESON, J.—You say the distinction is that which you have just mentioned. Now just look at this indictment, the felony is charged to be the receiving.

*Bompas*, Serjt.—I do not refer to the form of the indictment only.

MAULE, J.—If the part stating the stealing stood alone, would it be any indictment at all?

*Bompas*, Serjt.—Every bad indictment is no indictment.

MAULE, J.—It is a finding by the Grand Jury that the goods were stolen.

Lord ABINGER, C. B.—It is only putting in the first instance that which is usually put last.

*Bompas*, Serjt.—My friend says we are too late, because we did not object before plea. This is not consistent with the passage in the pleas of the crown. There must be a distinct requisition of the prisoner to say whether he will be tried or not. He cannot know unless he is informed whether the principal has been convicted or not.

Their lordships took time for further consideration, and at the March sessions of 1840,

WILLIAMS, J., gave judgment, and stated that the judges were of opinion that the conviction as to Lewin Caspar was incorrect in point of law, and that the judgment must be arrested. (a) His lordship said with reference to the prisoners who were charged with receiving, "The judges have considered the question, and, having considered it, they have come to the conclusion that there was nothing erroneous in that part of the prosecution, and that upon those counts which charged you as receivers of stolen goods, well knowing them to have been stolen, you were, in point of law, properly convicted, and the conviction ought to be sustained.

Ellis Caspar, and Emanuel Moses, were sentenced to fourteen years' transportation, and Alice Abrahams to four months' imprisonment, to be reckoned from the time of passing the sentence.

(a) Lewin Caspar was afterwards convicted, on an indictment charging him with inciting Henry Moss to commit the felony, and was sentenced to be transported for seven years.

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## NOVEMBER SESSION, 1839.

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BEFORE MR. BARON PARKE.

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### REGINA v. HENRY and TAUNTON.—p. 309.

A. and B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4, and that he could not, since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery.

The prisoners were indicted for a robbery on Jabez Poulson, on the 1st of October, at St. John the Evangelist, Westminster, putting him in fear, and taking from his person, and against his will, one watch, value £1; three rings, value 1*l.* 5*s.*; one sovereign, one shilling, one sixpence, two pence, and four halfpence, his property.

The prosecutor said, "I am a working jeweller, in the employment of Brown & Kay, manufacturing jewellers, Tavistock-row, and have been nearly eight years in their employ. On Monday, the 30th of September, I was walking to my lodging from Brown & Kay's between seven and eight o'clock in the evening, I think nearer eight, and saw the prisoner Henry; I stopped to look at some books in St. Martin's court, and he came up and remarked on the cheapness of them; I said they were so; I put the book I had in my hand down and walked on to Leicester square; he walked with me as far as my own door, and then wished me good night; he had followed me and entered into conversation. On the evening of the 1st of October I had just come from my own house to go out for a walk after business, about half-past eight o'clock; I was passing down my own street, and at the corner of James street Henry came up to me and said, 'How do you do, sir?' this was about four doors from my own house; I acknowledged the compliment and walked on; he followed and entered into conversation with me; I went down the street towards Charing-cross, and passed on through Charing-cross past the Horse-Guards; he still continued walking with me; I kept straight on down the street towards the front of Westminster Abbey, not Parliament street but the street on the right hand side; I went on down Dean street, and when we got down Dean street, near the corner of Peter street, he seemed suddenly to recollect himself, and he remarked that a friend and himself were going to open an eating-house, that the men were at work on the premises, and he would go and see how they got on, and would I go with him? I went with him to No. 66, Peter street, as I have since ascertained, it was about the middle of the street; when we got to the door he took a key from his pocket and opened the side door in the passage close to the street door; he went in first, I did not follow him immediately; I did not intend to go in, but he turned round and asked me to step in, which I did; the moment I stepped in he closed the door, and seizing me by the collar said, 'Now you are in my power;' there was a candle burning on a little shelf in the corner of the shop which was under repair; there were workmen's tools there; I said, 'What do you mean?' he said, 'I will show you what I mean, let us see what you have about you:' I struggled with him to get loose; he said it was of no use, he would call the police and give me in charge for unnatural practices, if I attempted to make the least noise; he then tore open my waistcoat and trowsers, turned my pockets inside out, and took from my trowsers pocket one sovereign, one shilling and sixpence, and some halfpence; at that moment I heard footsteps in the passage, and a man's voice call out 'Henry!' Henry did not answer, and I heard footsteps go to the back of the house, and I saw Taunton throw open a sash-window and come into the place where we were; I am certain he is the man; Henry was about removing my watch-guard from my neck at the time he came in, it was a black ribbon; Taunton said, 'Holloa, Henry, what have you got there?' Henry replied, 'Oh it is all right, a regular b——;' after that Henry proceeded to take the rings from my fingers; I resisted him, rather faintly, I confess, for I was in great trembling and fear; Taunton then said he would fetch in the policeman and give me in charge; Henry said, 'Oh never mind, let him go, we have got all we can;' he let go of me, and I then made my way into the street and got home as well as I could."

The jury found both the prisoners guilty, saying, at the same time,

they thought that Taunton knew that Henry was to bring the prosecutor to the house, and that property was to be obtained from him by a threat to accuse him of an unnatural offence, but that he did not consent to or assist in the taking of the property from him by violence.

PARKE, B.—That raises a question of law, which I shall reserve for the opinion of the judges, at least for the opinion of some of the judges. My opinion is, that in order to convict Taunton you ought to have framed the indictment upon the statute.

Henry was sentenced to be transported for fifteen years, and the judgment against Taunton was respited.

*Carrington*, for the prosecution.

*Payne*, for the prisoner Taunton.

His lordship reserved the question for the opinion of the fifteen judges, and in the case submitted to them, after stating the facts, proceeded as follows:—"The jury found Henry guilty—they found that Taunton was present at the time of the taking of the rings, and was a party with Henry to a design to bring the prosecutor there, and to obtain money or property from him on a false charge of an unnatural crime; but that he was not aiding or assisting in, or privy to the robbery committed by Henry, by taking from the person of the prosecutor.

"It seemed to me, that since the statute 1 Vict. c. 87, s. 4, the offences of robbery, and obtaining money or goods on a charge of sodomy, were distinct offences, and that Taunton could not be considered, under these circumstances, as a principal in the second degree to the robbery."

The case was afterwards considered by the judges, who held that Taunton could not be properly convicted on this indictment.(a)

(a) The stat. 7 & 8 Geo. 4, c. 29, s. 7, enacts, "that any one who shall extort a chattel or money, or valuable security from another, by threatening to accuse him of an infamous crime, he shall be deemed guilty of robbery, and indicted and punished accordingly."

The stat. 1 Vict. c. 87, s. 4, does not use the same language, but enacts, "that whosoever shall accuse, &c., and shall by intimidation by such accusation extort any property, shall be guilty of felony, and punished by transportation for life, or not less than fifteen years, or be imprisoned for any term not exceeding three."

The case was to have been argued by counsel, but in consequence of the number of days occupied by the arguments in the cases of *Reg. v. Frost*, &c., for high treason, the case was not argued, but the judges being in favour of the objection, the prisoner Taunton was afterwards discharged out of custody.

See the case of *R. v. James Norton*, ante, vol. 8, p. 671, and the cases there referred to.

## COURT OF COMMON PLEAS.

*Adjourned Sittings in London, after Michaelmas Term, 1838.*

BEFORE LORD CHIEF JUSTICE TINDAL.

STEINKELLER v. NEWTON.—p. 313.

To an action to recover damages for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter within certain specified times, the defendant pleaded, 1st, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and 2d, that he would have delivered the spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff:—*Held*, that the defendant had the right to begin.

It is no objection at *Nisi Prius* to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as, for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the court, if they have been received at *Nisi Prius*, will grant a new trial, and direct a fresh commission to be issued.

To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English courts, of compelling the production of the letter.

THE declaration was for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter to the plaintiff within certain specified times. The damages were laid at £5000. The pleas were, 1st, that the plaintiff caused and procured the defendant to enter into and make, and that he the defendant was induced to and did enter into and make the said several contracts and promises in the said declaration mentioned, and each and every of them, through and by means of the fraud, covin, and misrepresentation of the plaintiff; and, 2dly, that the defendant was always, from the time of making the said several contracts and promises in the said declaration mentioned, ready and willing to deliver, and would have delivered; the said several quantities of spelter, &c., within the several times, &c., but was wholly hindered and prevented from delivering them, and from performing his contracts, by the fraud and covin of the plaintiff, &c. The plaintiff, in his replication, traversed the facts stated in the pleas.

A question arose as to who was entitled to begin.

TINDAL, C. J., was of opinion, that as the defendant had pleaded fraud and covin, he was entitled to begin, and the plaintiff might afterwards, if the defendant failed in making out his case, go into evidence of the damage sustained by him in consequence of the breach of contract.

*Kelly* then stated the case for the defence.

For the defendant a witness was called, who was a London merchant in correspondence with several houses at Hamburg. In the course of his examination in chief he was asked by the counsel for the defendant the following question:—"Do you know whether Mr. Steinkeller deals largely in spelter?"

*Wilde*, Serjt., for the plaintiff, objected to the question.

*Kelly*, for the defendant.—A man may know of another having large dealings in a particular article.

*Wilde*, Serjt.—If the plaintiff deals so largely, there must be persons who have had dealings with him, and they are the persons to prove them.

*TINDAL*, C. J.—You must have the agents or the brokers who dealt with him to prove the facts.

To refresh the memory of the witness, it was proposed to put into his hands a paper which he had delivered to the defendant's attorney in the month of June, 1838, after the cause had been set down for trial.

*Wilde*, Serjt., objected.—The paper is not made contemporaneously with the facts. It is not made without a motive, but being written for one of the parties after the cause was set down for trial, is clearly not admissible in evidence.

*Kelly*.—It is only to refresh the memory of the witness; if it were made at the time, or the next day, it would be admissible; and it ought to be admitted, if it was made within a sufficiently short period from the transaction for the judge to say, that the recollection of the transaction was more fresh in the memory of the witness. The paper was written twenty months ago, and why may it not be used to refresh the witness's memory as to a date, although it was written some time after the transaction? There must be a reasonable construction put upon the rule.

*TINDAL*, C. J.—The difference is this. It must be confined to papers written contemporaneously with the transaction.

The witness was not allowed to look at the paper.

In the course of the defendant's case certain depositions, which had been taken under a commission to examine witnesses, were tendered in evidence.

*Wilde*, Serjt., for the plaintiff, objected to their being received. On the 22d December, 1837, the cause stood for trial, and application was made to your lordship to postpone the trial on account of the absence of a material witness of the name of Scheller. An order of your lordship bearing that date was made, directing that the cause should be a remanet to the sittings after Hilary Term, 1838, and certain wine warrants, together with a certain sum in money, were deposited as security; and there was a further term in the order that a commission should issue to examine certain witnesses. By the sittings after Hilary Term, 1838, no commission had been issued, and the plaintiff's attorney wrote to the defendant's attorney, informing him that he should consider the commission as abandoned, and should subpoena his witnesses. The answer received was, that a bill had been filed, and as the plaintiff was in Poland an injunction was obtained. Since then no notice has been given of any commission, or any thing of the kind. The parties on the other side say, as I understand, that they consider the letter to have been a dispensation with any further notice on the subject of the commission.

*Kelly*, for the defendant.—This is quite a matter of course. The



order of your lordship as to the commission is, "And I further order, that a commission issue for the examination on interrogatories of the witnesses for the defendant." No time is fixed within which the examination was to take place; and I deny the right of the plaintiff's attorney to limit the time, when the judge has not limited it. It is sufficient if the commission be executed before the trial takes place.

TINDAL, C. J.—The trial ought to have taken place at the sittings after Hilary Term. The question is, whether they have not been misled?

*Kelly*.—If they have, it is their own fault. The letter written by the plaintiff's attorney was that he should consider the commission abandoned, as it had not been issued previous to the sittings after Hilary Term. After this the defendant's attorney told the plaintiff's attorney that the commission was not abandoned.

TINDAL, C. J.—Should not the letter of the plaintiff's attorney have called for some answer in writing? Why did not the defendant's attorney write an answer?

*Kelly*.—He was not obliged to write. The commission was dated the 24th of May, 1838, and required the examination to take place on or before the 1st of November in the same year.

TINDAL, J. C.—This is not the place to discuss the admissibility of the depositions, it must be done before the court on affidavits.

*Wilde*, Serjt., for the plaintiff.—My objection is not to the issuing of the commission, but to the issuing of it without notice. We had no notice of the commission, and no copies of the interrogatories proposed to be put, and no request of cross-interrogatories. I do not at all argue whether a commission might not properly issue after the sittings after Hilary Term. But my objection is to the want of all notice; and I apprehend this is the place to make the objection, as the objection goes to the reception of evidence: and it is a question for the judge who is to decide as to the reception of the evidence.

*Kelly*, for the defendant.—I can show, if it is admissible here, that the opposite party has had all the notice to which by law he is entitled. I believe the practice to be, that application is made to the other party to learn whether he will join in the commission and bear part of the expense, and if he refuses, his opponent may proceed without him. But this is not the place for the inquiry. Here is an order of the court, and the commission produced is regular upon the face of it. If this matter were to be inquired into, it would lead to the trial of a collateral issue in every case in which a commission was produced.

*Wilde*, Serjt.—There is a case of *Cazenove v. Vaughan*, 1 M. & S. 3,(a) where the court refused to entertain the application, because the facts were not brought before the judge at Nisi Prius. Mr. Justice LE BLANC said, "In this case there was no evidence given at the trial to show that the defendant had not liberty afforded him to cross-examine, or that he might not have exercised it." And Mr. Justice BAYLEY said, "I think it must be taken from the circumstances stated, that the defendant had liberty to cross-examine, and did not choose to exercise it; for when the interrogatories in chief were served upon him he might have applied for

(a) In that case it was held that a deposition was admissible at the trial, because the defendant had notice of the time of the examination, and might have cross-examined at that time, or applied for further time for that purpose, and not having done either, it must be presumed that he did not wish to cross-examine.

time, had he been desirous of putting cross-interrogatories, and there was no proof at the trial that it was his intention to cross-examine." Lord ELLENBOROUGH gave judgment on the general ground; (a) but the other two judges, who at that time constituted the rest of the court, expressly mention the particular reason.

TINDAL, C. J.—I cannot shut out the evidence of the depositions. I think I must receive it, and take a note of your objection.

Wilde, Serjt.—Your lordship understands me as tendering the evidence I have mentioned?

TINDAL, C. J.—Yes: evidence of irregularity in the issuing of the commission.

The depositions were then read. A witness who had been examined at Hamburg, stated, in his answer to an interrogatory, the contents of a letter which was not produced.

Wilde, Serjt., objected that this part of the answer was not admissible, as it was not the best evidence.

Kelly and R. V. Richards, contra.—A letter which you cannot compel the production of, as the parties are without the jurisdiction of the court, is the same as a letter which has been lost. This is similar to a case in the Exchequer, where a man refused to produce his title deeds, and the court could not compel him; yet Mr. Baron PARKE admitted secondary evidence of the contents.

TINDAL, C. J.—I think it would be a most inconvenient and a most dangerous rule to hold that it should rest in the option of the party examined whether he will produce the document or not. We have no power to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence.

That part of the witness's answer which stated the contents of the letter was rejected.

The case proceeded, and the jury eventually found a

Verdict for the plaintiff—Damages £500.(b)

Wilde, Serjt., and Petersdorff, for the plaintiff.

Kelly, R. V. Richards, and S. Martin, for the defendant.

In the ensuing term a rule nisi for a new trial was obtained, on the ground that the commission had been irregularly issued and executed without notice to the plaintiff; and also that it was issued and proceeded with contrary to good faith. When the rule came on to be argued, the court refused to enter into the question of good faith; but the commission appearing to have been issued irregularly, the rule was made absolute for a new trial, under an arrangement by which a fresh commission was to be issued.

(a) See note (a), on the previous page.

(b) We understand that the plaintiff moved for a new trial, though the verdict was in his favour, because he thought that the testimony of the witnesses examined under the commission had reduced the amount of the damages to a sum considerably below that to which he was entitled.

*Adjourned Sittings in London after Michaelmas Term, 1839.*

BEFORE MR. JUSTICE MAULE,

*(who sat for the Lord Chief Justice.)*

BYERS and Others, Assignees of CLARK, a Bankrupt, v. SOUTHWELL.—p. 320.

The protection given by the stat. 2 & 3 Vict. c. 29, s. 1, to contracts with bankrupts and executions against their property bona fide executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion.

*Seem*, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditors' debt.

**TROVER.**—The first count alleged a conversion of the goods while they were the goods of Clark, before the bankruptcy. The second count alleged that the plaintiffs were lawfully possessed of the goods as assignees of Clark, and that the defendant converted them to his own use.

To the first count the defendant pleaded not guilty, and to the second he pleaded that the plaintiffs were not lawfully possessed of the goods as such assignees in manner and form as in that count mentioned. There was also a plea of leave and license. (a)

*Kelly*, for the plaintiff, put in the fiat and the appointment of the assignees. It appeared that there were three sets of two each. (b)

*Plutt*, upon this, submitted that it must be shown whether these persons were in partnership or not, as the petitioning creditors' debt would differ in amount according as they were or were not so. He contended that it was necessary to prove the petitioning creditors' debt as it was put in issue by the plea above set out.

*Kelly*, contra, submitted, that it was not put in issue by the plea, and therefore need not be proved.

**MAULE, J.**, was inclined to think that it was not put in issue by the plea, and referred to a case of *Jones v. Brown*, (c) as an authority on the subject.

(a) There was another plea which stated that the fiat in bankruptcy was issued on the 28th July, 1837, on the petition of William Byers, S. T. Watson, John Austin, and John Berson Austin, and Arthur Beloe and W. Fisher, claiming to be creditors of the said J. C., and that there was not, before or at the time of issuing the said fiat, any debt or debts due or accruing due to W. B., S. T. W., J. A. and J. B. A., A. B. and W. F., from John Clark, sufficient to support the said fiat according to the statute in force concerning bankrupts. To this plea there was a replication, which was demurred to, and judgment after argument was in Michaelmas Term, (November 8th,) 1839, given for the plaintiff on the demurrer.

The decision, according to the report in 6 Bing. New Cases, p. 39, (37 E. C. L. R. 272,) was, that under 6 Geo. 4, c. 16, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the chancellor orders the commission to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first to make up the requisite amount.

(b) See this explained in the preceding note.

(c) That case is reported in 1 Scott, 453. It was an action of trespass for goods, and the defendants, after alleging the bankruptcy and their appointment as assignees, justified the taking of the goods as belonging to them as such assignees. The plaintiff replied, that the goods were not

In the progress of the cause it became necessary to read a letter written by the bankrupt and addressed to the defendant. There was an admission that the letter was written by the bankrupt and sent by post. But the admission did not state when it was sent, and there was not any post-mark on the paper produced, which appeared to have been originally contained in an envelope.

*Plutt*, for the defendant, objected to the reading of the document without further evidence as to the time when it was sent.

*Kelly*, for the plaintiffs.—It will *prima facie* be taken to have been sent by the post at the time when it bears date.

*Plutt*.—It is important to show, in order to affect the defendant, that the paper was sent at a particular time, and for aught that appears this may have been fabricated and dated back.

MAULE, J.—I think this is an admission that the document was signed by Clark, the bankrupt, and dated by him on a certain day; but I do not think that makes it evidence against the defendant. There is no proof of its being sent by the post at any particular time.

A witness was afterwards called who identified the letter as having been produced by the defendant at a time very near the day on which it bore date, and in consequence it was read. It appeared that Clark left his place of business, and this letter was relied on as containing a statement of his intention to abscond in order to avoid his creditors, and so making his absence an act of bankruptcy, and itself being notice to the defendant of such act.

*Plutt*, for the defendant, contended that the facts proved did not show any act of bankruptcy, but that if they did, the execution was protected being *bonâ fide*, by the statute 2 & 3 Vict. c. 39. (a)

MAULE, J., was of opinion that there was not any special plea upon the record under which this statutory protection could be received in evidence, and that it was not admissible under the general issue of not guilty.

The verdict was eventually for the plaintiffs for 367*l.* 12*s.* 5*d.*

*Kelly*, *Hoggins*, and *Michie*, for the plaintiffs.

*Plutt* and *Barstow*, for the defendant.

*the goods of the defendants as such assignees*, but were the goods of the plaintiffs. It was held that the replication denying only that the goods in question belonged to the assignees admitted that the assignees were entitled to the goods of the bankrupt, and therefore that it was unnecessary for the defendants to give any proof of the bankruptcy or their appointment as assignees.

(a) By section 1 of that statute it is enacted, "that all contracts, dealings, and transactions by and with any bankrupt, really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit* given by any bankrupt by way of such fraudulent preference"

## HOGGETT v. EXLEY.—p. 324.

As to the right to begin in those cases which are not within the rule of the judges as to personal injuries, libel, and slander, but where the affirmative of the issue is on the defendant:—*Held*, that it must be left to the judge to decide in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff will be entitled to begin.

THE declaration was on a charterparty, by which the defendant undertook to provide a cargo of corn from Marseilles to England, in the ship *Spring*. There was no plea of the general issue, but a special plea to the effect that after the making of the charterparty, and before any breach of the contract, an agreement was made between the plaintiff and defendant, that a cargo of cotton should be substituted for the cargo of corn, and that it was so substituted, &c. &c.

*R. V. Richards*, for the plaintiff, claimed the right to begin, on the ground that he was entitled to damages for the breach of contract.

*Bompas*, Serjt., for the defendant objected.—If the defendant succeeds there will be no damages to assess.

MAULE, J.—That argument would prove too much.

*R. V. Richards*.—Wherever the plaintiff claims unliquidated damages which must of necessity compel him to call witnesses, he is entitled to begin. This bears no analogy to the cases where the plaintiff seeks to recover a sum certain.

*Bompas*, Serjt.—As the judges have laid down the rule, it is confined to personal injuries. I have heard Mr. Baron PARKE say so most distinctly. And it is so laid down in *Carter v. Jones*. (a) There was also a case as to the warranty of a horse, which was tried before Mr. Justice COLERIDGE at the last Bristol Assizes, in which a similar decision was given. (b)

MAULE, J.—I wish there was some rule which was imperative, and excluded all discretion on the subject. But there is not, and it must be left to the judge to decide in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff ought to begin. And I think in this case that he ought to begin.

*R. V. Richards* then stated the plaintiff's case, and there was ultimately a

Verdict for the plaintiff—Damages £225.

*R. V. Richards* and *Wordsworth*, for the plaintiff.

*Bompas*, Serjt., for the defendant.

(a) Vol. 6 of these Reports, p. 64, (25 E. C. L. R., 283.) It was an action for a libel with pleas of justification, but no general issue, and was tried July 6th, 1833; and Tindal, C. J., stated the rule to be that the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue be not pleaded, and the affirmative be on the defendant. His lordship added, in answer to an observation made by M. D. Hill, for the defendant, "I do not see any hardship in the rule, as it is most reasonable that the plaintiff, who brings the case into court, should be heard first, to state his complaint." See also the note (b) to the case of *Aston v. Perkes*, ante, p. 231.

(b) See the case of *Osborn and others v. Thompson*, post, p. 337, and the authorities there collected together.

BEFORE MR. JUSTICE MAULE.

INGRAM *v.* LAWSON.—p. 326.

In an action for a libel upon a ship imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was—*Held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action.

Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statements in it in his address to the jury.

THE declaration stated in substance that the plaintiff carried on the business of a master mariner and shipowner, and was the commander and owner of the ship *Larkins*, which was about to sail for the East Indies, and being desirous of obtaining goods and passengers, he had inserted an advertisement in the *Times* newspaper, of which the defendant was the printer and publisher, notifying the time of sailing, &c., and that the defendant published of and concerning him in the way of his said business, and of and concerning the said ship, &c., a certain false, scandalous, malicious, and defamatory libel, &c., [setting it out;] by means whereof he was injured in his credit, and it was believed that his ship was unfit to carry passengers or goods, and he had been prevented from obtaining goods on freight, and passengers of respectability, on the intended voyage, &c.

The defendant pleaded, 1st, not guilty; 2d, that the ship was not seaworthy; and 3d, a special plea which was demurred to, and on which, before the trial, judgment had been given for the plaintiff. (*a*)

The advertisement referred to was in the *Times* newspaper of the 31st of October, 1838, and was as follows:—"For Madras and Calcutta, will sail on the 28th December, the well-known, fast-sailing teak ship *Larkins*, 700 tons, Charles Ingram, H. C. S., commander, lying in the East India Docks. The ship has excellent accommodation for passengers, and carries an experienced surgeon.—For freight or passage, apply to the commander, at the Jerusalem Coffee House, or to G. Haviside & Co., Sun Court, or 69, Cornhill."

The libel appeared in another part of the same paper, and was as follows:—"To the Editor of the *Times*.—Sir, I think no apology necessary for troubling you with the following statement. I have but one motive in giving publicity to the communication. I overheard a servant in our establishment remark to one of his fellow-servants, that his old ship had returned to England at last; but that the captain had been obliged to put in at the Cape, and procure twenty additional hands to pump the ship, to enable her to complete her passage; but he understood the Jews had bought her, to take out convicts. With the recollection of the dreadful loss of life, which, in several instances, has occurred from ships not seaworthy being employed for such purposes, I was induced to question the man, and learn that the ship's name is the *Larkins*. I think the captain's name is Ingram, late in the East India Company's service

He tells me the voyage before last, when he was on board, they were obliged to pump every two hours, all the way from Calcutta; and on this last voyage she was constrained to obtain the additional hands I have stated, to keep the ship afloat. But she is now purchased by some Jews, for the purpose I have stated. I feel it my duty to give this publicity to it. I give you the statement as I heard it. I know nothing of the parties, and I have before remarked I have but one motive—viz. the possible prevention of the recurrence of some fearful calamity.—I am, sir, your obedient servant—W. T.”

A clerk of the attorneys for the plaintiff, produced a certificate from the Stamp-office, to show that the defendant was registered there as the printer and publisher of the Times newspaper.

*Platt*, for the defendant, asked the witness, on cross-examination, whether he did not know the author of the libel, and whether he was not a person named William Tyler?

*Kelly*, for the plaintiff, objected to the attorney's clerk being asked any such questions, as he could only acquire the information from the conduct of the cause in the office.

MAULE, J.—Of course, as the attorney's clerk, he will understand that he is only to say what he knows of his own knowledge, and not what he has learned from his situation, as clerk to the attorneys in the cause.

The witness said that he did not know of his own knowledge, who the author was, and the inquiry was not further pressed.

It was then proposed to read the examination of a witness named Walton, who, with others, had been examined on interrogatories before Mr. Mellor, the barrister. There was an admission that the witness was abroad, and the attorney's clerk stated that he remembered that Walton and others were examined before Mr. Mellor, and that counsel attended both for the plaintiff and defendant.

*Platt*, for the defendant.—This is not sufficient to let in the evidence. I cannot deny that an examination de facto took place, but that does not show that the paper tendered contains the notes taken by Mr. Mellor.

Mr. Mellor's clerk was then called, and proved Mr. M.'s handwriting to the notes taken; and just at the moment Mr. Mellor himself happened accidentally to enter the court, and no further objection was made to the reading of the examination.

After several witnesses had proved that the vessel was seaworthy, a witness was stating that a gentleman named Boyd had engaged his passage, but in consequence of the libel had refused to go.

*Platt* objected.—The declaration does not allege any special damage, by naming any particular persons.

*Kelly*.—If we may not give specific instances, we may give general evidence of persons having made application, and afterwards not going by the ship.

MAULE, J.—What do you say is put in issue by not guilty?

*Platt*.—The publication of the libel.

MAULE, J.—Then all the rest is admitted.

*Platt*.—There is no allegation at all of special damage.

MAULE, J.—There is an allegation that several passengers refused to go.

*Platt*.—That is not sufficient without naming them.

MAULE, J.—I think that this being a libel, not on a man but on a

chattel, it makes a difference. To say that a ship is unseaworthy is not a libel. To show that the owner lost something in some way is necessary in order to sustain the action. The plea of not guilty admits that some damages must be given; and I think that Mr. *Kelly* is at liberty to show by the evidence he proposes what the damage is.

*Platt*.—Then I contend that he must confine himself to four days, because the writ was issued four days after the publication of the libel.

*Kelly*.—I submit that I am not to be so confined in my evidence. There was a case in which a reporter for a newspaper brought an action against Mr. Harvey, the proprietor. The action was commenced before the end of the session of Parliament, but the trial did not take place till after the session had closed, and that became a matter of certainty at the trial, which, if it had taken place earlier, would have been a matter of uncertainty. Lord DENMAN, at *Nisi Prius*, yielded to the objection, that the plaintiff could only recover for the time which occurred previous to the commencement of the action: but a rule for a new trial was immediately granted by the court, on the ground that his impression was wrong, and that unless the injury is of such a nature as that actions can continually be brought from time to time, the jury may give all the damage fairly sustained up to the time of the trial.

*Platt*.—Assuming what your lordship has laid down, viz. that no action is maintainable without showing some damage, it is the more necessary that the evidence should be limited to what occurred before the commencement of the action, viz. the 4th of November, 1838; what occurred afterwards cannot form a part of the cause of action, according to your lordship's ruling, and therefore cannot be given in evidence.

*Channel* for the plaintiff.—The declaration is for a libel on the plaintiff as well as on the ship, and the court of Common Pleas have admitted it to be so on the argument on demurrer.

*Platt*.—Then it is not to be distinguished from the case of slander of an individual, and the special damage must be stated in the declaration.

No other witnesses were examined on the part of the plaintiff.

*Platt* addressed the jury for the defendant.—No one can doubt that this is a letter received from a person professing to know the facts, and inserted with an honest desire to protect human life. It is matter of history that a convict ship, the *Amphitrite*, with 150 souls on board, was lost off Boulogne. It is the duty of an editor of a newspaper to invite discussion upon such important matters. If application had been made for the name of the author, and it had been refused or not given, would not the plaintiff's counsel have proved the fact? And as they have not done so, I call on you to infer that the name of the author was given. They do not show that any application was made to the editor of the *Times* to insert any contradiction of the letter; and the plaintiff brought his action a few days after. This shows that the object was damages, and not the setting of the matter right by an explanation of the real character of the vessel. The question is, what damage has Capt. Ingram sustained between the 31st of October and the 4th of November? The vessel was not out of dock at the time: no passengers are named in the declaration as having declined to go in the ship in consequence of the libel. The learned counsel was then proceeding to refer to the plea which had been demurred to, when

*Kelly* objected. And *Platt* contended that he had a right to refer to the plea, as the record had been made up for the jury to assess the



damages *according to the premises* on which the plaintiff had put himself on the judgment of the court—

*Humfrey*.—The case of *Codrington v. Lloyd*, 1 Per. & D. 157, shows that a record made up without a plea demurred to, is bad.

MAULE, J.—The plaintiff has put himself on the judgment of the court as to the whole declaration.

*Platt* was then proceeding to state that the plea was evidence, as showing what the plaintiff had admitted to be true.

MAULE, J.—You surely do not mean to contend that you have a right to assume the facts stated in the plea as admitted?

*Platt*.—Yes. But I also refer to the plea as showing the conduct of the plaintiff in the management of the cause.

MAULE, J.—I think it is not competent for you to state these pleadings to the jury at all. (a) I consider *the premises* to refer to the declaration. At first I was disposed to think, till Mr. *Humfrey* cited a case to the contrary, that the plaintiff, not being obliged, but having voluntarily chosen to bring the plea before the jury, you might contend that you were at liberty to observe upon it; but as he was compelled to do it, I think it makes the objection to your alluding to it much stronger.

*Platt* continued his address to the jury.—It is admitted, on all hands, that there was a leak in the ship, and this might be sufficient to prevent passengers from going. I cannot say that this is not a libel upon the ship, but it is quite clear that there was no malice against Capt. Ingram; and I cannot say, after the evidence which has been given, that the vessel was not seaworthy. But with respect to the damages, as the object was only to invite discussion, and the columns of the paper were open for that purpose, I submit that they ought to be but small.

MAULE, J., (in summing up, *inter alia*,) observed,—A good deal has been said about the absence of malice and the bona fides of the writer of this letter. But I think that a person looking at it carefully, may doubt whether it does not proceed from an interested party, as it begins and ends with a disclaimer of any motive. It is clearly a most injurious letter to the plaintiff, and calculated to occasion him serious loss as the owner of the vessel. It is signed W. T., which is suggested to mean William Tyler, but no evidence is given upon that subject. It does not appear that any inquiry was instituted, but the letter was immediately inserted; and a person who so acts, whether he is a public journalist or not, is answerable for the consequences. It seems to be admitted on both sides that the paper has a very extensive circulation. It is said that the plaintiff might have contradicted the statement; but that seems to me to be reversing the order of things, by requiring the person who is injured by the unfounded statement to take the trouble of correcting it, instead of the party inserting it without inquiry being expected to take pains to ascertain its truth; and if it is not true, himself to contradict it. Under all the circumstances of the case it will be for you to give to the plaintiff moderate, temperate, and reasonable da-

(a) See the case of *Firmin v. Crucifix & Staff*, vol. 5 of these Reports, p. 98, (24 E. C. L. R. 230,) which was a question of partnership; and *Theaiger*, for the plaintiff, referred to statements in a special plea, which had been held bad on demurrer, as showing the connexion between the two defendants; but Lord Lyndhurst, C. B., said, that the special plea was out of the question, and the jury must decide the case upon the general issue.

mages; not vindictive or passionate, but such damages as you think naturally the consequences of the libel.

Verdict for the plaintiff.—Damages £900.

*Kelly, Channel, and John Henderson*, for the plaintiff.

*Platt, and Humfrey*, for the defendant.

In the ensuing term *Humfrey* moved for a new trial, on the ground that the learned judge who tried the case ought to have limited the claim of damages to such damages as actually accrued between the publication of the libel and the commencement of the action, but the court

Refused a rule. (a)

(a) See the case of *Hodsoll v. Stallbrass*, ante, p. 63.

BEFORE MR. JUSTICE COLTMAN.

GILLETT and Another v. WILBY.—p. 334.

To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded; 1st, the general issue; 2d, that the alleged improvements were not new; and 3d, that the plaintiffs were not the true and first inventors of the improvements:—*Held*, that on this state of the pleadings it could not be contended, that the patent was illegal as being a monopoly.

*Also*, that though all the improvements claimed must be shown to be new, yet it need not be shown that the defendant's cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action.

*Also*, that the validity of the patent might be considered as having come in question under the 2d plea, so as to entitle the plaintiff to a certificate to that effect under the 3d section of the stat. 5 & 6 Will. 4, c. 83.

THE plaintiffs in their declaration complained of an infringement, by the defendant, of a patent they had obtained for certain improvements in a cabriolet. The pleas were, 1st, the general issue; 2dly, that the alleged improvements were not new; and 3dly, that the plaintiffs were not the true and first inventors.

The allegation in the declaration was, that the defendant unlawfully, &c., did use and put in practice one of the said description of vehicles called cabriolets, with the said improvements, and that the cabriolet, so used by the defendant did imitate and resemble the said improvements.

The patent and specification were put in, from which it appeared that there were five different things which the plaintiffs claimed as their invention.

*Bull*, for the defendant, was contending that the patent was illegal, as being a monopoly.

*M. D. Hill*, for the plaintiffs, objected to this line of argument, on the ground that there was not an issue to which it could apply.

COLTMAN, J., was of opinion that if such a defence were intended to be relied on, it ought to have been specially pleaded.

*Bull* submitted, that under the last statute (a) it was sufficient to

(a) 5 & 6 Will. 4, c. 83, s. 5. That section enacts, "that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial,

have given notice of the objection, which the defendant in this case had done.

COLTMAN, J., was of opinion that it was not sufficient.

*Ball* was then contending, that the plaintiffs must show under the words of the declaration that the defendant's cabriolet imitated and resembled *all* the improvements.

COLTMAN, J.—I think it will be sufficient if it resembled any one. It is a divisible statement.

*Bull.*—In *Morgan v. Seward*, 2 M. & W. 544, (a) it is held that if a patent be for several improvements, and the jury find one of them not to be such, the patent is void altogether. I contend that every part must be new, or it is void altogether.

COLTMAN, J., in summing up, said—The defendant's first plea is, that he is not guilty of the infringement. The question upon this will be, whether the cabriolet was used by the defendant, and whether it is an infringement of the patent right. The second plea is, that the improvements claimed are not new; and the third, that the plaintiffs were not the true and first inventors of them. On the first point the patent is put in, from which it appears that the plaintiffs claim not only the seat behind, but the mode of entry in front, &c. &c. It is true that the plaintiffs must make out to your satisfaction that the whole of the improvements were new, and that some of them have been pirated. It is not necessary that they should use them all, but they must be shown to be all new, and if they are all new, and the defendant has infringed any one of them, it will be sufficient to support the action, and it is not necessary that he should have infringed them all. There are five different points in which the plaintiffs claim the invention as new, and if you are satisfied of that, then on the other point there is no evidence that they were not the first inventors, and then will come the question, whether the defendant has infringed any part of that which the plaintiffs claim as new?

Verdict for the plaintiff—Damages 1s.

*M. D. Hill* applied for a certificate, under the 5 & 6 Will. 4, c. 83, s. 3, (b) that the validity of the patent came in question.

COLTMAN, J.—I think you are entitled to the certificate.

*Bull.*—I was not allowed to question the validity of the patent.

COLTMAN, J.—I think that the validity of the patent has in part come

unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively to show cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit."

(a) That case decides that, if a patent be taken out for several inventions, which are claimed as improvements, and the jury find that one of them is not an improvement, the patent is altogether void.

(b) That section enacts, "that if any action at law, or any suit in equity for an account, shall be brought in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any scire facias to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them, upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried to certify on the record, or the judge who shall make such decree or order to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs."

in question, under the plea that the invention was not new. But I will look further into the subject.

The certificate was afterwards granted.

*M. D. Hill*, and *Shee*, for the plaintiffs.

*Ball*, for the defendant.

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BEFORE MR. JUSTICE ERSKINE.

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OSBORN and Another v. THOMPSON.—p. 337.

In assumpsit on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound; and the defendant only pleaded that it was; upon which plea issue was joined:—it was *Held*, that the plaintiff had the right to begin.

**ASSUMPSIT** on the warranty of a mare.—The declaration stated the warranty to be that the mare was sound, with the exception of crib-biting. Averment, that it was not sound, except crib-biting. The only plea was that the mare was sound, according to the warranty, on which issue was joined.

*Bompas*, Serjt., for the defendant, claimed the right to begin.—There was a case of *Fisher v. Joyce*, tried before Mr. Justice COLERIDGE, at the last Bristol Assizes, in which, on the very same state of the pleadings, that learned judge allowed the defendant to begin. The damages in this case are a pure matter of calculation, and Mr. Baron MAULE, in a case tried here the other day, held that the assessment of damages must be a substantial question to give the plaintiff the right to begin. *Hoggett v. Exley*, ante, p. 135.

ERSKINE, J., (having ascertained that Mr. Justice COLERIDGE was sitting for Lord DENMAN, in the adjoining court, sent to inquire of him about the decision at Bristol, and on receiving his reply,) said, Mr. Justice COLERIDGE sends me word that he did rule in the manner mentioned by my brother *Bompas*, but that he did it with much hesitation.

*Bompas*, Serjt.—It is very important that there should be one rule on the subject.

*Atcherley*, Serjt., for the plaintiff.—The question here is, what is the substantial issue on the record? it is only a conversion of terms, sound and unsound. The test is, who would have the verdict if no evidence were given on either side? The defendant, and not the plaintiff, would have the verdict. It is not like a new fact introduced by the plea.—[*Tulfourd*, Serjt., being referred to by *Atcherley*, Serjt., stated as amicus curiæ, that L. C. J. TINDAL had decided, that in a case like the present, the plaintiff was entitled to begin.]

*Humfrey*, also, for the plaintiff.—In the case of *Cox v. Walker*, where the same issue was raised, Lord DENMAN, C. J., held that the plaintiff was entitled to begin, and he did so on this ground, that if no evidence were offered, the defendant would be entitled to the verdict. In our declaration we allege, that, in consideration that the plaintiff would buy a mare, the defendant undertook that it was sound, &c., and we aver that it was unsound. Could we recover if we did not prove that the defendant had broken his warranty? Certainly not. It is as much an issue on the plaintiff as on the defendant. The question arises in cases of non-repair, (a) as well as cases relating to the warranty of horses.

(a) See the note at the end of this case.

*Bramwell*, on the same side.—The new rules do not apply to this case. The defendant says that he affirms the horse to be sound; but we affirm it to be unsound, and the one is just as much an affirmative as the other. Then, each party making an affirmative proposition, on whom does it lie to make out a cause of action, no such being confessed on the record? If the plaintiff avers that a man is dead, and the defendant says that he is alive, is not the onus on the plaintiff of proving that the man is dead?

*Bompas*, Serjt., for the defendant, was referring to a case.

ERSKINE, J.—I think you had better discuss it upon the principle. At present my impression is that the principle is against you.

*Bompas*, Serjt.—The test mentioned by Mr. *Humfrey* is as completely arguing in a circle as any I ever met with.

ERSKINE, J.—Must not the plaintiff prove that the horse was not sound?

*Bompas*, Serjt.—That is a complete begging of the question. Suppose the complaint were, that the defendant undertook to deliver a sound horse, and the defendant said, "I did deliver you a sound horse," would he not be bound to prove it? It is quite clear that he would. Each man is bound to perform his part of the contract. The defendant admits that the plaintiff performed his part by not denying it.

ERSKINE, J.—Supposing you were to call a witness who had never seen the horse in question, but some other horse; what would be the consequence?

*Bompas*, Serjt.—I should be defeated. I should lose the verdict. As to the averment that a man is dead, that argument does not apply, as a man is presumed to be alive till the contrary is shown. The question is, has the defendant performed his contract? He undertakes to prove that he has, and the onus lies upon him.

ERSKINE, J.—If there had been no other authority but the case before Mr. Justice COLERIDGE, and I had not had the benefit of consulting him, I should have felt some difficulty in deciding. But I have from my brother COLERIDGE the expression of his own doubts on the case. And, further, I have the statement of my brother *Talfourd*, that the lord chief justice of this court decided, in a case like the present, that the plaintiff was entitled to begin. On principle, on whom does the burden of proof lie? Suppose the defendant had not appeared, or called any witness, would the plaintiffs be entitled to a verdict, merely on proof of the damages? Certainly not; they would be bound to prove that the horse was unsound. On the contrary, if the plaintiffs failed, the defendant would be entitled to a verdict; and it cannot make any difference that the defendant appears by counsel, who is prepared to call witnesses in support of his case. I think the plaintiff is entitled to begin.

*Atcherly*, Serjt., then stated the plaintiff's case.

The trial lasted two days, and terminated eventually in a juror being withdrawn.

*Atcherly*, Serjt., *Humfrey*, and *Bramwell*, for the plaintiffs.

*Bompas*, Serjt., and *Shee*, for the defendant.

In the case of *Soward v. Leggatt*, ante, vol. 7, p. 615, (32 E. C. L. R. 654,) Lord Abinger, C. B., said, "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and effect of it," &c. &c. This

was an action of covenant, and the breach in the declaration was that the defendant did not repair the premises, but suffered them to become ruinous, &c., and the plea was, that the defendant did repair the premises, and did not suffer them to become ruinous, &c. In the case of *Belcher and others v. Macintosh*, ante, vol. 8, p. 720, (34 E. C. L. R. 601,) in which the pleadings were similar to those in *Soward v. Leggitt*, Alderson, B., said, "I think the plaintiff ought to begin, for if no evidence was given on either side, the defendant would succeed." See also the cases of *Harnett v. Johnson*, ante, p. 206; *Aston v. Perkes*, ante, p. 231; *Steinkeller v. Newton*, ante, p. 313; and *Hoggell v. Exley*, ante, p. 324.

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## CENTRAL CRIMINAL COURT.

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JANUARY SESSION, 1840.

BEFORE MR. BARON GUERNEY, AND MR. JUSTICE ERSKINE.

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REGINA v. GEORGE DALY.—p. 342.

The law does not authorize a private person to forego a prosecution upon any terms; and even if a promise be given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference.

THE prisoner was indicted for stealing, on the 6th of May, fifty-two yards of woollen cloth, called buckskin, of the value of 13*l.* 13*s.*, the goods of W. Jamieson Anson, his master.

The prisoner had been in the employ of the prosecutor for about two years and a half; and it appeared in the progress of the case, that, on the night of the 13th of November, the warehouse of the prosecutor had been opened by means of a false key, and a quantity of superfine black cloth of the value of £150 had been stolen; and in consequence, a placard was issued, offering a reward of twenty guineas for the discovery of the thief. On the cross-examination of the prosecutor, he was asked, whether he had not, in consequence of some conversation he had with the prisoner on the subject of that robbery, signed a certain paper? He admitted that he had. It was read, and was as follows:—

"I, W. Jamieson Anson, promise and pledge myself that, provided George Daly, now in the employ of the said W. Jamieson Anson, makes known any circumstance or circumstances connected with or proving a recent felonious robbery of sundry cloths mentioned in a certain handbill or placard, and belonging to my employer or employers; or, in other words, any circumstance or circumstances connected with a robbery of any property belonging to my employer or employers aforesaid, in which I have at any time been concerned, either directly or indirectly, do promise as aforesaid to forgive him, the said George Daly, and not prosecute, according to law, in any court of justice, him, the said George Daly, provided he, the said George Daly, do make known the whole of the circumstance or circumstances aforesaid, or do make known, without disguise or deceit, the possessors, or purchasers, or receivers of the said cloths or property, which may in any way or manner tend to lead to a recovery of the said property without purchase.—

Dated this 12th day of December, in the year of our Lord, 1839, at No. 106, Wood Street, Cheapside, London.

"Signed by me,

W. JAMIESON ANSON."

The prosecutor stated, that the above paper was dictated and composed by an inspector of police; and that, in consequence of it, he received a paper from the prisoner, which commenced as follows: "I, George Daly, on my oath, do now declare before my master, Mr. W. J. Anson, to tell all I know concerning the robbery at No. 106, Wood Street, Cheapside." It then set out an account of various pieces of buckskin which, at different times previous to the robbery of the 13th of November, he had pledged at various pawnbrokers' shops. But there was not any information on the subject of that robbery. The prosecutor added, that, being satisfied from particular circumstances that the prisoner must be able to give information on the subject of that robbery if he pleased, he told the prisoner that he should not, under the circumstances, consider himself bound by the paper he had signed; and the prisoner was in consequence taken into custody.

*Bodkin*, for the prisoner, commented upon the extraordinary nature of the document which the prosecutor had signed; and contended, that, having signed it, he ought not afterwards to have had the prisoner apprehended and indicted.

GURNEY, B., in summing up, with reference to that part of the case, said—The law does not authorize any private person to forego a prosecution upon any terms. Even if a promise were given, and broken in such a way as you would say was scandalous, yet, in point of law, that would not make any difference. But there is no ground for complaint against the prosecutor in this case, as he, being desirous of obtaining information as to the robbery on the 13th of November, told the prisoner that, as he had not received from him any information on that subject, he should not consider that he was any longer bound by the promise which he had made.

Verdict, guilty—Sentence, transportation for twelve years.

*Payne*, for the prosecution.

*Bodkin*, for the prisoner.

#### REGINA v. WHITE and SELLERS.—p. 344.

If a servant take his master's property and hand it over to another as a gift, it is as much a felony as if he sell it or take it to a pawnbroker's and pledge it.

THE prisoner, Elizabeth White, was indicted for stealing, on the 3d of January, one towel, value 6*d.*; three candles, value 3*d.*; 4 oz. weight of soap, value 2*d.*; 1½ lb. weight of bread, value 4*d.*; and 1½ oz. weight of butter, value 2*d.*; the goods of James Peat, her master; and the prisoner, Mary Ann Sellers, was charged with feloniously receiving the same, well knowing them to have been stolen.

The prosecutor stated, "The prisoner White was in my service as cook for about a fortnight and two or three days; in consequence of suspicion, on the 3d of January, between six and seven in the evening, I went out of my house, and secreted myself a few doors off on the other side of the way; I could see my own door from that place; I had not

been there above five minutes, when I saw White come out of the private door; I have more than one door; she had no bonnet on; I saw her come out of the house with something in her apron; she came up the street nearly opposite to where I was standing, when she was met by Sellers with a basket in her hand; White took something wrapped up in a white towel from her apron; Sellers opened her basket, and White put the bundle into it; they stood in conversation about two minutes, and then walked together towards Piccadilly; I followed them, hoping to meet a policeman; they went as far as the White Horse Cellar public-house before I could find one; I then gave them into custody; they did not see that I was following them; the basket was searched by the policeman, and in it was something wrapped up in a towel, which appeared to be the same bundle I had seen put in it; it contained a quantity of bread, three kitchen candles, some soap, and some butter; I examined the towel, and knew it to be mine; there was nothing else in the basket which I claimed; Sellers was carrying it; I searched my house, and we missed the towel, some candles, bread, soap, and butter; we have missed two more towels besides: I know this towel to be mine."

On his cross-examination, he said, (*inter alia*), "The things are not worth eighteen-pence; but when I saw a bundle taken out, I thought it was something else, and when I got before the police I was bound to go on." It further appeared that the soap was common yellow soap; that the candles were broken; and that the bread was only a portion of a loaf.

For the defence it was contended, that the prisoner, Elizabeth White, did not intend to part with the towel to the other prisoner, but only used it to wrap up the other articles, which, being of small value, were given out of compassion, and without any felonious intent.

ERSKINE, J., in summing up, said—If the prisoner, Elizabeth White, took the property and handed it over to the other prisoner as a gift, it is as much a felony as it would have been if she had sold it, or taken such part of it as could be dealt with to a pawnbroker's, and pledged it. The purpose for which she took it is not material. If you think, as to the towel, that Elizabeth White did not intend to hand it over to Sellers to get rid of, then the case will be slighter against Sellers than if she did: because, in that case, she might not know but that Elizabeth White had the privilege of giving away the other things. You will say, whether you are satisfied that Elizabeth White took the property, intending to deprive her master of it; and if so, whether Sellers knew that the property had been stolen.

Verdict—both guilty, but recommended to mercy. Sentence, three months' imprisonment.

*Payne*, for the prisoners.

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BEFORE MR. COMMON SERJEANT MIREHOUSE.

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REGINA *v.* WILLIAM SELL.—p. 346.

A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty.



THE prisoner, on his arraignment, pleaded guilty to an indictment, charging him with stealing three shillings and six-pence, the moneys of Andrew Pettinger, his master and employer, and sentence was passed upon him, in the absence both of his own counsel and the counsel for the prosecution.

*Clarkson* afterwards, on behalf of the prisoner, applied to the common serjeant to allow him to retract his plea of guilty, and plead not guilty, alleging that it was the usual practice to allow such a course to be taken.

*C. Phillips*, for the prosecution, was willing that such a course should be adopted.

The common serjeant doubted whether it could be done after judgment had been pronounced.

*Clarkson* observed, that the court, during the session, had power over its own judgment, and might vary it in any way, and if so, might also get rid of it altogether, and allow the case to be tried. (a)

The common serjeant still entertaining a doubt, referred the matter to the judges in the adjoining court—viz. Mr. Baron GURNEY and Mr. Justice ERSKINE, who, according to his statement, were of opinion that it might be done.

The prisoner was then brought up, and asked if he was guilty or not guilty, and replied that he was not guilty.

But, on the case being again mentioned to GURNEY, B., COLERIDGE, J., being present, and ERSKINE, J., absent, GURNEY, B., stated, that he and ERSKINE, J., did not understand, when the matter was first brought before them, that sentence had been passed upon the prisoner; (b) and both their lordships, viz. GURNEY, B., and COLERIDGE, J., expressed themselves clearly of opinion, that judgment having been once pronounced, the prisoner could not be admitted to plead not guilty. The result, therefore, was, that the sentence which had been pronounced remained in force, but, under the peculiar circumstances of the case, application for a remission of it was made to the Secretary of State.

*C. Phillips*, for the prosecution.

*Clarkson*, for the prisoner.

(a) The ground upon which a sentence can be altered during the continuance of the session, proceeds, as we understand, upon the notion that the second judgment being, as it were, written over the first, vacates it. This would not apply to the getting rid of the judgment altogether, which can only be done in the proper way, where there has been any irregularity in it. But here there was not any irregularity in the judgment at first pronounced, and therefore it must stand, unless varied by another judgment pronounced by the court during the continuance of the session.

(b) This shows the inconvenience of the system alluded to in note (b) to the case of *Reg. v. Fuller and Others*, ante, p. 36. It is quite clear that the learned common serjeant must have mentioned to the judges the fact of the sentence having been passed, as without that fact it would have been the ordinary case of a prisoner, being allowed to retract his plea, in which there is never any difficulty. But the matter being mentioned to the judges privately, during the progress of another case, is very likely not to be completely understood, so as to enable them to come to a satisfactory conclusion.

## MARCH SESSION, 1840.

BEFORE MR. BARON PARKE.

## REGINA v. THOMAS MORRIS.—p. 349.

Though to make a thing the subject of an indictment for larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least.

THE prisoner was indicted for feloniously receiving, on the 11th of December, of a certain evil-disposed person, nine pieces of paper, value two shillings, of the goods of John Bentley and others, well knowing them to have been stolen.

The papers in question appeared to have been torn by some person out of a book kept by a coalmeter named Johnson, who, in his evidence for the prosecution, described the nature of the book as follows :—"It is a certificate book, which we receive out of the coalmeter's office when we go on board ships; they are certificates which we give to different merchants; they are not signed as they are in the book; there are blanks left for the name of the ship from which the coals are delivered, the quantity, the barge, the number of it, the lighterman, and to whose account they are delivered, and the date of the delivery. It is signed by the meter."

One only of these pieces of paper was traced to the possession of the prisoner.

At the close of the evidence for the prosecution,

*Adolphus*, for the prisoner, submitted, that there was not any case to go to the jury. The prisoner is charged with stealing nine pieces of paper. Only one of them is traced to his possession, and that is not of any value, so as to sustain an indictment. It must be of the value of some coin known to the law.

PARKE, B.—Though it may be of very small value, still it is worth something. You say that it must be of some assignable value—of the value of some coin. Show me an authority for that position.

*Adolphus*.—The practice has been uniform on that subject. There must, I submit, be a value assignable.

*Clarkson*, for the prosecution.—We can show how much the paper cost. But there is the case of the reissued bank notes. (a)

PARKE, B.—There is no doubt it must be of some value, and it is of some value. But it is quite new to me, that it must be of the value of some coined money—of a farthing at least.

*Prendergast*, for the prisoner.—Unless it be so, you cannot lay a cor-

(a) *Reg. v. Clarke, R. & R., C. C. R. 181.* The prisoner was indicted for stealing promissory notes, and there were also counts for stealing certain pieces of paper stamped with a stamp, &c. The notes consisted of country bank notes, which, after having been paid in London, were sent down to the country to be reissued, and were stolen on the road. It was argued in that case, as in the present, that the papers in their then state were worth nothing, and would not sell for so much as a farthing, and that nothing could be the subject of larceny which was not worth the smallest current coin in the kingdom. But the judges held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, particularly the latter, being valuable to the owners, which related to a promissory note.

rect statement of the value in the indictment. And there is the old maxim, "de minimis non curat lex."

PARKE, B.—It must be assigned of some value. You say of the value of some known coin. But I do not know any authority for that. I do not know that it could not be stated as of the value of a hundredth part of a farthing. Show me some case where the indictment has failed on the ground of the article being valueless.

*Prendergast.*—*Phipoe's case* may be referred to as bearing on the question. (a) But though there is not any case on the subject, yet it seems to me that it had been taken for granted in a great many. In *R. v. Clarke*, the charge was for stealing papers with stamps on them. The indictment here does not describe the papers as printed papers, nor certificates, but only as nine pieces of paper. They are not writing paper; they can only be used as waste paper. There is only one produced; but assuming that the whole nine had been traced to the prisoner's possession, they would not fetch any thing like a farthing. The distinction which formerly existed between grand and petty larceny was, that petty larceny meant stealing goods of some value known to the law, but not of the value of a shilling. And, in civil cases, a farthing damages is the lowest amount that is ever given, because it is the lowest coin which is known to the law.

*Clarkson.*—The papers are not filled up. Therefore they are valuable as forms that may be used. And we can show that the engraving, &c., would make one of them of the value of more than a farthing.

PARKE, B.—It is better to have the evidence of the fact.

A witness was called who said, "I charge 3s. 3½d. for ninety-six of the papers, which renders the value of one about a farthing and a half." On his cross-examination he said—"One of the pieces of paper, without any thing on it, would not be worth any thing;" it is only the fourth part of a sheet.

PARKE, B.—It has cost more than a farthing. Therefore the point does not arise. But I must be understood for one as not considering that it was necessary to show that the article must be of the value of some known coin. It must be of some value, no doubt. There is clearly evidence to go to the jury that it is of the value of more than a farthing to the owners. It has cost them that. I have attended to the argument as to the description in the indictment, and it seems to me that that description is correct. If I should on consideration entertain any doubt, and it should become material for the prisoner, I will consider it further; but as at present advised, I think the description correct. I have not been able to find any case in support of the argument for the defence, nor have the prisoner's counsel been able to produce any.

The prisoner was acquitted on the merits.

*C. Phillips, Clarkson, and Bodkin*, for the prosecution.

*Adolphus, Prendergast, and Horry*, for the prisoner.

See the case of *Reg. v. Bingley and Law*, vol. 5 of these Reports, p. 602, (24 E. C. L. R. 474). The prosecutor in that case had been at market, and left all his money with the landlord at the inn where he had been, and on his way home was attacked by the prisoners, who knocked him down and took from him the only thing that he had in his pocket, viz. a small slip of paper which contained a memorandum of a sum of money which a person owed him. Gurney, B., in summing up the case, said, "If any thing was taken away from the prosecutor by violence, however insignificant its value, that is sufficient to constitute a robbery. In cases of robbery the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, showed that he considered that it was of some value to himself." The prisoners were found guilty.

(a) 1 Leach, 473; and 2 East, P. C. 599. That case, which related to a promissory note,

was decided on the ground that the prosecutor had not any property in the thing taken. The judges there said, that it was essential to larceny that the property stolen should be of some value, and that the note in question was so far from being of any value to the prosecutor, that he had not even the property of the paper on which it was written.

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APRIL SESSION, 1840.

BEFORE MR. BARON ALDERSON.

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REGINA v. GEORGE HARVEY.—p. 353.

If the owner of goods employ a person, not in his service, to take them to a particular place, show them to a customer, and bring them back, without authorizing him to sell them to, or leave them with the customer, and he, instead of taking the goods to the specified place, sell them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only, and not the possession of the goods.

THE prisoner was indicted for stealing, on the 6th of April, one gelding, of the price of £6, one set of harness, of the value of 10s., one cart, of the value of £4, and three pigs, of the value of 3*l.* 19s., the property of John Regan.

The prosecutor said—"I live at Eastham, in Essex, and deal in pigs, which I take about in a cart. On Monday, the 6th of April, I met the prisoner at the Duke's Head public-house, Walthamstow, about half-past twelve o'clock; he was generally about that house; I had three pigs in my cart, which had a pony to it with harness on; I had to show some pigs to a lady, but I was taken very ill, and the prisoner said he would mind the cart if I gave him a pint of beer; I asked him to take the horse and cart, and show the pigs to the lady; he was to have returned in a quarter of an hour, but I saw no more of him till he was in custody at Barnet; I never told him to sell the pigs, but to show them to the lady." On his cross-examination he admitted that he told the prisoner what was to be the price of each of the pigs, if the lady should take a fancy to them, but he added—"He was only to show the pigs to the lady; I told him the price, as he asked me what they were if she should ask him; he was not to sell them, only to see if they were the right size for the lady; she would not have bought of him; he was not trusted to sell them for me and receive the money; I would not have trusted him with the money; he was to bring the pigs back to me in a quarter of an hour, whether she liked them or not."

It appeared that the prisoner sold the three pigs to three different persons, and afterwards drove the horse and cart to Barnet, where he was taken into custody; and he then told the policeman that he was going to return them to the prosecutor, as soon as he had dined.

On the part of the prisoner, it was contended, that with respect to the horse and cart, there was not any evidence that the prisoner intended to convert them to his own use; and with respect to the pigs, he could not be convicted of stealing them, unless the jury were satisfied either that he was not in the situation of a bailee, or that he intended from the beginning to steal them, and offered to take care of the cart merely for that purpose, for which latter supposition it was argued there was not any foundation on the evidence.

ALDERSON, B., in summing up, said—There are two questions for your consideration in this case. The first is, whether the prisoner had a felonious intent from the commencement of the transaction; and the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is, whether they were delivered to the prisoner simply that he should show them to the lady, and bring them back bodily; if they were, then, if the felonious intent came upon him at that time, it would come upon him at the time when he had only the custody and not the possession, and in that case he would be guilty of stealing them. With respect to the horse and cart, it is clear that the custody of them only was delivered to the prisoner; and then the question arises, whether he intended to steal them or meant to bring them back to the prosecutor.

Verdict—Guilty of stealing the pigs, and not the horse, cart, and harness. Sentence, six months' imprisonment.

*Payne*, for the prisoner.

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BEFORE MR. RECORDER LAW.

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REGINA v. CHAPPLE and Others.—p. 355.

To substantiate the charge of harbouring a felon, it must be shown that the party charged did some act to assist the felon personally.

THE indictment charged Thomas Chapple and Charles King with breaking and entering the dwelling of John Porter on the 7th of September, at St. Giles's in the Fields, and stealing therein fourteen silver spoons and various articles, the property of the said John Porter, and also charged Charles Chapple, Eliza Plant, Ann King, Henry Cox, and Sophia Cox, with feloniously receiving, harbouring, comforting, assisting, and maintaining the said Thomas Chapple and Charles King, well knowing that they had committed the felony.

It appeared that the various prisoners who were charged with the offence of harbouring the felons had been found in possession of various sums of money derived from the disposal of the property stolen, but it did not appear, although they were in frequent communication with the persons charged with the felony, that they had received any of the stolen property itself, or had done any act to assist the felons personally.

At the close of the case for the prosecution,

LAW, Recorder, intimated an opinion that the offence charged, so far as Charles Chapple and the others not indicted for the stealing were concerned, was not made out by the evidence, as there was no act shown to have been done by them to assist the felons personally. He referred to a case in which it had been held, that writing letters to intimidate the witnesses and prevent them from coming forward to give evidence, was not a harbouring and assisting of the felon. He then went into the adjoining court for the purpose of consulting on the subject with Mr. Justice LITTLEDALE and Mr. Baron ALDERSON, and on his return

said, "I have mentioned the case to the learned judges as shortly as I could, so as not to cause an interruption of the public business, and the answer was what I expected, viz., that in their opinion the proof amounts to evidence of an imperfect receiving, and not to the offence charged in the indictment."

Verdict—Thomas Chapple and Charles King guilty of breaking and entering, &c., and the other prisoners not guilty.

*Clarkson*, for the prosecution.

*C. Phillips* and *Lucas*, for the defence.

BEFORE MR. JUSTICE LITTLEDALE AND MR. BARON ALDERSON.

REGINA v. CATHERINE MICHAEL.—p. 356.

A prisoner was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a tea-spoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died :—

*Held*, that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand.

THE prisoner was indicted for the wilful murder of George Michael. She was also charged on the coroner's inquisition with the same offence.

The indictment stated, that the prisoner, contriving and intending to kill and murder George Michael on the 31st day of March, in the third year of the reign of her present majesty, upon the said George Michael feloniously, &c., did make an assault, and that the prisoner, a large quantity, to wit, half an ounce weight, of a certain deadly poison, called laudanum, feloniously, &c., did give and administer unto the said George Michael, with intent that he should take and swallow the same down into his body, (she then and there well knowing the said laudanum to be a deadly poison,) and the said George Michael the said laudanum so given and administered unto him by the said Catherine Michael as aforesaid, did take and swallow down into his body; by reason and by means of which said taking and swallowing down the said laudanum into his body, as aforesaid, the said George Michael became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said George Michael from, &c., till, &c., did languish, &c., and died; and concluding in the usual form, as in cases of murder.

It appeared that the deceased was a child between nine and ten months old, and that the prisoner was its mother, and was a single woman, living in service as wet nurse at Mrs. Kelley's, in Hunter Street, Brunswick Square. The child was taken care of by a woman named Stevens, living at Paddington, who received five shillings a week from the prisoner for its support. A few days before its death the prisoner told Mrs. Stevens that she had an old frock for the child, and a bottle of medicine, which she gave her, telling her it would do the baby's bowels good. Mrs. Stevens said the baby was very well, and did not want medicine; but the prisoner said it had done her mistress's baby

good, and it would do her baby good, and desired Mrs. Stevens to give it one teaspoonful every night. Mrs. Stevens did not open the bottle or give the child any of its contents, but put the bottle on the mantel-piece, where it remained till Tuesday, the 31st of March, on which day, about half-past four in the afternoon, Mrs. Stevens went out, leaving the prisoner's child playing on the floor with her children, one of whom, about five years of age, during the absence for about ten minutes of his elder sister, gave the prisoner's child about half the contents of the bottle, which made it extremely ill, and in the course of a few hours it died. The bottle was found to contain laudanum. The prisoner said that a young man, an assistant of Dr. Reid's, had given the bottle by mistake. This was proved to be untrue; and Dr. Reid stated, that in the course of a conversation he had with the prisoner, she used these remarkable words, speaking of the death of the child, and the probability of an inquest being held upon the body:—"If I am hanged for it, I could not support the child on my wages." It was also proved that the prisoner purchased the laudanum at a chymist's in Tavistock Place, Russell Square, saying that it was for her mistress, Mrs. Kelly, who was in the habit of taking it, being a bad sleeper. One of the medical men examined at the trial, said that a teaspoonful administered to a child of the age of the deceased would be sure to destroy life.

ALDERSON B., in his summing up, told the jury, that if the prisoner delivered the laudanum to Sarah Stevens with the intention that she should administer it to the child, and thereby produce its death, and the quantity so directed to be administered was sufficient to cause death, and while the prisoner's original intention continued, the laudanum was administered by an unconscious agent, the death of the child, under such circumstances, would sustain the charge of murder against the prisoner. His lordship added, that if the teaspoonful of laudanum was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

The jury found the prisoner guilty. The judgment was respited, that the opinion of the judges might be taken, whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

*Ryland*, for the prosecution.

*Ballantine*, for the prisoner.

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At a subsequent session, Mr. Baron ALDERSON, in passing sentence upon the prisoner, said, that the judges were of opinion that the administering of the poison by the child of Mrs. Stevens, was, under the circumstances of the case, as much, in point of law, an administering by the prisoner as if the prisoner had actually administered it with her own hand. They therefore held that she was rightly convicted.

## MAY SESSION, 1840.

BEFORE MR. JUSTICE PATTESON AND MR. JUSTICE COLTMAN.

REGINA *v.* THOMAS CANNIFF.—p. 359.

All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least.

THE prisoner was indicted for the manslaughter of Richard Fleming. He was also charged on the coroner's inquisition with the same offence.

From the evidence for the prosecution, it appeared that the prisoner was a blind man, who got his living by playing the violin. That on Saturday, the 11th of April, the deceased was at a public-house called the Hoop and Grapes, in Whitechapel, when the prisoner came in, and both parties having been drinking, the deceased challenged the prisoner to toss for a pint of beer. When they had done so, a dispute arose between them. The prisoner said he had won, and the deceased refused to pay; the prisoner went to lay hold of him, and the deceased pushed him away; the prisoner then unloosed a dog which was fastened to him by a string and tied it to the leg of the table, and went again to lay hold of the deceased, but was again pushed away; they then got hold of each other, and there was a struggle, and they pushed about from one side to another; there were no blows struck, but there were three falls, and the deceased fell undermost each time, and the third time the prisoner's knees came upon the lower part of the stomach of the deceased and ruptured the intestines, which rupture, according to the testimony of the surgeons, was the cause of death.

For the prisoner, it was contended, that he, being blind, laboured under a disadvantage when contending with a man who could see, and might in the scuffle have been actually pulled down by the deceased, instead of having thrown him down and forced his knees against him; and it was argued that the jury must be satisfied that the death of the deceased was occasioned by a wilful act on the part of the prisoner, before they could convict him of the offence of manslaughter.

PATTESON, J., in summing up, said—All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger, are unlawful. And if you think the deceased's death was occasioned by an act of the prisoner in a struggle of that kind, I cannot tell you that it does not amount to manslaughter. If the prisoner was struggling, but did not attempt to throw him, I should tell you, it is not a case of manslaughter; but it is for you to say whether that is the fact or not. If the prisoner laid hold of the deceased in anger, and struggled with him and *threw* him, then it is a case of manslaughter. If you can collect from the whole of the circumstances that the prisoner was pulled down against his will, and in consequence fell upon the deceased, then he will not be guilty. But there does not seem any thing in the evidence to show that the prisoner evinced any disposition to give up the contest. On the contrary, it appears that the contest was continued till the fall which occasioned the death. You have been told by the learned counsel for the prisoner that you must be satisfied that the death was



occasioned by a wilful act on the part of the prisoner. In one sense of the word "wilful," I agree with him. I take it for granted he does not mean by it malicious, or intending to do injury; but that it must be the act of the will, and that it must be shown that the prisoner attempted to throw the deceased. They had no right to struggle in this way; if it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter.

Verdict—Not Guilty.

*Payne*, for the prisoner.

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### JUNE SESSION, 1840.

BEFORE LORD CHIEF JUSTICE TINDAL AND MR. BARON PARKE.

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### REGINA v. COURVOISIER.—p. 362.

The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the crown, and to state, that if such attack should be made he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned judge, made in a case tried some years before, on the nature and effect of circumstantial evidence—if he adopts them as his own opinions and makes them part of his own address to the jury.

If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury.

THE prisoner was indicted for the wilful murder of Wm. Russell, Esq., commonly called Lord William Russell, on the 6th of May last.

*Adolphus*, in stating to the jury the case for the prosecution, after detailing the substance of the evidence, observed, that he understood some attack on the part of the defence was to be made upon the character of the female servant, who was the principal witness, but that if any such attack were attempted, he should be able to show that it was totally without foundation.

*C. Phillips*, for the prisoner, objected to Mr. *Adolphus* assuming that any such attack was to be made, when he (Mr. *Phillips*) had not given any intimation of the kind, and, on the contrary, had no intention of doing any such thing.

TINDAL, C. J.—Mr. *Adolphus* has a right to put the case hypothetically, and say, If the character of my witness should be attacked, I shall be able to show that there is no foundation for any imputation upon her.

*Adolphus*, also, in the course of his comment upon the case, alluded to the subject of circumstantial evidence, and after reading from a printed book containing an account of the trial of a person named Patch, for the murder of a Mr. Blight, an extract from the address of the prisoner to the jury, was proceeding to read the observations of Lord Chief Baron Macdonald, who tried the case, upon the nature and effect of circumstantial evidence, when he was interrupted by

*C. Phillips*, for the prisoner, who submitted that it was not correct for his learned friend to be reading to the jury the observations of a judge in a particular case tried many years before.

TINDAL, C. J.—He has a right to use them as his own opinions. There is no objection to his adopting them as part of his own speech.

*Adolphus* continued to read the general observations of the learned chief baron, but did not refer to any of the particular facts of the case.

The trial commenced on Thursday, the 18th, and after the Court adjourned on that evening, some additional and very important evidence was discovered; and at the sitting of the court on the morning of Friday, the 19th, *Adolphus* proposed to open the nature of the evidence which had been discovered, in a short address to the jury; but the court were of opinion that he was not at liberty to do so, and the evidence was given without any statement of its nature being previously made to the jury. The trial concluded in the evening of Saturday, the 20th. The prisoner was found guilty of the murder.

*Adolphus*, *Bodkin*, and *Montagu Chambers*, for the prosecution.  
*C. Phillips*, and *Clarkson*, for the prisoner.

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REGINA v. RICHARD GOULD.—p. 364.

Where any thing is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved. If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence.

THE prisoner was indicted for a burglary in the dwelling-house of John Templeman.

It appeared that the prisoner had made a statement to a policeman under some peculiar circumstances, which induced *Bodkin*, for the prosecution, with the approbation of the court, to decline offering it in evidence, but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made search for the lantern.

TINDAL, C. J., and PARKE, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence.

The prisoner had been tried and acquitted on a charge of having murdered Mr. Templeman, at the time when the alleged burglary was committed, and in furtherance and prosecution of its commission.

PARKE, B., in summing up the case, told the jury that the charge in the indictment did not affect the life of the prisoner, as there was not an allegation that the burglary was accompanied by violence, and that if he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even of assault on the indictment for murder, on which he had been acquitted altogether, in his opinion, that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment.

The prisoner was found guilty, and sentenced to transportation for life.

*Bodkin* and *Ballantine*, for the prosecution.

BEFORE MR. COMMON SERGEANT MIREHOUSE.

## REGINA v. GRUNCELL and HOPKINSON.—p. 365.

An ostler assisted in removing from a wagon, which stopped at the inn where he was employed, a quantity of hay which had been taken by the wagoner from his master's stables and put into the wagon, such hay not being allowed for the horses on the journey.

*Held*, that the ostler was properly indicted for *receiving*, because, as the hay was not allowed by the master for the horses, the moment it was removed by the wagoner from the stable to the wagon *animo furandi*, the larceny was complete.

THE prisoner Gruncell was indicted for stealing a quantity of hay, the property of his master, and the prisoner Hopkinson with receiving it, well knowing it to have been stolen.

It appeared that the prisoner Gruncell, who was a carter, and was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, on the day mentioned in the indictment, took from his master's stables two trusses of hay above the quantity which was allowed for the horses; and that the prisoner Hopkinson, who was the ostler at a public-house where the wagon stopped on the journey, came to the tail of the wagon, and received the two trusses of hay from the other prisoner, and carried them from the wagon to the stable.

*Adolphus* submitted that the indictment was wrongly framed as to the prisoner Hopkinson, in charging him with being a receiver; because, if he had committed any offence at all, it was that of stealing, as the hay, being in the master's wagon, was in the master's possession in point of law, and the act of the prisoner, in removing it from the wagon, constituted a larceny, and not a receiving.

MIREHOUSE, C. S., was of opinion that the indictment was properly framed, but said he would consult Mr. Baron PARKE, who was in the adjoining court. He accordingly did so, and, on his return, said—"The learned judge has gone very carefully, with me and Mr. *Clark*, through the cases on this subject, and he is clearly of opinion with me, that the indictment is properly framed; and he is so on this ground, that, as the hay was not hay appropriated by the master for the horses, the moment it got into the cart *animo furandi*, the larceny was complete. If it had been hay allowed for the horses which had been stolen, it would have been otherwise.

Verdict—Guilty.

*Adolphus* and *Payne*, for the prisoners.

## WELCH SUMMER CIRCUIT, 1839.

## CHESTER ASSIZES.

(Crown Side.)

BEFORE MR. BARON GURNEY.

## REGINA v. BRIMILOW.—p. 366.

If on a trial of an indictment for a rape, it appear that the prisoner was under fourteen years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11.

**RAPE.**—The prisoner was indicted for a rape.

It appeared that the prosecutrix was eleven years old. The facts were clearly proved, and the charge was fully made out by the evidence; but it was also proved, that the prisoner, at the time of the commission of the offence, was under fourteen years of age.

GURNEY, B., told the jury, that, as the prisoner was under fourteen years of age, he could not be convicted of committing a rape; (a) but his lordship left it to the jury to say, whether he was guilty of an assault under the stat. 1 Vict. c. 85, s. 11, referred to, ante, vol. 8, p. 243, n., (34 E. C. L. R. 372.)

Verdict—Guilty of an assault.

*Hill and Townsend*, for the prosecution.

*Cottingham*, for the prisoner.

The learned baron entertaining a doubt, whether, as the law considered the prisoner, on account of his non-age, incapable of committing a rape, he could, on an indictment for a rape, be legally convicted of an assault under the stat. 1 Vict. c. 85, s. 11, and having conferred with PATTESON, J., his lordship reserved the case for the opinion of the fifteen judges; and the case being afterwards considered by the judges, their lordships held the conviction right.

(a) See the cases of *Reg. v. Groombridge*, ante, vol. 7, p. 582, (32 E. C. L. R. 641,) and *Reg. v. Phillips*, ante, vol. 8, p. 736, (34 E. C. L. R. 610.)

## MIDLAND SPRING CIRCUIT, 1840.

## NOTTINGHAM TOWN ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

REGINA v. BEST.—p. 368.

A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not, in fact, sold any spirits, but he gave A. the money to prevent an information.

*Held*, that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out.

MISDEMEANOR.—The first count of the indictment charged, that the defendant, disregarding the statute, (18 Eliz. c. 5, s. 4,) *upon colour and pretence* that one William Peverill had committed a certain offence against a certain penal law, in this, that the said William Peverill had, before that time, sold, by retail, and delivered a quantity, less than two gallons, of certain spirits and distilled spirituous liquors, to wit, one quartern of gin to one Elizabeth Harper, without being duly licensed, against the form of the statute, &c., unlawfully and for wicked gain's sake, and without the order and consent of the queen's courts at Westminster, did make composition with the said William Peverill, and take from him three sovereigns, three half-sovereigns, and ten shillings, twelve pennies, and twenty-four halfpennies, as a reward for forbearing to prosecute for the said supposed offence against the form of the statute, and against the peace.

The second count was like the first, except that it stated the selling of the spirits to be in a certain house in the occupation of William Peverill, he not having a retailing license.

The third count stated the selling to be by retail without license.

It appeared from the evidence of William Peverill, that he kept a retail beer shop, but had no license to sell spirits, and that Elizabeth Harper, about twenty minutes after ten o'clock in the evening in question, came to his shop and asked for ale, which Peverill refused to let her have, saying that it was past hours. She then asked for a Christmas-box or new year's gift, to which Peverill answered, that he had a drop of gin in the house, which might be about a quartern, which he gave to her, and poured it into her mug. She then threw down sixpence on the tap-board, on which Peverill said, "No, I give it to you." She said, "No, I had rather pay for it." Peverill said, "No, Bessy, I have given it to you as a new year's gift." Whereupon she took up the sixpence and her mug and went towards the street-door. On opening the street-door, Peverill saw the prisoner, to whom Elizabeth Harper presented the mug with the gin in it, upon which the prisoner, addressing Peverill, said, "I have got you now; I have been waiting for you the last six weeks, and now I will do you." Peverill said,

"What for?" He said, "For selling gin without a license." Peverill said, "I did not, I gave it to her as a new year's gift." He said, "I know you did sell it, I gave her sixpence to pay for it."

It further appeared, the prisoner soon after came to Peverill's house, and said, "Except you come to my house to-morrow morning by ten o'clock, and bring £4 or £5 with you to make it up, I will lay an information against you."

The statement of Peverill, as to giving the gin as a new year's gift, was confirmed by another witness; and it was satisfactorily proved, that the prisoner obtained from Peverill the money stated in the indictment, as a reward for forbearing to prosecute him for the supposed offence of selling gin without a license.

No information was actually preferred, nor any process sued out.

*Miller*, for the prisoner, submitted, that, as no offence had been actually committed by Peverill, (supposing his account to be true,) and as no process had been issued, or information laid against him, the case was not within the stat. 18 Eliz. c. 5, s. 4. (a)

*Wildman*, for the prosecution, referred to the cases of *Regina v. Southerton*, 6 East, 126, (b) and *Regina v. Gotley*, R. & R. C. C. 84. (c)

*Bosanquet*, J., reserved the point for the consideration of the fifteen judges.

Verdict—Guilty, subject to the opinion of the judges on the point reserved.

*Wildman*, for the prosecution.

*Miller*, for the prisoner.

In the ensuing term, the case was considered by the judges, who held the conviction right.

(a) By which it is enacted, "that if any person or persons (except the clerks of the court only for making out process, otherwise than is above appointed) shall offend in suing out of process, making of composition, or other misdemeanor, contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at Westminster, that then he or they so offending, being thereof lawfully convicted, shall stand on the pillory," be disabled to sue in any action popular or penal, and forfeit £10; and justices of Oyer and Terminer, justices of Assize on their circuits and the Quarter Sessions, are impowered to hear and determine offences against this act." By the stat. 56 Geo. 3, c. 138, the punishment of the pillory was abolished as to this offence, and fine and imprisonment substituted for it.

(b) In that case, it was held that a threatening to put in motion a prosecution for penalties for the purpose of obtaining money to stay the prosecution, is not an indictable offence at common law, although it be alleged that the money was obtained; but Lord Ellenborough intimates an opinion that the charge might have been supported if the indictment had been framed on the stat. Eliz. c. 5.

(c) The prisoner was convicted of having compounded an offence against the Highway Act. Some of the counts stated, that the party from whom the money was taken had committed the offence; and the others stated, that the prisoner compounded and took the money by and upon colour and pretence of a certain matter of offence pretended to have been committed. It was proved, that the person from whom the prisoner took the money had incurred a penalty of £5 under the Highway Act, and that the prisoner had received money from him to compound it, but that no process had been sued out, and no information laid before any magistrate. *Le Blanc*, J., respited the judgment, upon a doubt whether the offence was within the stat. 18 Eliz. c. 5, inasmuch as no action or proceeding was depending, in which the order or consent of any court in Westminster Hall for a composition could be obtained; but the judges held the conviction right; and that the statute 18 Eliz., c. 5, applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a court at Westminster, or judgment or conviction.

## PROMOTIONS.—p. 371.

IN Easter Term, 1840, Mr. Serjt. *Adams*, Mr. Serjt. *Andrews*, Mr. Serjt. *Storks*, Mr. Serjt. *Ludlow*, Mr. Serjt. *Bompas*, Mr. Serjt. *Goulburn*, and Mr. Serjt. *Talfourd*, received patents of precedence, conferring on them the same rank that they held under the warrant of King William the Fourth.

In the Vacation after Trinity Term, 1840, *William Glover*, Esq., and *Stephen Gazelee*, Esq., were called to the degree of Serjeants-at-Law.(a)

(a) It would seem that in the Table of Precedence in Blackstone's Commentaries, there is an error as to the rank of serjeants-at-law. They are there placed below knights' younger sons, and below colonels. Mr. Serjt. Manning, in his notes to "The case of the Serjeants," (p. 268), gives a copy of a petition from the serjeants to James the First, stating that there was a question between them and certain knights as to precedence, and praying his majesty's directions, but the MS. from which he cites, concludes with the words "Quere the yssue;" and the learned serjeant in his notes does not cite any authority, showing exactly what ranks the serjeants are entitled to take. From the authorities and documents hereafter referred to, it would appear that the serjeants-at-law rank above masters in chancery, who rank above knights bachelors. Professor Christian, in his edition of Blackstone's Commentaries, published in 1809, says (vol. I. p. 406, n. 18), "In the two last heraldic processions at the funeral of Lord Nelson and Mr. Pitt, masters in chancery and serjeants-at-law had precedence before knights bachelors; and masters in chancery had place inferior to serjeants-at-law.—The heralds say, that admirals and captains in the navy, and generals and colonels, and officers in the army, have no rank or place assigned them in a procession." In the copy of Blackstone's Commentaries, belonging to the Court of Queen's Bench, there is a MS. alteration of Blackstone's Table of Precedence, in the handwriting of Sir F. Pollock, by which serjeants-at-law are placed above knights bachelors, and this note is added by Sir F. Pollock, "so ruled by Sir Isaac Heard, Garter principal king-at-arms, at Lord Nelson's funeral." In the London Gazette of Jan. 14, 1806, the official account of Lord Nelson's funeral (which took place on the 9th of that month) is inserted; and from that it appears, that serjeants-at-law there took precedence of knights bachelors. In the same Gazette it is stated, that "within Temple Bar the procession was received by the Right Hon. the Lord Mayor of London, attended by the aldermen and sheriffs, and the deputation of the common council. The carriages of the deputation of the common council fell into the procession between the deputation of the great commercial companies and the physicians of the deceased, a conductor on horseback being appointed to indicate the station. The carriages of the aldermen and sheriffs fell into the procession between the knights bachelors and serjeants-at-law, a conductor on horseback being there stationed for the purpose as before. The Right Hon. the Lord Mayor on horseback, bearing the city sword, was marshalled and placed in the procession between H. R. H. the Prince of Wales and the herald of arms, who preceded the great banner, in obedience to a warrant under his majesty's royal signet and sign manual, bearing date the 6th instant, directing Garter principal king-at-arms, to marshal and place the Lord Mayor of London, on the present occasion, in the same station wherein his lordship would have been placed if his majesty had been present." In the order of the ceremonial to be observed at Lord Nelson's funeral, published by the heralds' college just before it took place, serjeants-at-law are placed above masters in chancery, and the latter above knights bachelors. We are informed by Sir James Shaw, Bart., who was Lord Mayor of London at the time of Lord Nelson's funeral, that he claimed as Lord Mayor, to take precedence in the city of London, of every one except the sovereign, which claim was, after some discussion, in effect allowed by the royal warrant before referred to, and he therefore, in the city of London, took precedence of H. R. H. the Prince of Wales.—In the London Gazette of March 1, 1806, which gives the official account of the funeral of Mr. Pitt (which took place on the 22d of February), neither serjeants-at-law nor masters in chancery are mentioned, probably because none attended the funeral; but in the order of the procession, published by the heralds' college, shortly before the funeral, masters in chancery are placed above knights bachelors, and serjeants-at-law above masters in chancery, as in the order of the procession for Lord Nelson's funeral; and in this procession (which was not in the city of London), the Lord Mayor was placed next below the privy councillors, who were not peers; the aldermen ranking in the same place as they had done at the funeral of Lord Nelson.

The Gazettes above referred to, will be found in the British Museum, and the orders of the ceremonials are remaining in the College of Arms. In a recent work on Precedency, by C. J. Young, Esq., York herald, is this note:—"The following precedence appears to

have been observed at the funerals of Viscount Nelson and the Right Hon. William Pitt, viz. :—

Baronets.

Knights of the Bath.

Knight-Marshal.

Judge of the Admiralty.

Prime Serjeant [rank altered in 1814—See 2 M. & S. 253].

Gentlemen of the Privy Chamber.

Attorney-General.

Solicitor-General.

*Serjeants-at-law.*

Masters in Chancery.

*Knights Bachelors.*

Divines.

Physicians.

Esquires.

Gentlemen."

But in a communication with which we have been favoured by that gentleman, he says, "The place and precedence upon the occasions alluded to, are in direct opposition to the practice observed in other ceremonials, wherein I have found the *serjeants-at-law*—viz. : In a parliament of Henry the 6th, the order of precedence was—

Judges.

Barons of the Exchequer.

*Knights.*

Attorney and Solicitor-General.

King's Serjeants.

*Serjeants-at-Law.*

Sons of Knights.

Masters in Chancery, &c.

"And in the procession to Whitehall, on King William's return from Holland in 1697, the precedence was as follows:—

Judges.

Baronets.

Knights of the Bath.

Gentlemen of the Privy Chamber.

Master of the Ceremonies.

Grooms of the Bedchamber.

Chamberlain of the Exchequer.

Judge of the Admiralty.

Master of the Revels.

*Knights Bachelors.*

King's ancient Serjeant.

*Other Serjeants.*

Masters in Chancery, &c.

"However, it is but rarely that *serjeants-at-law* are found in public ceremonials unconnected with the courts."

In the Cott. MSS. in the B. Mus. (Jul. C. ix.) is a letter from Sir R. Cotton to Mr. Cook, recorder, which commences—"The speaker in *parlament*, called to be *serjeant*, hath precedence of that *curifhood*;" and in the same collection (Vesp. F. ix. p. 40, et seq.) are some very curious papers respecting precedence; and among them is a copy of the petition of the *serjeants* to James the First.

Much other information, respecting the degree of *serjeant-at-law*, will be found in "The case of the *Serjeants*," edited by Mr. Serjt. Manning.



## COURT OF QUEEN'S BENCH.

*Sittings at Westminster after Hilary Term, 1840.*

BEFORE LORD DENMAN, C. J.

BINGHAM *v.* STANLEY.—p. 374.

A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2d, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin.

For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession.

**ASSUMPSIT.**—The first count of the declaration stated, “that on the 22d of May, 1838, the plaintiff made his draft or order, called a check, on a banker, and directed it to Messrs. Wright, and thereby requested Messrs. Wright to pay himself or bearer £500, and then delivered the same to Benjamin Lisle, who then transferred and delivered the same to the plaintiff, who then became, and was, and is the lawful bearer thereof; and the said Messrs. Wright did not pay the same, although the same was presented to them for payment thereof.” Second count, for money lent. Third count, on an account stated.

**Pleas(a)**—First, that the account stated, which is mentioned in the

(a) As the form of the pleas and replication may be useful in practice, we have subjoined them.

**Pleas**—1st. As to the first and third counts of the said declaration, the defendant says, that the account in the said last count mentioned, was so stated as in that count is mentioned of and concerning the amount of the said draft or order in the first count mentioned, and on no other account whatever.

And the defendant further saith, that before the making of the said draft or order in the first count mentioned, and also before the making of the said promise of the defendant in the third count mentioned, to wit, on the 22d day of May, A. D. 1838, he the defendant borrowed of the said Benjamin Lisle, in the first count mentioned, and he, the said Benjamin Lisle, then lent to the said defendant in a certain common gambling room, in and parcel of a certain messuage and premises of the said Benjamin Lisle, divers, to

third count, was concerning the same amount which is mentioned in the first count, and that, before the making of the draft, the defendant procured of B. L., in a common gambling room in the house of B. L., 500 counters, for the purpose, as B. L., well knew, of illegally playing at French hazard, and that for securing to B. L. the sum of £500, being the nominal value of the counters, he made the check in the first count mentioned; and that before B. L. delivered the check to the plaintiff, the latter had full knowledge that it was made in respect of the loan of the counters as before mentioned. Second plea, the like, except that instead of stating a knowledge in the plaintiff as to the loan of the counters, there was an allegation that the check was transferred to the plaintiff without consideration, and for the mere purpose of enabling the plaintiff to sue on it for the benefit of B. L. Replication to the first plea, that the plaintiff had no notice of the premises in that plea mentioned; and to the second plea, that B. L. transferred the check to

wit, 500 pieces of ivory called counters, for the purpose, as the said Benjamin Lisle then well knew, of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of French hazard, contrary to the statute in such case made and provided; and the defendant further saith, that for securing to the said Benjamin Lisle the sum of £500, being the nominal amount and value of the said counters so by him lent to the defendant as aforesaid, for and in respect of the said loan of the said counters, and on no other account whatever, he the said defendant then, to wit, on the day and year last aforesaid, made the said draft or order in the said first count mentioned, and directed the same to Messrs. Wright, Henrietta Street, and thereby requested the said Messrs. Wright to pay to himself or bearer the sum of £500, and then delivered the said draft or order to the said Benjamin Lisle, as in said first count is mentioned; and the said Benjamin Lisle then took and received the said draft or order of and from the defendant for and in respect of the said loan of the said counters, and on no other account whatever [†]; and the said defendant saith, that before and at the time when the said Benjamin Lisle so transferred and delivered the said draft or order to the plaintiff, and the plaintiff so became the bearer thereof, as in the said first count is mentioned, and at the time when he the said plaintiff took and received the same of and from the said Benjamin Lisle, to wit, on the day and year last aforesaid, he the plaintiff had full knowledge that the said draft or order was so made and delivered by the said defendant to the said Benjamin Lisle for and in respect of the said loan of the said counters by the said Benjamin Lisle to the said defendant, as hereinbefore in this plea mentioned, and on no other account whatever, and this the said defendant is ready to verify, &c.

Second plea.—Exactly similar to the first, to the [†], and then went on as follows:—And the defendant saith, that the said Benjamin Lisle transferred and delivered the said draft or order to the plaintiff, as in the said first count mentioned, without any consideration whatever for so doing, and for the mere purpose of enabling the said plaintiff to sue him the said defendant upon the said draft or order for the benefit of the said B. Lisle; and that there never was any consideration whatever for the said plaintiff being the holder of the said draft or order, but that he the said plaintiff holds the same, and now sues him the said defendant thereon for the benefit and on behalf of the said B. Lisle, and this the defendant is ready to verify.

And as to the second count of the declaration, the defendant saith, that he did not promise in manner and form as the plaintiff hath above in that behalf complained against him the defendant, and of this he puts himself upon the country, &c.

Replication.—The plaintiff as to the plea of defendant, by him first above pleaded to the first and third counts of the said declaration, saith that at the time he took and received the said draft of and from the said Benjamin Lisle, he the plaintiff had no notice of the premises in the said plea mentioned, or any part thereof; and this the plaintiff prays may be inquired of by the country, &c.

And as to the plea of defendant by him secondly above pleaded to the said first and third counts of the said declaration, the plaintiff saith that the said Benjamin Lisle transferred and delivered the said draft or order to the plaintiff, and the plaintiff took and received the same from the said Benjamin Lisle, for a good and sufficient consideration, to wit, to the amount of the said draft or order, and that the plaintiff before and at the time of the commencement of this suit, held and still holds the same for such consideration, and this the plaintiff prays may be inquired of by the country, &c.

the plaintiff for a good and sufficient consideration (concluding to the country).

*Erle*, for the defendant.—I submit that on these pleadings the plaintiff must begin. In one case it was considered that, on issues like these, the defendant should begin, but that decision has been questioned.

*E. Williams*, on the same side, referred to the case of *Edmunds v. Groves*, 2 M. & W. 642.(a)

Lord DENMAN, C. J.—I think that the issues are on the defendant. The defendant must begin.

For the defendant, Mr. *Eden*, the plaintiff's attorney, was called: he said, "I am attorney for the plaintiff, and am also attorney for Mr. Lisle."

*Erle*.—When did you last see Lisle?

Sir *F. Pollock*, for the plaintiff.—He is the attorney of Lisle, and must not disclose anything affecting his client.

Lord DENMAN, C. J.—I must have the fact of when he saw him last.

The witness.—"I saw him at my office on Saturday last. I have seen the plaintiff and Lisle together at different times—once as lately as within this fortnight or three weeks."

*Erle*.—Did you ever see this check in Lisle's hands?

Lord DENMAN, C. J.—I think you cannot ask that, as he was Lisle's attorney.

The question was not put.

Verdict for the plaintiff.

Sir *F. Pollock*, and *C. Chadwicke Jones*, for the plaintiff.

*Erle*, and *E. V. Williams*, for the defendant.

(a) See also the case of *Aston v. Perkes*, ante, p. 231, and the notes to that case.

### COWIE v. GOODWIN.—p. 378.

A party actually occupied premises which had been let to him under a written agreement: in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises:—

*Held*, that he was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises.

USE and occupation.—The defendant occupied certain apartments in a house belonging to the plaintiff, who held under a lease, and had let the apartments to the defendant by an agreement. The plaintiff's lease expired at Michaelmas, 1839, and in March preceding the plaintiff had given the defendant notice to quit at that period. The defendant had made repeated complaints of the bad state in which the premises were

in many respects; but on the Sunday before the Midsummer-day, the wall of the privy, which was situated on the ground-floor, gave way, and the kitchens were overflowed with the filth, and the water of a pump, which was situated in one of the kitchens, was affected by it, and the use of the kitchens was altogether taken away. The defendant immediately began to look out for fresh premises, but did not remove till nearly six weeks after Midsummer-day. The rent up to Midsummer was paid into court.

For the plaintiff the agreement was put in evidence, and proof of the actual occupation and payment of rent was given.

For the defendant, the other facts were proved; and it was contended, on the authority of the cases of *Salisbury v. Marshall*, 4 C. & P. 65, (19 E. C. L. R. 275;) *Edwards v. Hetherington*, 7 D. & R. 117, and *Collins v. Burrow*, 1 M. & Rob. 112, that use and occupation being an action of an equitable nature, could only be maintained in respect of a beneficial occupation; that there had been no such occupation here, and that consequently the plaintiff could not maintain the action; and that this case was distinguished from that of *Baker v. Holtzappel*, 4 Taunt. 45.

*Hughes*, for the plaintiff, in his reply, submitted that the circumstances did not form an answer to a distinct agreement, followed by actual occupation.

Lord DENMAN.—I shall ask the jury whether these premises were unfit for proper and comfortable occupation, and if the defendant had *bonâ fide* quitted the apartments as soon as he could procure others.

The jury having answered both these questions in the affirmative,

The plaintiff elected to be nonsuited. (a)

*Knowles*, and *Hughes*, for the plaintiff.

*C. Clark*, and *Kennedy*, for the defendant.

(a) *Platt*, in Easter term, moved for a new trial for misdirection, but the rule was refused.

### MUDDLE v. STRIDE and Others.—p. 380.

In an action against the proprietors of a steam vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover;—but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable.

*Whether*, in such a case, on the arrival, and detention by foul weather, of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quære?*

THIS was an action against the defendants as representatives of the Margate New Steam Packet Company, to recover compensation for damage sustained by certain goods which they undertook to convey by one of their vessels from London to the plaintiff, who was a silk mercer and draper, carrying on business at Dover, to which place one of the company's vessels was in the habit of going. The first count of the declaration stated, that the defendants did not use due care; and the second, that they promised to deliver the goods within a reasonable time, but did not. The defendants pleaded the general issue—not guilty; and also that they never received the goods.

The evidence for the plaintiff showed that the goods, which were articles of silk and linen, were bought at a custom-house sale. The person who bought them, said that they were in good order, and that he packed them carefully in a three-inch deal packing-case, in which they were taken on board the *Royal Adelaide*. The vessel left London Bridge Wharf the same morning as the goods were put on board—viz. a few days before the end of August—and met with very rough weather; and, on her arrival off Dover, signals were made to inform the captain that it would be dangerous for the vessel to attempt to enter the harbour at Dover, and, in consequence, she put back, and went to Margate, where she remained. There was not any vessel went from Margate to Dover until the 4th of September, on which day the goods were sent by the *Royal George*, another vessel belonging to the defendants. On the packing-case being opened at Dover, the goods were found to be damaged—part of them were wet, and the packing-paper at one side of the case was also wetted, and a very offensive smell issued from the box. The damage done to the goods altogether was estimated at £20.

At the close of the plaintiff's case, Lord DENMAN, C. J., was inclined to think that the evidence left it in doubt whether the damage was occasioned by the negligence of the defendants or not. But the jury expressing a wish to hear the defence,

*Thesiger*, for the defendants, contended, that there was not any negligence on the part of those who had the care of the vessel, but that any damage which happened must have been occasioned by perils of the seas.

The captain and some of the crew were examined as witnesses for the defence, and stated, that the vessel was obliged to return to Margate in consequence of the weather; and that, on her arrival there, the goods were removed from the deck, and put into the cabin, from which they were not removed till they were put on board the *Royal George*, on the 4th of September. The man who had the care of the goods during the voyage, swore that they were all dry when the vessel arrived at Margate, and, although she shipped several heavy seas, yet the goods were not any of them damaged by water.

*Crowder*, for the plaintiff, in reply, after referring to *Story on Carriers*, p. 344, (a) and the case of *Golden v. Manning*, 3 Wils. 429, and 2 W. Black. 916, contended, that peril of the seas was the only defence which the defendants could set up; and also that they ought, when the vessel arrived at Margate, to have given notice to the plaintiff, in order that he might, if he pleased, have sent for the goods himself, and so obtained them earlier.

LORD DENMAN, C. J., (in summing up.)—The first count of the declaration states, that the defendants did not use due care; and the second, that they did not deliver the goods within a reasonable time. The defendants have pleaded—first, not guilty, which puts the whole question of negligence in issue; and secondly and thirdly, that they did not re-

(a) An American work, entitled, "Commentaries on the Law of Bailments, &c., by JOA. STORY, LL.D., Dane Professor of Law in Harvard University." In the passage referred to, the author, speaking of the termination of the carrier's risk, says, that if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by a deposit of them in a warehouse at B.; but he is chargeable for any loss which occurs until an actual delivery to the party.

ceive the goods in the manner mentioned, which is a pure untruth; and I cannot tell why these things should be done—it is quite disgraceful. On the part of the plaintiff it is said, that the only defence is the perils of the seas; and that is true, I think. I do not see any other mode which the defendants have of excusing themselves. I thought at first, at the close of the plaintiff's case, that it was left in doubt as to whether the damage was occasioned by the negligence of the defendants. But you wished the case to proceed, and I am glad that I suffered it to go on. For the question is now set at rest; for the man in whose care the goods were, says that they were quite dry when they arrived at Margate, so that the sea-water could not have damaged them. However, the injury appears to me to be of a very mysterious kind. The goods appear to have been injured by some liquid of an offensive character. If you think that was the consequence of any ill care in the packing of the goods on board the vessel, the defendants will be liable; and even if the perils of the seas required more care in the packing than was bestowed upon them, then the perils of the seas will not be an answer. If, on the whole, in your opinion, it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict; because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as the other, then also the defendants will not be liable for negligence. With respect to the detention of the goods at Margate, I think, perhaps, it would have been as well if the defendants, when the vessel arrived there, had communicated to the plaintiff that the goods were there, as possibly he might not have been willing that they should remain so long a time. But that seems to me to be a very minute circumstance in the case. However, if you think that any damage was sustained in consequence, you may give it. On the whole, you will say, whether the goods were damaged from the want of due care on the part of the defendants, and whether there was a detention of them for an unreasonable time.

Verdict for the plaintiff—Damages £20.

*Crowder* and *E. Jones*, for the plaintiff.

*Thesiger* and *Bodkin*, for the defendant.

*Second Sitting at Westminster in Trinity Term, 1840.*

BEFORE MR. JUSTICE COLERIDGE.

LORD CAMOYS *v.* SCURR, Clerk.—p. 383.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—*Held*, that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself.

CASE.—The first count of the declaration stated, that plaintiff “heretofore, to wit, &c., on, &c., at the request of the defendant, delivered to the defendant, and the defendant at his request had the care and custody

of a certain mare of the plaintiff, of great value, to wit, of the value of £100, for the purpose of the defendant riding and trying the same; and thereupon it then became and was the duty of the defendant, whilst he had the said mare for the purpose aforesaid, to take due and proper care of the same: yet the defendant, not regarding his duty in that behalf, whilst he so had the said mare for the purpose aforesaid, to wit, on the day and year aforesaid, took so little and such bad and improper care thereof, that by reason of the defendant's carelessness and improper conduct in that behalf, the said mare was injured and died." The declaration contained also a count in trover. Pleas—1st, to the whole declaration, not guilty; 2d, to the first count, "that the plaintiff did not deliver to the defendant, nor had the defendant the care and custody of the said mare in the said first count mentioned, in manner and form as in the said first count is alleged;" (concluding to the country.) 3d plea, to the last count, "that the defendant committed the alleged grievance in the said last count mentioned, by the leave and license of the plaintiff to him for that purpose first given and granted;" (concluding with a verification.) Replication, denying the license.

It was opened by *Kelly*, for the plaintiff, that the mare was placed in the hands of Mr. Shackel for the purpose of being sold, and that the defendant, who appeared to like the mare, asked permission to have a trial of her, which was granted, and the defendant having received possession of the mare, not only tried her himself, but put another person's servant on the mare, and whilst the servant was riding her, the mare was injured, and afterwards died of the injuries she received. He submitted that a person who had a mare on trial, had no right to put any other person on her back; and that if he did, it was such a conversion as would make him liable to the owner in an action of trover. He cited the case of *Bringloe v. Morrice*, 1 Mod. 210. (a)

It was proved by Mr. Shackel that he gave the mare into the possession of the defendant, for him to have her for the purpose of trying her. It was admitted that the mare received injuries, of which she died, while she was thus lent to the defendant.

It was opened by *Platt*, for the defendant, that when the defendant had himself tried the mare for a short time, he desired Robert Hobart, who was a very excellent horseman, and who was the groom of General Dyson, to mount the mare and try her in Hyde Park; and that on Hobart riding her down the drive on the east side of the park, the mare ran away with him, and struck herself against an iron post near Hyde Park Corner, by which the mare received injuries of which she died, the groom Hobart also receiving very severe injuries. Upon these facts it was submitted, that the defendant was entitled to a verdict, as he had a right to put a person of competent skill on the back of the mare for the purpose of trying her.

Evidence was given which proved the facts opened for the defendant.

(a) This was an action of trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent him the mare, and gave him license to ride her, and that by virtue of this license the defendant and his servant had ridden the mare alternately. The plaintiff demurred to the plea. "Per Curiam.—The license is annexed to the person, and cannot be communicated to another, for this riding is matter of pleasure. North took a difference where certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent hath an interest in the horse during that time, and in that case his servant may ride; but in the other case not; a difference was taken betwixt hiring a horse to go to York and borrowing a horse; in the first place the party may set his servant up, in the second not."

COLERIDGE, J.—The defendant had this mare for the purpose of trying her, and I think that he was entitled to put a competent person on the mare to try her. I shall leave it to the jury to say, whether the groom of General Dyson was a competent person, and whether he rode the mare only for the purpose of trying her. On the part of the plaintiff it has been argued, that the defendant was guilty of a conversion; but if no accident at all had happened, could it be said that putting the groom on the mare to try her was such a conversion as would make the defendant liable in an action of trover? The only question of fact is, whether the defendant did any more than was necessary for the purpose of trying the mare.

*Kelly*, for the plaintiff, elected to be nonsuited.

Nonsuit.

*Kelly* and *Humfrey*, for the plaintiff.

*Plutt* and *Petersdorff*, for the defendant.

On a subsequent day *Kelly* applied to the court to set aside the nonsuit, on the ground that the defendant had no right to allow the groom Hobart to ride the mare for him; but the court refused a rule.

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## NORFOLK CIRCUIT.

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### HUNTINGDON ASSIZES.

BEFORE MR. BARON PARKE.

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#### REGINA v. BARRATT and MAYLE.—p. 387.

On an indictment for abduction on the stat. 9 Geo. 4, c. 31, s. 19, the jury ought not to convict the prisoner, unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady such as his stating that he had seen the will of one of her relatives, (naming him,) and that she would have £220 a-year, are important for the consideration of the jury in coming to a conclusion whether the prisoner was actuated by motives of lucre or not.

If the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 85, s. 11.

A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken, a letter was found in a writing-desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction.

ABDUCTION.—The prisoner Barratt was indicted on the stat. 9 Geo. 4, c. 31, s. 19, for having "feloniously and from motives of lucre," taken away and detained Maria Ellis against her will, she having a future interest in certain personal estate, "with intent her the said Maria Ellis to marry." The indictment also charged an intent to defile. The prisoner Mayle was charged as an accessory before the fact.



It appeared from the evidence of Miss Ellis (who was about seventeen years of age), that the prisoner was a music master, and that she had first known him in the year 1838, when he taught her music at a school kept by Mrs. Wilson at Stamford; soon after which time he paid his addresses to her, which were favourably received by her, but which her relatives insisted on her breaking off. It further appeared that Miss Ellis was sent to a school at Somersham, in Huntingdonshire, kept by Miss Pocock, where the prisoner, at the beginning of the year 1840, had an interview with her, which being discovered by Miss Ellis's friends, she, by their direction, wrote the prisoner a letter, of which the following is a copy:—

“Somersham, Feb. 10, 1840.

“Dear Sir,—By the earnest entreaty and advice of my friends, and from my own conviction of its being the right path for me to pursue, I am induced to write to you to say our correspondence and intimacy must now cease for ever. You are well aware that it has always been contrary to the wishes of my friends and best advisers; and my own judgment tells me that I could have no happiness in living under their displeasure. Their firm determination, I find, is to discard me entirely from their homes and affections; they have left me but two alternatives, and it would make me miserable to be unfriendly with my nearest and dearest relatives. I hope you will consider this decisive, for I am firmly resolved to abide by my present determination; and remain yours, &c.

“MARIA ELLIS.”

It further appeared that about the 20th of February a letter was written in pencil by Miss Ellis to the prisoner, of which the following is a copy:—

“Somersham, Feb.

“My Dear Mr. Barratt,—If I may be allowed to address you so familiarly, for ‘sir’ is so very cold—in fact, I cannot bear it—perhaps when you see the signature of this letter you will be inclined to throw it away without reading it; but I must beg your attention for a few minutes, though I well know I do not deserve it, even for a moment. The reason I trouble you is because I wish you to know all, and with the hopes that you will then not blame me so much.

“When you came to Somersham, you no doubt recollect a person passing through the yard; it was an old servant of Miss Pocock’s; she recognised me, and two days after the school commenced she told Miss P., who, of course, told me she knew, and that they intended to write to my friends, whom I received a letter from some days after, with nearly these words, saying that they left me my choice, my own dear friends and home, or to continue my acquaintance with you; if so, they intended to banish me for ever from their home. Now you well know it was impossible for me to do that as I am so young; if I had been older I should have acted very differently. I need hardly add, that it has caused me more unhappy hours than I hope I shall ever have again; but I am sure I shall not, at least on that point, for it is my full determination never to marry. Perhaps you may smile, but I can assure you I am sincere; and, though this is the last time I shall ever address you, think not that I can ever forget one whom I so highly esteem. If possible, you will be more in my thoughts than before, and to GOD, who alone knows my heart, my prayers will always be offered up for your happiness and

welfare; and I hope, with His assistance, I shall be able to bear all this with fortitude.

"Oh! what a blessing it would have been, both to you and I, if Mrs. Newberry had acted rightly when she knew, which I know she did, to have spoken about it, for I shall partly blame her for blighting my future happiness. I have one favour to ask you, which I hope you will comply with, as it will be the last, perhaps, for ever, that is, that you will never pass me in Peterborough or any other place you may meet me in without speaking to me. This may be an improper request, but if you did, no words can express my feelings. I think it would almost kill me. I must beg of you to excuse this being written in pencil, for I dare not be seen with a pen and ink in my hands. I have nothing more to add, except that I hope you will accept my best wishes for yourself and dear friends, and believe me to remain now and always, your very sincere friend,

"MARIA ELLIS."

"P. S.—Miss P. forced me to send your letter back. I mention it, for perhaps you thought it unkind. Farewell, and may the ALMIGHTY watch over you."

It further appeared that on the 3d of March, 1840, Miss Ellis was walking out with her schoolfellows, when she saw the prisoner and another person in a gig, and almost immediately afterwards the prisoner came behind her, and, having placed his hand on her shoulder, carried her in his arms to the gig, she struggling and screaming all the time as he was doing so. It was proved that the two prisoners took her in the gig to St. Ives, where the prisoner Mayle got out, and the prisoner Barratt alone took Miss Ellis to an inn at Huntingdon, from which they proceeded in a post-chaise to Thrapstone, and thence in another chaise to Wellingborough; and it was proved by Miss Ellis that during this part of the journey the prisoner Barratt took out a pistol and threatened to shoot himself. It further appeared, that the parties proceeded in another chaise to the railway station at Weedon, at which place the brother of Miss Ellis came up and took her away from the prisoner Barratt.

From the cross-examination of Miss Ellis it appeared that at an early part of her acquaintance with the prisoner Barratt she had offered him a pair of white gloves, which he declined accepting, and that she had worked him a pair of slippers, and asked for a lock of his hair, and that she had accepted a ring from him, which she had in her possession at the time of the trial, and that during the time of her residence at Mrs. Wilson's, she, with the other pupils of that lady, had gone to the theatre to see a conjurer named Festo, and that the theatre being darkened to give effect to the performance, the prisoner Barratt attempted to kiss her, and sat with his arm round her waist for some time, of which she never complained to Mrs. Wilson, although she mentioned it to some of her schoolfellows on the next day. Miss Ellis was also cross-examined, with a view of showing that she had consented to the abduction.

Evidence was given to show that Miss Ellis would, on her attaining the age of twenty-one, be entitled to a sum of £2100, under the will of the late Mr. Whitwell; and it was also proved that the prisoner had said that he had seen the will of Mr. Whitwell, and that he knew Miss Ellis would be entitled to £220 a year.

It was proved by a police-officer that he apprehended the prisoner in London at his brother's house, to which place he had gone after Miss

Ellis had been taken away from him. The police officer stated, that when he took the prisoner into custody, he found a letter in a desk in the room where both the prisoner and his brother were, which letter was directed to a person in the neighbourhood of the prisoner's late residence. The witness, on finding the letter, was about to open it, when the prisoner told him it had nothing to do with the business that he had come about. The officer opened the letter, and it was now offered in evidence on the part of the prosecution.

*J. Sydney Taylor* and *Gunning*, for the prisoner, objected to the letter being received in evidence, on the ground that it was neither proved to be in the handwriting of the prisoner, nor had it been found in his possession. It was conceded that written documents found upon persons, though not proved to be written by them or by their direction, might be received in evidence as facts in the case, but there was no case that went the length of saying that a written paper not traced to the prisoner's possession, nor proved to be in his handwriting, but which happened to be found in the house of a third person where he was arrested, was admissible in evidence.

PARKE, B.—I am of opinion that the letter is receivable in evidence, on the ground that the prisoner has made a statement in reference to it which shows that he was cognisant of its contents, which raises the presumption that it was written by his direction. If the letter has really nothing to do with the charge against the prisoner, its production cannot strengthen the case for the prosecution; but if it has, then the contents of a written paper so found, and connected as this is with what the prisoner said on his apprehension, is matter of consideration for the jury.

The letter was given in evidence. It contained directions to the person to whom it was addressed, to forward to London the prisoner's luggage, as he intended to proceed to Calais to keep out of the way, in consequence of an attempt which he had made to carry off the prosecutrix, and for which it stated that he feared he could be transported.

There was no evidence against Mayle as an accessory before the fact.

*J. Sydney Taylor* addressed the jury for the prisoner Barratt.—Even if Miss Ellis was neither directly nor indirectly a consenting party to her own abduction, there is no proof that the prisoner was actuated by motives of lucre. If the prisoner carried off this lady even against her own consent, and was instigated to do so by the natural desire of an ardent unreflecting lover to rescue her from the condition of constraint in which she was placed, and to make her his wife from affection to her person, and did not seize her person as the means of getting at her property, I submit, in point of law, the charge of felony cannot be sustained. The policy of the law was to prevent the practices of cold and heartless speculators, who, without having the slightest feeling of affection for a female entitled to some present or future interest in real or personal property, and, perhaps, having no previous intimacy with the person marked out as the victim of their cupidity, deliberately planned the getting possession of the object of their schemes, either by force or fraud, in order to obtain the property, on which alone they had fixed their affections. In the present case it is evident that the attachment was mutual, and that the prisoner was passionately fond of the young lady; to insure an honourable union with whom he had encountered all these perils. Look at the letters and consider whether such language from a beloved

object, supposed to be in a state of, at least, moral coercion and captivity, was not sufficient to prompt and impel the prisoner to take the violent step which he did to rescue a devoted girl, and place her beyond the reach of those whose interference had made her miserable and him desperate, without his being in the slightest degree influenced by the sordid and base motive of lucre, which the indictment alleges. In the case of *Rex v. Wakefield* (which occasioned the present enactments on this subject, as an amendment of the old law), the circumstances were very different. In that case the parties had no previous intimacy; and therefore all inducement to the act arising from real passion and affection was out of the question; and the abduction in that instance, as well as almost every other which has been the subject of penal inquiry, could be accounted for on no other grounds than those of cold and sordid calculation, to get possession of a lady's property by first obtaining possession of her person.

PARKE, B. (in summing up).—I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *Rex v. Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument, that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of the charge of felony. It is clearly made out that Miss Ellis is entitled to personal property, and that the prisoner took her away with the intention of marrying her; and I think that the other intent may be entirely laid out of your consideration, as there is no evidence of it whatever. You will therefore say whether, the prosecutrix being a lady entitled to property, the prisoner either took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty of the felony. With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of Miss Ellis, such as his having told one of the witnesses that he had seen Mr. Whitwell's will, and that she would be entitled to £200 a year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not. Unless you are satisfied that such a motive prompted him to take away the prosecutrix against her will, he is entitled to be acquitted of the felony; and you will then consider whether he used any force to her person in taking her away, and took her away against her consent; for if he did, and he is not guilty of the felony, you may, under the present indictment, convict him of the assault.<sup>(a)</sup>

Verdict—Guilty of the assault.

*B. Andrews and Byles*, for the prosecution.

*J. Sidney Taylor and Gunning*, for the prisoner.

(a) Under the stat. 1 Vict. c. 85, s. 11, referred to ante, vol. 8, p. 248, n. (b)

## WESTERN SPRING CIRCUIT, 1840.

BEFORE MR. JUSTICE COLTMAN AND MR. BARON ROLFE.

## TAUNTON ASSIZES.

BEFORE MR. JUSTICE COLTMAN.

## REGINA v. PERKINS.—p. 395.

A boy between ten and eleven years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him that he was aware that he would be punished hereafter if he said what was untrue:—*Held*, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis.

**MURDER.**—The prisoner was indicted for the murder of Charles Lock, by shooting him with a gun.

It appeared, that on the 28th of March, 1840, the deceased received a severe wound from a gun loaded with shot, of which wound he died at five o'clock the next morning. The deceased, who was ten years old at the preceding Michaelmas, made certain statements, after he had been wounded, and it was proposed to give these statements in evidence as declarations in articulo mortis.

To show the state of the child at the time when the statements were made, which was in the evening of the 28th of March, two surgeons were examined, Mr. Charles Moore Collins, and his father, Mr. Charles Palk Collins.

Mr. Charles Moore Collins said, "I was of opinion the boy could not survive many days. I said to him, 'My good boy, you must know you are now labouring under a very severe injury, which in all probability you will not recover from, and the effects of it will most likely kill you.' My father asked him if he was perfectly conscious where he should go if he told a lie, and where he should expect to go if he told the truth on the subject. In answer to the first he said he should expect to go to hell, and to the latter, he should go to heaven. My father said nearly similar words to what I said myself. When he was told that he was not likely to recover, I could see a change in the expression of his countenance. The appearance of tears came into his eyes, and an appearance such as it is difficult to describe—an appearance of distress; but he said nothing, that I can remember, expressing either assent or dissent. My father did say to the deceased, 'you may recover, though in all probability you will not.'"

Mr. Charles Palk Collins:—"I was present on the evening of the 28th. I said to the deceased, after feeling his pulse, and examining the wound, 'My little man, you appear to me to be much more sensible than from the nature of the accident you have received I should have

expected. It is impossible for me to say whether you may survive the injury or not. I think it more than probable you may be dead before morning.' I then asked him if he was aware of the nature of an oath. He made no reply. I then said, 'If you don't tell the truth, and how this accident occurred, where do you expect to go?' He then said, 'to hell.' If you do speak the truth, I suppose you expect to go to heaven? He made no reply. I then told him, 'I put these questions to you, that in case of your death, the truth of the accident may be ascertained,' or words to that effect. I don't think he made any reply. He expressed no opinion as to his state. After that he made a statement, which I took down in writing."

On cross-examination this witness said, "I said 'you may recover; it is impossible for me to say; but I don't think it likely you will be alive by the morning.'" This witness also said further, that the child appeared at the time in a very debilitated state from the injury, but that he appeared to be a very quick, intelligent child. The witness also stated that he had known the child before the accident.

*Bere*, for the prisoner, objected that the statements made by the deceased were not receivable in evidence—1st, because it did not sufficiently appear that the deceased was without any hope of recovery; and, 2dly, that as the deceased was under fourteen years of age, they were not receivable unless the deceased was aware of the obligation of an oath.

COLTMAN, J., received the statements in evidence, reserving the question as to their admissibility.

Verdict—Guilty of manslaughter.

*Carroll*, for the prosecution.

*Bere*, for the prisoner.

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LIT-  
TLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.  
WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; AND ROLFE, B

*Bere*, for the prisoner.—The question is, whether the statements of the deceased were receivable in evidence as declarations in articulo mortis. It was proved that one of the surgeons told the deceased that he might recover, though he (the surgeon) thought he would not, and that the deceased himself did not say any thing. To render a statement receivable, the learned judge must be satisfied either from the expressions used by the deceased, or from the surrounding circumstances, that the deceased at the time of making the declaration, was without any, even the slightest, hope of recovery. This appears from the cases of *Rex v. Spilsbury*, ante, vol. 7, p. 187, (32 E. C. L. R. 487;) *Rex v. Van Butchell*, ante, vol. 3, p. 629, (14 E. C. L. R. 493;) *Rex v. Wellbourn*, 1 Ea. P. C. 358; *Rex v. Christie*, Carr. Supp. 232, and 2 Russ. C. & M. 685; *Rex v. Mosley*, M. C. C. 97; *Rex v. Crocket*, ante, vol. 4, p. 544, (19 E. C. L. R. 578;) *Rex v. Hayward*, ante, vol. 6, p. 157, (25 E. C. L. R. 331;) *Rex v. Bonner*, Id. 386, (25 E. C. L. R. 451;) and *Rex v. Fagant*, ante, vol. 7, p. 238, (32 E. C. L. R. 501.)

ALDERSON, B.—*Simpson's case*, 1 Lewin's C. C. 78,(a) is contrary to

(a) See also the case of *Reg. v. Battye*, post.

the decision of my brother GASELEE in *Rex v. Fagent*, as in that case the deceased got better, and Mr. Justice BAYLEY received the evidence.

LORD DENMAN, C. J.—It might be that the latter part of the evidence in *Rex v. Fagent* threw a light upon, and explained the other part.

*Bere.*—There was also a case at Exeter before Mr. Justice COLERIDGE, of a music-master, who was tried for the murder of his wife, by cutting her throat. It appears that the medical man had no time after the woman was wounded to tell her of her danger, and that she said something, and died within a quarter of an hour; and the learned judge would not receive evidence of the statement she had made, because neither the medical man had told her of her danger, nor had she expressed any thing on the subject. There is also another objection, which is, that the declaration is not admissible, even if it were in articulo mortis, because the deceased was only ten years and some months old; and I submit, that unless there be some evidence that the deceased was acquainted with the nature of an oath, his declaration in articulo mortis is not receivable.

ALDERSON, B.—The deceased says he expects to be punished hereafter, if he does not tell the truth.

*Bere.*—The surgeons differ as to the expressions used. The only analogous cases I can find are those relating to the time at which children can commit crime; and the rules on that subject may afford a criterion as to the time at which the law presumes a child to know right from wrong. A child under seven years old cannot commit a crime, and between seven and fourteen a child is presumed to be incapable till the contrary appears. Lord COKE says, 1 Inst. 247 b, "In criminal cases, as felony, &c., the act and wrong of a madman shall not be imputed to him, for that in those causes actus non facit reum nisi mens sit rea, and he is amens, (id est) sine mente, without his mind or discretion, and furiosus solo furore punitur; a madman is only punished by his madness; and so it is of an infant until he be of the age of fourteen, which in law is accounted the age of discretion."

ALDERSON, B.—All this would go to show that a child under seven could not be examined at all.

PARKE.—There is no rule as to the age of children to be examined as witnesses. A child, who has sufficient knowledge, may be examined. With a child ten years old all this speculation would not be gone into.

*Bere.*—In the case of *Rex v. Pike*, ante, vol. 3, p. 598, (14 E. C. L. R. 473,) a declaration made in articulo mortis by a child four years old was rejected, on the ground that a child of that age could not have had that idea of a future state which is necessary to make such a declaration admissible.

ALDERSON, B.—There was no evidence of the capacity of the child.

*Bere.*—Nor is there here.

ALDERSON, B.—I think there is.

*Bere.*—In the case of *Rex v. Travis*, 1 Str. 700, a child between six and seven years of age was not allowed to be examined, and the case proceeded on the ground that children of so tender years cannot be presumed to know right from wrong, so as to be admitted as witnesses; and in the case of *Rex v. Owen*, ante, vol. 4, p. 236, (19 E. C. L. R. 362,) Mr. Justice LITLEDALE states, that the age of fourteen is the age at which the presumption of law arises that a person is capable of judging of what is wrong. I therefore submit, that to render a decla-

ration of this kind admissible the judge must be satisfied that the party making it had not even the slightest hope of recovery; and if the party making the declaration was under fourteen years of age the judge must also be satisfied that the party was aware of the obligation of an oath.

The case was considered by the judges, who held that the declarations of the deceased were properly receivable in evidence, and that the conviction was right.

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## WELSH SPRING CIRCUIT, 1840.

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### BEAUMARIS ASSIZES.

BEFORE MR. JUSTICE WILLIAMS.

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### REGINA v. JONES.—p. 401.

The quarter sessions of a county made regulations as to the expenses to be allowed in cases of felony, and by one of them directed that the taxed bill of costs should be annexed to the order for their payment. These regulations were confirmed by a judge under the stat. 7 Geo. 4, c. 64, s. 26. In a case of felony the clerk of assize made out the items of the costs allowed, and on the other half of the same sheet of paper wrote the order for payment of their amount. The attorney for the prosecution tore off the first half of the paper, which contained the items, and presented the other half to the county treasurer for payment. The treasurer refused to pay:—*Held*, that, on account of the mutilation of the order the treasurer was not indictable for this refusal.

Where a queen's counsel was instructed to argue a criminal case for a defendant on a point reserved for the consideration of the fifteen judges, but at the time fixed for the argument had not obtained a license from her majesty to argue against the crown, but only a certificate from the Secretary of State's office, the court directed the argument to stand over for such license to be obtained.

**MISDEMEANOR.**—The first count of the indictment charged that Hugh Wynn, Esq., was coroner of the county of Anglesey, and that a coroner's inquest taken before him had found Hugh Roberts guilty of the manslaughter of his wife (reciting the inquisition), and that the coroner bound over Anne Owen to prosecute at the next assizes for the county of Anglesey; that she did appear at the assize held before Mr. Justice VAUGHAN on her recognisance to prosecute, and did prosecute Hugh Roberts on the 25th of July, 1838 (reciting the indictment which was preferred, which was for murder); and that, upon the request of Anne Owen, the Court, at the assizes, did order that the treasurer of the county of Anglesey should forthwith pay unto the said Anne Owen, or her order, a certain sum, to wit, the sum of 86*l.* 18*s.* 6*d.*, for so prosecuting the said Hugh Roberts for murder and manslaughter; and that the said order was then and there forthwith, by one John Lloyd, clerk of assize, he being the proper officer of the Court in that behalf, made out upon and directed to the treasurer of the county, and delivered to Anne Owen; and that the defendant, then being treasurer of the county, had sight of the order, and was then and there served with a copy of the same, and requested to pay the same; and it was averred that the place where the offence of Hugh Roberts was supposed to have been



committed was contributing to the county rate, and that the defendant unlawfully, wilfully, and obstinately neglected and refused to pay the sum mentioned in the said order, or any part, contrary to the said order and the form of the statute, &c.

The second count was nearly similar to the first, but omitted the allegation respecting the coroner's inquest.

The third count was similar, but stated that Anne Owen appeared on subpoena, instead of stating that she was bound by recognisance.

The fourth count merely stated the substance of the order, and charged that the defendant disobeyed it.

This indictment was preferred against the defendant as treasurer of the county of Anglesey, the alleged offence being the refusal of the defendant to pay the sum of money specified in the following order.

"At the Anglesey Summer Assizes, 1838:—The Court doth order the treasurer of the county of Anglesey, forthwith to pay to Anne Owen, or her order, the sum of 86*l.* 18*s.* 6*d.*, for prosecuting Hugh Roberts for murder and manslaughter. For doing which, this shall be the said treasurer's warrant. By the Court.

"J. LLOYD, Clerk of Assize."

It appeared, that at a General Quarter Sessions of the peace, held at Beaumaris, for the county of Anglesey, on the 3d of April, 1838, certain regulations were established as to the rate of costs and expenses to be allowed to prosecutors, under the stat. 7 Geo. 4, c. 64, s. 26, which regulations having, on the 12th of April following, received the approbation and signature of a judge, according to the statute, are by that section declared to be "binding upon all persons whatsoever."

Amongst these regulations there was one to the following effect:—"That, in all cases, the taxed bill of costs and the justice's certificate of costs before trial be attached to the warrant of the taxing officer, and be delivered with it to the county treasurer."

It appeared in evidence, that the usual course and practice in making out orders or warrants upon the treasurer, was in conformity with the last-mentioned regulation; and it was proved, that these orders are usually made out upon a sheet of paper, and that upon one side is the order upon the treasurer, in the form before set forth, and upon the other are specified the several items composing the amount for which the demand is made upon the treasurer; and that in this case such form had been observed. It further appeared that the attorney of Anne Owen, having received the order in question, in the state above described, tore off the half sheet which contained the particulars of the several charges, and *presented that half sheet only* which contained the order or warrant above set forth to the defendant, who *for that cause* refused to pay the same.

*Townsend* and *W. Yardley*, for the defendant, submitted, first, that the magistrates at the quarter sessions had power to make the regulation above set forth, and that it having received the sanction of the judge, according to the statute, it was "binding upon all persons whatsoever;" and secondly, that even if that were not so, the defendant, as treasurer, was not bound to obey a mutilated document.

*Jervis* and *Welsby*, for the crown.—The magistrates have exceeded their authority in making this regulation. Their power only extends to regulating the *rate* of costs and expenses. The order, as it is, is a per-

fect order made by the officer of the court on the treasurer, which the treasurer is bound to obey; and if the treasurer be thus ordered to pay a certain amount, he has no right to inquire as to the way in which the officer of the court has arrived at that amount.

WILLIAMS, J., reserved the points for the opinion of the fifteen judges.

Verdict—Guilty, subject to the points reserved.

*Jervis and Welsby*, for the prosecution.

*Townsend and W. Yardley*, for the defendant.

The case was to have been argued before the judges in Easter Term, 1840; but it being stated by *C. Cresswell*, who was instructed to argue for the defendant, that he had not obtained a license from her majesty under the royal sign manual, to argue against the crown, and that he had only received a certificate from the Secretary of State's office, the judges directed the case to stand over till Trinity Term, that her majesty's license might be obtained.<sup>(a)</sup>

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LITTLEDALE, J.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; GURNEY, B.; COLTMAN, J.; ERSKINE, J.; MAULE, J.; AND ROLFE, B.

*C. Cresswell*, for the defendant.—This is not such an order as the treasurer was bound to obey. By the stat. 12 Geo. 2, c. 29, s. 7, the treasurers of counties are to deliver in at the quarter sessions, exact accounts of all moneys paid by them, "and to lay before the justices at such sessions, the proper vouchers for the same." By the stat. 7 Geo. 4, c. 4, s. 26, the justices at the quarter sessions are empowered to make regulations as to the rate of expenses in cases of felony. It is said on the other side that this merely empowers them to fix a *scale* of charges; but I submit that it does more, and that they have power to regulate the way in which those costs shall be demanded. It is said that the treasurer has no right to inquire into the items. But if the taxing officer had allowed more than the justices directed to be allowed by the regulations, would the treasurer be indictable if he did not pay the amount ordered by the taxing officer?

ALDERSON, B.—How can the treasurer know that the regulations are complied with, unless he sees the items?

TINDAL, C. J.—There seems to be no use in tearing off half the paper.

GURNEY, B.—The figures on the first half of the paper may be most important. In a case before my Brother COLERIDGE, in the bail court, yesterday, it was imputed that a person had in a case of this kind falsi-

(a) The attorney and solicitor-general, a queen's serjeant, or a queen's counsel, cannot appear in a case against the crown (even if the crown be a nominal party only) without a license under her majesty's sign manual. To obtain this license, a petition is presented to her majesty. This petition is left at the secretary of state's office, and a sum of 1*l.* 10*s.* paid, on which a certificate is given; and the license is then prepared, to which her majesty's sign manual is obtained. The form of the petition is given in Gude's Cr. Office Practice, vol. 2, p. 599, and the form of the license, Id. 390. Serjeants and counsel, who have patents of precedence, may appear in cases against the crown, without any such license.

fied the items to a large amount, and got payment on an order for the total.

*C. Cresswell*.—The attorney might falsify the facts and get too large an allowance, and then, having an order for the gross amount, he might burn the statement containing the false items. I submit, also, that as the whole was written by the taxing officer on one sheet of paper, the whole was one instrument, of which the bill of items formed a part; and that the order not being perfect without the bill on the other half sheet, the attorney for the prosecution presented only a part of the order. This is a regulation made with a view that the county should not pay more than is allowed by the scale of charges. If the treasurer disobeyed the order of the sessions approved by the judge, he might be indicted. The treasurer had a right to see the whole of the document, and was not bound to obey a part of it.

*Jervis*, for the crown.—The real question is, whether the quarter sessions, by importing into their regulations a term which they had no right to import into them, can be a court of appeal over the taxing officer of the assizes, who for this purpose is the court. It is said on the other side that they have a power to annex conditions to the scale of expenses. The stat. 12 Geo. 2, c. 29 (the county rate act), does not apply. By the 22d section of the stat. 7 Geo. 4, c. 64, costs are to be allowed to prosecutors and witnesses in cases of felony; and the 24th section directs that the order shall be delivered out, and by that section the treasurer is "required" "upon sight of every such order forthwith to pay the person named therein, or to any one authorized to receive the same on his or her behalf, the amount in such order mentioned, and shall be allowed the same in his accounts." The clerk of assize is bound by the scale of charges regulated under the 26th section, but the treasurer is bound on sight of the order to pay the amount specified in it; and it is to be presumed that the taxing officer has taxed according to the scale. The treasurer refused to pay here, because the bill of items was taken off; he might in another case refuse because the justice's certificate was not annexed, and yet that is the only voucher the attorney has for the expenses before the committing magistrate. In practice the attorney never makes out a bill for the clerk of assize to tax; and the practice is for the clerk of assize to have the brief handed to him, and then look at the back of the indictment to see who the witnesses were, and on doing this he gives his order for the costs. I submit that the quarter sessions may (subject to the approbation of the judge) regulate the rate of costs, but not the manner in which they are to be paid. Can the sessions review a taxation made at the assizes? Can they say you have allowed a farmer who was a witness 3s. 6d. a day instead of 1s. 6d., according to our scale? If the sum allowed was too large, the treasurer might have asked a review of the taxation, or might have taken out a summons to show cause why a bill should not be delivered. The annexing of the magistrate's certificate or the bill of items could be of no use, as the order is that which the treasurer is bound to obey.

GURNEY, B.—The officer made out this paper in the proper form.

*C. Cresswell*, in reply.—How can a party tear off one-half of the document and present the other, and then indict the treasurer for disobedience? The whole is the order made out by the clerk of assize. The attorney makes out no bill.

*Jervis*.—He is deprived of the magistrate's certificate.

ERSKINE, J.—Which is of no use to him after the taxing officer allows it.

*C. Cresswell*.—Mr. *Jervis* says, "Suppose that the items were annexed, and the taxing officer allowed more than he ought according to the scale, that could not make any difference." But, I would ask, how could an order, bad on the face of it, be enforced by indictment? The treasurer has a right to see the paper in the same state in which it was originally issued by the officer of the court; and if this conviction is supported, it will defeat a regulation which tends to prevent abuses.

The case was considered by the judges, who held the conviction wrong, their lordships being of opinion that the defendant, as treasurer, was not bound to obey the order in the state in which it was presented to him, by reason of its mutilation; but their lordships did not determine the point as to the power of the sessions to make the regulation set forth ante, p. 403.

## NORTHERN SPRING CIRCUIT, 1840.

### YORK ASSIZES.

BEFORE MR. JUSTICE ERSKINE.

### REGINA v. PRINGLE.—p. 408.

The provisions of the stat. 7 Geo. 4, c. 16, s. 38, extend to the forging and uttering a receipt or other document, relating to a Chelsea pension, *supposed to be payable*; and are not confined to cases of forging and uttering receipts, and other documents, relating to pensions in actual existence.

An indictment on that statute charged the prisoner with having forged and uttered "a certain receipt, relating to and concerning the payment of a certain pension, to wit, 4*l*. 11*s*. 0*d*., *supposed to be payable* to one N. M., as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex."—*Held* good.

FORGERY.—The prisoner was indicted under the 38th section of the stat. 7 Geo. 4, c. 16.(a) The first count of the indictment charged that

(a) By which it is enacted, "that if any person shall willingly and knowingly personate, or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person, entitled or *supposed to be entitled* to any pension, wages, pay, grant, or other allowance of money, prize-money, or relief due or payable, or *supposed to be due or payable*, for on account of any service done, or *supposed to be done*, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in his majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, or soldier, or other person as aforesaid, in order fraudulently to receive pension, wages, pay, grant or any other allowance of money, prize-money, or relief due or payable, or *supposed to be due or payable*, for or on account of any services done, or *supposed to be done*, by any such officer, non-commissioned officer, soldier, or other person as aforesaid,

the prisoner on, &c., and, &c., “feloniously did *forge* and counterfeit, and cause and procure to be forged and counterfeited, and knowingly and willingly act, aid, and assist in the forging and counterfeiting *a certain receipt* relating to and concerning the payment of a certain pension, to wit, 4l. 11s. 0½d., *supposed to be payable* to one Nicholas Morrill, as an out-pensioner of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex, for a certain time, to wit, for ninety-two days, from the 1st day of July, 1838, to the 30th day of September following, both days included, which said forged and counterfeited receipt is as follows: that is to say [here the forged receipt was set out, and also the forged certificate attached to it, which stated that the party named in it was alive, and entitled to the pension]; for and in order to the recovery of the said pension, with intent thereby then and there to obtain payment of the said pension from the lords and other commissioners of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex, against the form of the statute,” &c. The second count was exactly similar, except that it stated an intent to obtain payment from “a certain person then and there authorized to pay the same, to wit, one Thomas Constantine Brooksbank,” instead of an intent to obtain payment from the commissioners. The 3d count was like the second, but substituting the name of “Joseph Thompson” for that of Mr. Brooksbank. The 4th and 5th counts were like the 1st and 3d, but set out the receipt without the certificate. The 6th, 7th, and 8th counts were in the same form as the 1st, 2d, and 3d, except they were for *uttering*, instead of *forging*. The 9th count was like the 6th, except that it set out the receipt without the certificate. The 10th count was for *forging* “*a certain certificate*, relating to and concerning a certain other pension, to wit, 4l. 11s. 0½d., *supposed to be payable* to the said Nicholas Morrill as an out-pensioner of the said hospital for a certain time, to

or if any person shall *forge*, or counterfeit, or alter, or cause or procure to be forged, or counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person entitled, or *supposed to be entitled*, to any pension, wages, pay, grant, allowance of money, prize-money, or relief due or payable, or *supposed to be due or payable*, for or on account of any such service or supposed service as aforesaid, or the name or handwriting of any officer, under-officer, clerk, or servant of the said commissioners of the said hospital at Chelsea, or of any officer or person in any way concerned in the paying, or ordering, directing, or causing the payment of the said pensions, wages, pay, money, allowance of money, prize-money, or relief, or any of them, or shall *forge*, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any letter of attorney, bill, ticket, order, certificate, voucher, *receipt*, will, or any other power, instrument, warrant, document, or authority whatsoever relating to or in anywise concerning the payment or obtaining or claiming any pension, wages, pay, grant, allowance of money, prize-money or relief, for and in order to the receiving, obtaining, or claiming any such pension, wages, pay, grant, allowance of money, prize-money, or relief, or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such letter of attorney, bill, ticket, order, certificate, voucher, *receipt*, will, or any other power, instrument, warrant, document, or authority whatsoever, with intent to obtain the payment of any such pension, wages, pay, money, or allowance of money, prize-money, or relief from the said commissioners of the said hospital at Chelsea, or from any officer, under-officer, clerk, or servant of the said commissioners, or from the person authorized or supposed to be authorized to pay the same, or with intent to defraud any person whatsoever, or any corporation whatsoever, every such person so offending, being thereof lawfully convicted, shall be, and is hereby declared and adjudged to be, guilty of felony, and shall and may be transported for life, or for such term of years as the court shall adjudge.”

wit, for ninety-two days, from the 1st day of July to the 30th of September following, which said forged and counterfeit certificate is as follows [the certificate was set out without the receipt], for and in order to the recovery of the said last-mentioned pension," with intent to defraud the commissioners. The 11th count was exactly similar to the 10th, except that it was for *uttering* instead of *forging*. The 12th count was for uttering the certificate [setting it out], with intent to obtain payment from a certain person then and there authorized to pay the same, to wit, one Joseph Thompson, with intent to defraud the commissioners. The 13th count was for *uttering* a forged "*document*, relating to and concerning the payment of a certain other pension, to wit, 4*l.* 11*s.* 0½*d.*, supposed to be payable to the said Nicholas Morrill, as an out-pensioner" [describing it as in the 1st count, and setting out the receipt and certificate], with intent to defraud the commissioners.

It appeared that the prisoner, for the purpose of obtaining payment of a pension which had ceased to exist on the death of a pensioner named Morrill, had forged and uttered a receipt and certificate, which were in the following form:—

"Assignment Receipt,

"84 ft. Nicholas Morrill.

"1*s.* 0½*d.* per diem, Sheffield, 426.

"We, the undersigned churchwarden and overseer of the parish of Brightside Brierlow, in the county of York, do hereby acknowledge to have received of Thomas Constantine Brooksbank, Esq., agent for the out-pensioners of Chelsea Hospital (by the hands of Mr. Joseph Thompson), the sum of 4*l.* 11*s.* 0½*d.*, being the amount due to the above-named out-pensioner of the said hospital for ninety-two days, from the 1st of July, 1838, to the 30th of September following, both days included, by virtue of an assignment made by the aforesaid pensioner, conformably to an act of Parliament passed in the fifty-ninth year of the reign of his Majesty King George the Third, intituled, 'An Act to Amend the Laws for the Relief of the Poor.' Five per cent. being deducted pursuant to the act of Parliament, 28 Geo. 2, c. 1.

"JOHN WILSON, Churchwarden.

"4*l.* 11*s.* 0½*d.*

"Witness, J. Pringle.

"THOMAS GRAY, Overseer of the Poor."

"We, the undersigned churchwarden and overseer of the parish aforesaid, do hereby certify that the above-named out-pensioner is alive and entitled to his pension, being no otherwise provided for by government.

"Dated this 19th day of October, 1838.

"JOHN WILSON, Churchwarden.

"THOMAS GRAY, Overseer of the Poor."

Verdict—Guilty.

*Baines* and *Wortley*, for the prisoner, submitted in arrest of judgment, that, in order to constitute an offence under the latter branch of the 38th sect. of the stat. 7 Geo. 4, c. 16, it was essential that there should be an actual existing pension at the time of the commission of the offence of forging and uttering, and that the indictment should have charged the actual existence of such pension, and that it was not suffi-

cient under that branch of the section to allege (as in the present indictment) that the instrument forged related to a pension *supposed* to be payable.

ERSKINE, J.—The objection, if well founded, is one that affects not only the form of the indictment, but also the question whether the prisoner has committed a felony or not.—I will reserve the point for the consideration of the judges.

*Acherley*, Serjt., *Armstrong & Hoggins*, for the crown.

*Baines & Wortley*, for the prisoner.

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BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; LITTLEDALE, J.; PARKE, B.; BOSANQUET, J.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ERSKINE, J.; AND ROLFE, B.

*Wortley*, for the prisoner.—The question in this case arises on the wording of the latter part of the 38th section of the stat. 7 Geo. 4, c. 16; and I submit that no offence under that statute is stated on the indictment; and that its provisions as to forging and uttering receipts and documents do not apply to a supposed pension, but only to actually existing pensions. In the earlier part of the section as to personating, and as to the forging of the name or handwriting of any officer, &c., the words “supposed to be entitled,” and “supposed to be due and payable” occur, but in the latter part of the section they are omitted, and the forgery and uttering appear therefore to relate to actually existing pensions, wages, pay, &c., and the words “such pension” in that portion of the clause which relates to the uttering of forged receipts and documents, only refer to the last antecedent, which is such pension as is mentioned with respect to the forging of the receipts and documents. This statute is merely a re-enactment of former provisions. In the stat. 46 Geo. 3, c. 69, relating to Chelsea pensioners, the provisions as to personating and forging are in separate sections. The 8th section, which relates to personating, contain the words “supposed to be entitled,” but in the 9th section, which relates to forgery, they are omitted. In the stat. 47 Geo. 3, sess. 2, c. 25, s. 7 & 8, the same difference occurs; and I submit that where the legislature in one section of an act of Parliament use particular words, and in another section omit them, it must be taken that the omission is intentional. In the cases as to settlement by renting a tenement, the courts in construing the stat. 6 Geo. 4, c. 57, which omitted some of the terms contained in the stat. 59 Geo. 3, c. 50, held that the construction should be different, and that they were bound by the words of the different enactments. In *Brown's case*, 2 East, P. C. 1007, the prisoner was convicted on the stat. 32 Geo. 2, c. 10, for personating William Wheeler, “a person supposed to be entitled to certain prize-money for service done on board the ship *Terpsichore*.” There was no evidence that William Wheeler ever served on board that ship, or even that such a person existed; and the judges held the conviction wrong, as there was no evidence that there was any such person as William Wheeler, who either was entitled, or at least *primâ facie* entitled to prize-money, as a seaman on board the *Terpsichore*,(a) and in *McAnelly's case*, 2

(a) The words of the stat. 31 Geo. 2, c. 10, s. 24, are, “whosoever willingly and knowingly shall personate, or falsely assume the name or character of any officer, seaman, or other person, entitled or supposed to be entitled to any wages,” &c.

East, P. C. 1009, it was also held that the personation of a non-existing person was not within that statute. The case of *Rex v. Tannett*, R. & R. C. C. 351, also decides that the personation must be of some person who had belonged to the ship, and that the indictment must charge the personating of some such person; and it would seem that the object of the enactments was to protect the pensioners.

Lord DENMAN, C. J.—Would the pensioner lose his pension if the commissioners paid some one else?

*Wortley*.—In the case of *Rex v. Martin*, R. & R. C. C. 324, the prisoner was indicted under the stat. 54 Geo. 3, c. 93, s. 89, for personating Joshua Boatwright, a seaman entitled to prize-money for service on board a vessel called the Lord Keith. Boatwright had been entitled to the prize-money, but had died before the prisoner had personated him. The prisoner was convicted, and the judges held that the conviction was right, and that the act applied, although the seaman personated was dead. In the case of *Rex v. Cramp*, R. & R. C. C. 327, who was indicted on the same statute, the prisoner had personated a seaman named Cuff, who was dead, and whose prize-money had been paid to his mother before the time of the personation. The prisoner was convicted, and the judges held the conviction right; and that the fact that the money had been paid to the mother made no difference; these two latter cases were not decided on the statute relating to Chelsea pensioners, but on the stat. 54 Geo. 3, c. 93, s. 89, which relates to Greenwich pensioners, and in which the words are “shall forge,” &c., “any letter of attorney, bill, ticket, certificate,” &c., “in order to receive any such wages, pay,” &c., “which shall be due or supposed to be due,” or shall utter any forged letter of attorney, &c., in order to receive any wages, &c., “due, or supposed to be due, to any officer or seaman,” &c. The words “supposed to be due” occurring in all the enactments respecting forgeries relating to Greenwich pensioners, but not occurring in any of the provisions relating to the forgery of receipts or other documents relating to Chelsea pensioners, I submit therefore that the indictment is bad.

*Hoggins*, for the crown.—I submit that the 35th section of the stat. 7 Geo. 4, c. 16, explains the 38th section, and by the 35th section it is enacted, that “in all indictments, informations, prosecutions, or other proceedings, against any person or persons,” “for forging, counterfeiting, or altering, or causing or procuring to be forged, counterfeited, or altered, or aiding or assisting in forging, counterfeiting, or altering, or uttering or publishing as true, or causing or procuring to be uttered or published as true, or aiding or assisting in uttering or publishing as true, knowing the same to be false and counterfeited, any letter of attorney, bill, ticket, order, certificate, assignment, last will, or power of attorney, or other power or authority whatsoever, in order to receive, obtain, or claim wages, pay, allowances of money, pension-money, or prize-money due, or supposed to be due, to any such officer or soldier, or other person, or for knowingly or willingly taking a false oath, or causing and procuring any other to take a false oath to obtain probate of any will, or to obtain letters of administration, in order to receive, obtain, or claim wages, pay, prize-money, or pension-money, due or supposed to be due to any such officer or soldier, or other person, or for any fraud, misbehaviour, or other offence to which such form is applicable, it shall be sufficient to charge the same as being done with intent to defraud the



lords and others commissioners of the Royal Hospital for soldiers at Chelsea, in the county of Middlesex." The form of the present indictment is there recognised, and I submit, that, taking the two sections together, the words "any such pension," at the latter part of the 38th section, must be taken to mean any such pension as is mentioned in the first part of the clause. If the present objection is well founded, no indictment can be framed on this act for a forgery of a receipt or document relating to a pension supposed to be due.

LORD ABINGER, C. B.—It might be an offence at common law, or an offence against some other statute.

ERSKINE, J.—If the indictment had stated it to be a pension payable to Nicholas Morrill, it would have failed, as there was no proof of an existing pension.

LORD DENMAN, C. J.—In the act the word "of" is omitted.

TINDAL, C. J.—It may be on the roll.

Hoggins.—I put my case in this way:—the first count of the indictment is sufficient, as it follows the words of the 35th section, and I pray that section in aid of the 38th section; and, taking the two sections together, I submit that the indictment is good.

Wortley, in reply.—The 35th section does not give any form of indictment, it is merely intended to apply to the laying of the intent to defraud.

ALDERSON, B.—The words "*any* pension," in the latter part of the 38th section, are very large. The question is, whether they may not include any pension due and payable, any pension supposed to be due and payable, or any pension not yet granted.

BOSANQUET, J.—The receipt itself speaks of its being due and payable to the pensioner.

Wortley.—The indictment might have been for forging a receipt.

ALDERSON, B.—In *Tannet's case*, the supposed person whom the prisoner personated was not entitled to the money, nor did the persons who were to pay it suppose that he was so, because there was no such man; but where a person had a pension, and was dead, the persons who had to pay the money might still suppose that it was due from them, not knowing of the death.

The case was afterwards considered by the judges, who held the indictment was good, and the conviction right.

## NORTHERN SUMMER CIRCUIT, 1840.

## YORK ASSIZES.

BEFORE MR. BARON ROLFE.

REGINA *v.* MEGSON, BATTYE, and ELLIS.—p. 418.

In a case of murder it appeared that two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon, that she found herself growing worse, and that she *had been in hopes* she would have got better, but *as she was getting worse*, she thought it her duty to mention what had taken place. Immediately after this she made a statement;—*Held*, that this statement was not receivable in evidence as a declaration in articulo mortis, as it did not sufficiently appear that, at the time of the making of it, the deceased was without hope of recovery.

**MURDER.**—The prisoners were indicted for the wilful murder of Ann Stewart.

On the part of the prosecution it was proposed to give in evidence a declaration made by the deceased on the 29th of April, as a declaration in articulo mortis. To show the state in which the deceased was, a surgeon was called, who said—"On the evening of the 28th of April, I found the deceased in bed with all the usual symptoms of fever brought on by cold; on the 29th she complained of her chest, and was suffering from inflammation of the lungs; she was extremely ill, and I then told her she was in a very precarious state; on the next day (the 30th) she was much worse, and, in my judgment, was in imminent danger; she then made a statement to me; upon hearing that statement I examined her person, and found the left labium pudendi much swollen, and the right labium discoloured, and the skin within the labia on both sides abraded; she was also suffering much from pain over the ribs, which increased on pressure and on drawing in the breath; she died on the next day. Immediately before she made the statement to me she said that she found herself growing worse, and that she had been in hopes she would have got better, but as she was getting worse, she thought it her duty to mention what had taken place."

ROLFE, B.—I think that it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence.

The evidence was rejected. (a)

The jury found all the prisoners not guilty.

*Baines* and *Pashley*, for the prosecution.

*Wortley*, for the prisoner Megson.

*Wilkins*, for the prisoner Battye.

(a) See the case of *Reg. v. Perkins*, ante p. 395, and the authorities there referred to.

## REGINA v. MEGSON, BATTYE, and ELLIS.—p. 420.

On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished, (but who was since dead,) had come home evidently suffering from recent violence. It was proved, that on her return home she made a statement as to the injury she had received, and named the persons who had committed it:—*H-Id*, that the particulars of this statement could not be given in evidence as independent evidence, to show who were the persons who committed the offence, and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by showing that she made a recent complaint of the injury she had received.

**RAPE.**—The three prisoners who were tried in the last case were indicted for a rape committed on the person of Ann Stewart, (the same person who was alleged in the last case to have been murdered.)

Evidence was given to show that the outrage in question had been perpetrated on Ann Stewart, (who had since died,) early on the morning of the 24th of April, and it was proved by the person with whom she lodged, that she returned home about five o'clock on the morning of that day, and that when she so returned her dress was in disorder, and that she had only one boot, and that her cap was torn, and that her clothes were much stained with blood. It was also proved, that on the examination of her person by a surgeon on a subsequent day, it appeared that she had a bruise on the knee, another bruise within the right thigh, a lacerated wound in the vagina, and other marks on the private parts, such as, in the opinion of the medical witnesses, showed forcible connexion to have taken place. The deceased, as soon as she returned home on the morning of the 24th, made a complaint of what had happened to her on that morning.

*Baines*, for the prosecution, proposed to ask the terms in which Ann Stewart had made the complaint.

*Wortley*, for the prisoner Megson.—I submit that that evidence is not admissible. The evidence as to what the deceased said, on returning to her lodgings on the 24th of April, must be confined to the fact that she made a complaint. The *particulars* of the complaint made by her are clearly not admissible as evidence of the truth of her statement. The words of Phillips on Evidence are, "It is now the general practice to exclude any mention of the details of the complaint. In case of the death of the party injured, or in case of her absence for any cause, the particulars of her complaint stated in the absence of the prisoners, could, under no circumstances, be received." Vol. 1, p. 204, 8th ed.

*Baines* and *Pashley*, for the prosecution.—The woman's complaint of her bodily sufferings is undoubtedly receivable in evidence; that was so held in the case of *Aveson v. Lord Kinnaird*, 6 East, 188. The only question is, whether her account of the particular cause of those sufferings may be admitted. According to the case of *Thomson and Another v. Trevanion*, Skinn. 402, cited 1 Phill. on Ev. 203, the woman's statement of the cause of her sufferings would seem to be admissible. So in *Rex v. Foster*, ante, vol. 6, p. 325, (25 E. C. L. R. 421,) it was held by Baron GURNEY, Mr. Justice PATTESON, and Mr. Justice PARK, that what a deceased person had said, immediately on being knocked down by a cab, as to the cause of the injury which he had received, was evidence against the cab-driver on his trial for manslaughter. As to the exclusion of the particulars of the complaint in case of rape, the statement cited from Phillips on Evidence rests on *Rex v. Clarke*, 2 Stark.

N. P. C. 242, (3 E. C. L. R. 333.) But, in the recent case of *Reg. v. Walker*, 2 M. & Rob. 212, Baron PARKE said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said; but for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination." The propriety of the ruling in *Rex v. Clarke* is also doubted by Mr. Starkie in his work on Evidence, 2 Stark. Ev. 700, n. (a).

ROLFE, B.—There is a wide difference between receiving such statements as confirmatory of a prosecutrix's credibility in a charge of rape, on which she is examined as a witness, and in a case like the present, where the complaint made is to be received as independent evidence. I entertain very great doubts indeed, about the admissibility of such evidence.

The evidence was not given.

ROLFE, B., (in summing up.)—I had a strong feeling that it was not competent to the prosecutor to extract in detail the complaint made by the deceased on her return home. In ordinary cases of rape, where a witness describes the outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage is properly admissible to show her credit and the accuracy of her recollection. Here, however, the object was to give in evidence the particulars of the complaint as independent evidence, with a view of showing who were the persons who committed the offence.(a) All that could be safely received was, I think, her complaint that a dreadful outrage had been perpetrated upon her.

The prisoners were acquitted.

*Baines and Pashley*, for the prosecution.

*Wortley*, for the prisoner Megson.

*Wilkins*, for the prisoner Battye.

(a) See the case of *Reg. v. Gutteridge*, post.

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## NEWCASTLE ASSIZES.

BEFORE R. B. ARMSTRONG, ESQ.

(Who sat for Mr. Justice Coltman.)

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REGINA v. ROBSON.—p. 423.

A count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as "a certain forged request for the delivery of goods to one J. R.," is good under the stat. 2 & 3 Will. 4, c. 122, s. 2, and is not too general.

FORGERY.—The first count of the indictment charged, that the prisoner, on and at, &c., "feloniously did forge a certain request for the delivery of goods," which said forged request for the delivery of goods is as follows, that is to say:—

"May 17, 1840.

"Mr. French,

Newcastle-on-Tyne.

"Sir—Please to forward as address below, soon as possible, three mourning rings, sizes O. P. Q., good weight and well finished; three or four gold *guard curbs*; the last you sent me were not as I like them; you may send one or two ladies' gold watches, fashionable patterns; I want them immediately. As I may be from town for a short time, you had better direct your parcel to Mr. J. Robinson, 88 Percy street, Newcastle, as Mr. R. is the person I wish to recommend to you; he is a safe hand, having plenty of cash; he is the writer of this: and as my clerk deceived me to a considerable amount, be particular not to address it Robson. I hope you will be kind enough to let Mr. Robinson have them directly. I remain yours, &c.

"G. B. BERGNA.

"P. S. I have thought it best to sign my own name, as a precaution against future trouble.

"For Mr. B. Bergna,  
JACOB ROBINSON.

"Mr. J. French, Jeweller,  
"5, Newcastle Place, London."

--with intent to defraud one Jacob French, against the form of the statute," &c. The second count was for uttering the forged request for the delivery of goods, setting it out exactly as it was set out in the first count. The third and fourth counts were similar to the first and second counts, except that, in setting out the forged instrument, the address "Mr. J. French, jeweller, 5 Newcastle-place, London," was omitted. The fifth count charged that the prisoner on, &c., at, &c., "feloniously did forge a *certain other request for the delivery of goods*, with intent to defraud the said Jacob French; against the form of the statute," &c. The sixth count charged that the prisoner on, &c., at, &c., "feloniously did offer, utter, dispose of, and put off a *certain other request for the delivery of goods*, with intent to defraud the said Jacob French, he the said Joseph Philip Robson, at the time he so uttered, put off, and published the said last-mentioned forged request for the delivery of goods as aforesaid, then and there well knowing the same to be forged; against the form of the statute," &c. The seventh count charged that the prisoner on, &c., at, &c., "feloniously did offer, utter, dispose of, and put off a *certain other forged request for the delivery of goods to one Jacob Robinson*, with intent to defraud the said Jacob French, he the said Joseph Philip Robson, at the time he so uttered, put off, and published the said last-mentioned request for the delivery of goods, to the said Jacob Robinson, then and there well knowing the same to be forged; against the form of the statute, &c. The eighth count was exactly similar to the seventh, except that it stated the instrument to be a forged request for the delivery of goods to Giovanni Battista Bergna, instead of describing it as a forged request for the delivery of goods to Jacob Robinson.

It appeared that the prisoner had formerly been employed by Mr. Bergna (who was but little acquainted with the English language), to write letters for him, and that the forged document was received by Mr. French, who resided in London, and had before sold goods to Mr. Bergna.

Evidence was given to show that the forged instrument was in the handwriting of the prisoner, and also that the paper on which it was

written had been torn from a copybook, which was found in the room in which the prisoner was apprehended.

The forged instrument was put in and read; and it appeared that the words which in the setting of it out in the indictment were set out as "guard curbs," in the instrument itself were "guards curbs." It was proved that by the term "guards" is meant chains to guard a watch or eye-glass, and that the term "curb" means a description of the pattern.

Wortley, for the prisoner, submitted—first, that with respect to those counts of the indictment in which the instrument was set out, the laying of the words to be "guard curbs" instead of "guards curbs" was a fatal variance, and he cited the case of *Rex v. Drake*, 2 Salk. 660;(a) and secondly, that the other counts were bad, as they did not describe the instrument in such a manner as would sustain an indictment for stealing it, so as to satisfy the provisions of the stat. 2 & 3 Will. 4, c. 123, s. 2, which provides, that in indictments for forgery it should be sufficient to describe the forged instrument "in such a manner as should sustain an indictment for stealing the same."

Ingham and Granger, for the prosecution, submitted—first, that there was no variance, as the sense of the words was not altered by the introduction of the letter s, and that the words "three or four gold guard curbs" meant exactly the same as the words "three or four gold guards curbs." They cited the cases of *Rex v. Hart*, 1 Leach, 172,(b) *Rex v. Beach*, 1 Cowp. 229,(c) and *Rex v. Oldfield*, 2 Russ. C. M. 1482,(d) and on the second point they submitted that the description of the forged instrument was quite sufficient to satisfy the provisions of the stat. 2 & 3 Will. 4, c. 123, s. 2; for that, in indictments for larceny of written documents, the instrument was always described in terms quite as general as those contained in the present indictment.

Mr. ARMSTRONG, considering it doubtful whether the objections could be sustained, left the case to the jury, who found the prisoner

Guilty.

Ingham and Granger, for the prosecution.

Wortley, for the prisoner.

In the ensuing term the case was considered by the fifteen judges, who held the conviction right, and that the counts which did not set out the instrument were good, under the stat. 2 & 3 Will. 4, c. 123, s. 2;(e) but the point as to the variance was not decided.

(a) In that case, which was an information for a libel, it was held that the setting out of the word "nor" instead of the word "not," was a fatal variance, although the sense was not altered thereby.

(b) In that case it was held, that the word "received," in the setting out of a forged instrument, and the word "reiceved" in the instrument itself, was no variance.

(c) In that case a variance of "undertood" instead of "understood" was held not to be material; and in that case Lord MANSFIELD, C. J., said—"The true distinction seems to have been taken in the case of *Reg. v. Drake*, which is this: that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material."

(d) In that case a forged bill, addressed to Messrs. Masterman, was set out as being addressed to Messrs. Masterman, and this was held to be no variance, and Sir W. RUSSELL adds (ib.), "But if by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal."

(e) See the next case and the note to that case.

## WELSH SUMMER CIRCUIT, 1840.

## BEAUMARIS ASSIZES.

BEFORE LORD DENMAN, C. J.

REGINA v. DAVIES.—p. 427.

A count in an indictment for uttering a forged deed described it as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. W. of the one part, and D. G. of the other part, purporting to be an under-lease by the said R. W. to the said D. G. of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of £8, payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment, by the said D. G. to the said R. W., of the yearly rent of £8:"—*Held*, good, under the stat. 2 & 3 Will. 4, c. 123, s. 2.

**FORGERY.**—The prisoner was indicted for forging and uttering a deed. The first count of the indictment charged the prisoner with having forged the deed; and the second count, which was for the uttering, was in the following form:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Philip George Davies, on, &c. at, &c., feloniously did offer, utter, dispose of, and put off, a certain other deed, purporting to be made on the first day of March, in the year of our Lord one thousand eight hundred and thirty-seven, between one Robert Williams of the one part and the said David Griffith of the other part, and purporting to be an underlease by the said Robert Williams to the said David Griffith of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of eight pounds, payable on the first day of March in every year, and purporting to contain a covenant by the said David Griffith with the said Robert Williams for the payment by the said David Griffith to the said Robert Williams of the yearly rent of eight pounds, with intent to defraud the said George Bradley Roose; the said Philip George Davies at the time he so uttered and published the last-mentioned deed as aforesaid, then and there well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

There was no sufficient evidence on the first count, but the second was fully proved.

*Jervis*, for the prisoner, submitted, that the second count of the indictment did not sufficiently describe the forged instrument under the stat. 2 & 3 Will. 4, c. 123, s. 2.

Lord DENMAN, C. J., reserved the point for the consideration of the fifteen judges.

Verdict—Guilty.

*Townsend*, for the prosecution.

*Jervis*, for the prisoner.

In the ensuing term the case was to have been argued before the fifteen judges, and *Townsend*, for the prosecution, appeared before their lordships to argue the case in support of the conviction, but he stated that no counsel appeared for the prisoner.

Lord DENMAN, C. J.—I think that if no counsel is instructed on the part of the prisoner, we ought not to hear counsel on the part of the prosecution.

The case was not argued, but having been considered by the judges, their lordships held that the second count of the indictment was good, and that the conviction was right.<sup>(a)</sup>

(a) See the preceding case, and see the case of *Reg. v. Rogers*, ante, p. 41, as to the form of a count for forging a warrant for the payment of money, framed on the stat. 2 & 3 Will. 4, c. 123, s. 2, and the case of *Reg. v. Martin*, ante, vol. 7, p. 549, as to the form of a count for forging a receipt framed on the same statute. In the case of *Reg. v. Raake*, ante, vol. 8, p. 626, the indictment charged the prisoner with having forged "a certain order for the payment of money, to wit, for the payment of 60*l.*," without setting it out or further describing it.

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## HOME SUMMER CIRCUIT, 1840.

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BEFORE MR. BARON GURNEY.

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### REGINA v. WHITEHEAD.—p. 429.

A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count, laying the property of the goods in the queen. It was shown by proof of the record that the husband of Elizabeth A. had been convicted of felony, and it was also proved that he was still in prison under his sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in the possession of the house and goods till they were stolen by the prisoner.

*Held*, that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the queen, although there had been no office found, and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported.

HOUSEBREAKING.—The first count of the indictment charged the prisoner with feloniously breaking and entering the dwelling-house of Elizabeth Andrews, and stealing therein several articles of wearing apparel, her property. In a second count the articles were charged to be the property of the queen.

It appeared that the husband of Elizabeth Andrews had been convicted of felony; that at the time the house was broken into and these things stolen he was in Maidstone jail, under sentence of imprisonment for one year, and the record of his conviction and sentence was proved. It was also proved that all the articles included in the indictment had been the property of the husband, and had remained in the house from the time of his apprehension, and that the wife continued in possession of the house and the goods till they were stolen.



*Horn*, for the prisoner, submitted that the prisoner could not be convicted either of the housebreaking or the larceny, as the house was not in point of law the house of Elizabeth Andrews, nor were the goods her property, neither were the goods the property of the queen, notwithstanding the conviction of the husband, until office found.

GURNEY, B., reserved the case for the consideration of the fifteen judges.

Verdict—Guilty.

*Horn*, for the prisoner.

In the ensuing term the case was considered by the judges, who held the conviction good for the larceny only on the second count, which laid the property of the goods to be in the queen.

## MIDLAND SUMMER CIRCUIT, 1839.

### WARWICK ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE LITLEDALE.

REGINA v. NEALE and Others.—p. 431.

Any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly, and it is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly.

**RIOT.**—The defendants were indicted for a riot at Birmingham on the 4th of July, 1839.

It was opened by *Campbell*, A. G., for the crown.—That before the 4th of July, 1839, there had been several meetings of a tumultuous character in the town of Birmingham, and that, on account of the then inefficient state of the police of that town, the mayor of Birmingham proceeded to London on the 3d of July, accompanied by Dr. Booth and Mr. Chance, who were magistrates; and on the 4th of July they came back with sixty of the metropolitan police force, whom Mr. Chance swore in as special constables under the stat. 5 & 6 Will. 4, c. 43. On the evening of the 4th of July there was a tumultuous meeting in the Bull-ring at Birmingham; a great number of persons assembled; they had flags 'here were harangues; and the people of the town were most seriously

alarmed. That such an assembly was an unlawful assembly could not for a moment be doubted, because every assembly to the terror of her majesty's subjects was an unlawful assembly, and though there be no breach of the peace, if the assembly is of such a nature as to cause alarm, no one can tell where it will end, or what will be its consequences, and the law will not allow such an assembly. (a) After the arrival of the metropolitan policemen in Birmingham, and after they had been sworn in by Mr. Chance as special constables, Dr. Booth proceeded with them to the Bull-ring, and desired the mob to disperse; but the mob refusing to disperse, the magistrates did what their duty required—they called on the policemen, who had been made special constables, to do what was necessary to apprehend the offenders and disperse the unlawful assembly. At first the policemen prevailed to a certain extent, but the mob were so numerous, and acted so outrageously, that the police were overpowered, and several of them dangerously wounded. The riot continued for a considerable time. The Riot Act was read, and it was found necessary to call in the military, by whom the streets were cleared, and the peace of the town preserved. It would be shown clearly that there was a most dangerous riot subsisting for more than an hour, and that the defendants were concerned in it.

It was proved by Dr. Booth and other witnesses, that before the 4th of July there had been meetings in Birmingham, and that the tradesmen were in such terror that they closed their shops, and some of them complained to the magistrates, wishing them to take steps to prevent the continuance of the meetings; and that the police force of Birmingham at that time amounted to about twenty-eight persons, some of them decrepit old men; the population being about 200,000. That the mayor, Mr. Chance, and Dr. Booth obtained the attendance of sixty of the metropolitan police force, whom Mr. Chance swore in as special constables. It was also proved by Dr. Booth, that at about eight o'clock in the evening of the 4th of July, he proceeded to the Bull-ring, at Birmingham, which was crowded; and that the people groaned at him, and called him a spy; and that the mayor and himself proceeded with the policemen to the Bull-ring; that both the mayor and himself desired the mob to disperse, which they would not, and stones were thrown by the mob, and the horse of Dr. Booth was struck; and that Dr. Booth directed the policemen to take a man who was reading a paper to the crowd, when the mob began hissing and groaning, and confusion and riot and throwing stones followed. It was also proved that the policemen tried to disperse the mob, and that they were overpowered; and that the policemen used their staves, and the mob used bludgeons and stones, and also a dagger or some sharp instrument, as two of the police were cut and wounded. It was further proved that the Riot Act was read, and the military sent for; and that in about an hour the mob were dispersed. Evidence was given to show that each of the defendants took an active part in the riot. It also appeared, from the cross-examination of the different witnesses, that there had been frequent meetings of great numbers of persons in Birmingham, and considerable excitement in the year 1832, on the subject of the Reform Bill.

*Miller*, for the defendant Storey.—It is not because on certain occa-

(a) See the case of *Regina v. Vincent*, ante, p. 91, and the case of *Rex v. Birt*, ante, vol. 5. p. 154, (24 E. C. L. R. 252.)

sions large numbers of persons may be assembled to effect a political purpose, or to exercise a political right, and timid persons may apprehend a disturbance, that therefore such meetings are illegal. If it were so, there could hardly be a contested election in any part of the kingdom; for it rarely happens that there is a contested election without great excitement existing, and much apprehension in the minds of the timid and more nervous portions of society. A meeting may pursue its legitimate purpose; and though there may be some sudden terror excited, yet the meeting is not thereby rendered an illegal meeting. Suppose that there is a large meeting to petition parliament to redress some supposed grievance, many persons may think that it may lead to a breach of the peace; but does that render the meeting illegal? If it does, what would become of the right of the people to assemble to petition, if they cannot meet in such numbers as to give weight to their petitions, or lest nervous people might suppose that from the vigour of the language used, danger might result to the neighbourhood; and it is not because certain persons may have applied to the magistrates to have special constables sworn in, and may have apprehended disturbance, that it necessarily follows that such meetings would be illegal. And now let us see whether there was any necessity for the introduction of any power, originally foreign, into the town of Birmingham on this occasion. Not a single inhabitant has been called to state that this meeting was conducting itself in a manner calculated to produce the slightest alarm; and what right has any magistrate to tell people in a public area in a town to disperse? and unless he has a right to do so, if he let loose a body of constables upon them, and the people resist in consequence of being assailed, they are justified by law, and the rioters are the men who are set upon them, and not those who are assailed. If the police or the magistrates had no authority to assail the people, and a riot ensued afterwards, the people were justified in repelling the assault, and were not guilty of any offence.

*Campbell, A. G.*, in reply.—I will venture to lay down this as law: If this meeting had been perfectly lawful; if they had met on the requisition of the mayor of Birmingham to consider of a petition legally addressed to her majesty, the subsequent conduct of the mob was highly criminal; because, even if an assembly which has lawfully met together, shall be required by a magistrate to disperse, that would give them no right to throw stones, no right to make use of bludgeons or stabbing instruments. If they would be justified in continuing to meet and keep together in the place, that can never justify them in becoming assailants. However, it appears here, that the moment they were desired to disperse, stones flew about, the horse of Dr. Booth was struck; and it is shown abundantly by the evidence, that this assembly was in every point of view utterly illegal.

*LITTLEDALE, J.* (in summing up).—It appears, that, on several days before the 4th of July, a great number of persons were assembled at Birmingham; and it also appears that on the 4th of July there was an assembly of persons; but up to the time that Dr. Booth went in among them, I do not find that any riot had taken place on that day; it is, however, another question whether there had been an unlawful assembly; because if there was a meeting attended with circumstances calculated to excite alarm, that is an unlawful assembly; and whether there be an unlawful assembly, may also depend on the resistance made to the at-

tempts to disperse it, and prevent the persons remaining together; and it is not only in the power of magistrates, and not only lawful for magistrates to disperse any such meeting, but if they do not, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. (u) The first question in the present case is, whether this meeting, constituted as it was before Dr. Booth and the police made their appearance, was an unlawful assembly; if it was, then the magistrates had a right to disperse it. The mode of dispersing an unlawful assembly may be very different, according to the circumstances attending it. It might be an unlawful assembly in a very slight degree; parties might have got just within the pale of what is unlawful, and the appearance of one magistrate and two or three constables might disperse them. If this assembly were of that description, there was no pretence for a magistrate's going with a great police force to disperse the persons assembled. But all these cases admit of a variety of shades, because an assembly may be such that though, up to the time the magistrate goes to it, there may be no breach of the peace, yet it may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly. If it was a slight matter, a magistrate going with two or three constables would oblige the people to go away at once; but if he were to go to a large and tumultuous meeting with only two or three constables, it would be absurd, and he would only be laughed at; and there may be cases where a magistrate would be bound to use force to disperse the assembly. All these different cases must depend on their own circumstances; and you would have to say in each, whether, under the particular circumstances, the magistrates were justified in resorting to the means that they did. If the meeting about which we are now inquiring was an unlawful assembly, it was the duty of the magistrate to disperse it; and you will then have to consider whether the magistrates used more violent means than were necessary to disperse the assembly. They are to use all lawful means, and you must say whether or not they did more.

The jury found all the defendants guilty.

*Campbell, A. G., Bulguy, and Waddington*, for the crown.

*Miller*, for the defendant Storey.

(a) See the case of *Rex v. Pinney*, ante, vol. 5, p. 254, (24 E. C. L. R. 252,) and the notes to that case; and the case of *Rex v. Kennett*, *Id.* p. 282, (24 E. C. L. R. 321.)

## REGINA v. HOWELL, ROBERTS, JONES, and WILKES.—p. 437.

Indictment, on the stat. 7 & 8 Geo. 4, c. 30, for feloniously demolishing a house. All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.

A. and others were indicted for feloniously demolishing the house of B. It was proved that A. and a mob of persons assembled at H.; A. there addressed the mob in violent language, and led them in a direction towards a police office about a mile from H., some of the mob from

time to time leaving and others joining. At the police office the mob broke the windows, and then went and attacked the house of B., and set it on fire—A. not being present at the attack on the house or at the fire:—*Held*, that on this state of facts A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob, who were at H., were the persons who demolished B.'s house.

If rioters attack a house and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to show that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the stat. 7 & 8 Geo. 4, c. 80, s. 8.

Destroying moveable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold.

If rioters destroy a house by fire, that is as much a demolition within the stat. 7 & 8 Geo. 4, c. 30, s. 8, as if any other mode of destruction were used.

If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there.

A house is properly described as "in the parish of Birmingham," although for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish.

A. had been committed for more than twenty days on a charge of riot. At the assizes he was indicted for feloniously demolishing a house: A.'s counsel applied to postpone the trial, and to have a statement of the evidence of several witnesses, whose names were on the back of the indictment, but who were not examined before the magistrates. The judge postponed the trial till the next day, and held that the prisoner was only entitled to a copy of the depositions taken before the magistrates.

B. had been committed for less than twenty days on a charge of riot, and was indicted for felonious demolition. His counsel stated that he had intended to traverse, and was wholly unprepared to try. The judge postponed the trial for two days, and would not postpone the trial till the next assizes, as the general nature of the charge was not so different that the prisoner must be taken to be wholly ignorant of it.

If a person be indicted for a misdemeanor, and it be a different misdemeanor from that for which he has been committed or held to bail, he is entitled to traverse, although he has been committed or bailed more than twenty days.

INDICTMENT, on the stat. 7 & 8 Geo. 4, c. 30, for feloniously demolishing a house. The first count of the indictment charged that the prisoners, together with divers others, to the jurors unknown, to the number of 2000, on the 15th of July, 1839, riotously and tumultuously assembled together to the disturbance of the public peace, and with the said other persons so riotously and tumultuously assembled together, did feloniously and unlawfully, and with force, demolish, pull down, and destroy a certain house, *in the parish of Birmingham*, belonging to James Bourne and Henry Bourne. The second count charged, that the prisoners did "begin to demolish and pull down" the house. The indictment also contained other counts, on which no question arose.

As soon as the prisoners had pleaded, *Daniel*, for the prisoner Wilkes, stated that the prisoner Wilkes had not been committed on any charge of felony, but had, on the 18th of July, been committed on a charge of misdemeanor, alleged to have been committed by the prisoner Wilkes on the 15th of July; and that depositions had been returned which referred to that charge.<sup>(a)</sup> He therefore applied that the trial should be postponed, and that the crown should furnish to the prisoner a statement of the evidence to be adduced against him on the charge of felony.

LITTLEDALE, J.—I do not say anything at present as to postponing the trial; but as to the other point, who ever heard that any prisoner was to be furnished with a statement of the evidence? If there are any de-

(a) The prisoners Wilkes and Jones had been committed on a charge of riot, alleged to have occurred at Birmingham on the 15th of July, 1839.

positions, they are returned, and the prisoner is entitled to a copy of them. This is only like any other felony. In cases of high treason there are particular arrangements as to the list of witnesses, and a copy of the indictment, &c.; but that does not apply in felony. If the prisoner had been indicted for a misdemeanor, and that had been a different misdemeanor from that for which he had been committed, or held to bail, he would have been entitled to traverse, even though he had been committed or bailed more than twenty days. But this case is the same as that of any felony (a highway robbery, for instance) which has occurred during the assizes, and there the prosecutor is always entitled to prefer his indictment and try at the same assizes.

An affidavit of the prisoner Wilkes was put in, which stated that he was committed for a misdemeanor; that six persons were examined as witnesses against him, and that he was now indicted for a felony of which he was ignorant, and that he was unable to defend himself, there being seventeen witnesses on the back of the bill, of whose evidence he knew nothing.

*Campbell, A. G.*, for the crown.—If the affidavit had stated that there was any particular witness whose attendance the prisoner could not procure at these assizes, there might be some ground for postponing the trial, but nothing of the kind is suggested here.

*Daniel*.—If the affidavit had named any witness, it would not have been entitled to credit, as the statement is, that the prisoner is ignorant of the evidence he has to meet.

*LITTLEDALE, J.*—It does not appear to me that the general nature of the charge is so different from that on which the prisoner was committed, that the prisoner must be taken to be wholly ignorant of it, and that I ought to postpone the trial till the next assizes; but it seems to me to be reasonable, as the case has taken a different turn, that a reasonable time should be given, because the course of defence may be different in felony to that in misdemeanor. I therefore think that the trial should stand over till to-morrow.

*Miller*, for the prisoner Jones, applied that the trial should be postponed as to him, on the ground that the prisoner Jones had been charged before the magistrates with a misdemeanor only, and had not been committed twenty days, and that, intending to traverse to the next assizes, he was wholly unprepared to take his trial.

*LITTLEDALE, J.*—Your affidavit will state that your client is entitled to traverse, that he did not expect to take his trial at all these assizes, and he is therefore to be considered in the situation of a person who is totally unprepared, and has got no witnesses, and intended to traverse. I think it is reasonable that you should have till the day after to-morrow.

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It was opened by *Campbell, A. G.*, that a mob of disorderly persons had met between seven and eight o'clock on the evening of Monday, the 15th of July, 1839, at Holloway-head, which is a place adjoining the town of Birmingham, and that a number of persons were also assembled at the Bull-ring, in Birmingham, which surrounds St. Martin's Church, in that town; and that this mob, who were armed with bludgeons, sticks, and iron rails, came up a place called Digbeth, at about eight o'clock, and proceeded to the public office, where they demolished the windows,

and then proceeded by the Bull-ring and attacked the house of Messrs. Bourne, wholesale and retail grocers, in Moor-street, where they broke the shop shutters, destroyed the windows, got into the warehouse, brought out the goods and burnt them, and then set fire to the house; these proceedings lasting till about a quarter before ten o'clock, when the police and the military were called in, and the engines sent for; and at about one o'clock the flames were extinguished, nothing remaining of Messrs. Bourne's house except the brick walls. He submitted that it was not necessary to show that the prisoners, or any of them took hammer in hand, and by actual muscular exertion assisted in destroying the house of Messrs. Bourne, neither was it necessary to show that any of them took fire or fed the flames that were consuming the premises of Messrs. Bourne, for that if the prisoners were abetting the act they were guilty as principals; and with respect to most of the prisoners the question would be, whether they were not guilty of abetting those who with their own hands committed the offence; and if they were so, they were guilty of acting as principals; and the charge was made out. He cited Curwood's Hawkins, Vol. 2, c. 29, s. 8, and the case of *Rex v. Batt*, ante, vol. 6, p. 29.

On the part of the prosecution, Mr. Henry Bourne was called: he said, "I live in High street, in Birmingham; I occupy a house and warehouses there; they are in the parish of St. Martin; I am a tea-dealer and grocer; my partner is James Bourne; the premises are occupied by myself and him, and our trade is carried on there; previous to the 15th of July, Birmingham was much excited; and on the 15th of July, I observed, in the evening, about eight o'clock, persons collecting together in great numbers; they were more particularly in Digbeth, a street leading out of the Bull-ring; our retail premises are in High street, and our wholesale premises in Moor street; both streets communicate with the Bull-ring; at about eight o'clock I desired the house to be shut up; the shop was secured with iron bolts and bars; the house was fastened in the same way; after I had fastened the house and shop I went up stairs and looked out of a window; I saw from the window a great number of persons—hundreds of persons; they were walking towards the public office; that is about thirty or forty yards from my house; on seeing them pass towards the public office, I remained where I was; immediately afterwards I heard the windows of the public office breaking; the mob then came back and commenced breaking our windows, and then our shutters; it was the windows in Moor street they first broke, and then the shutters of the shop; the house and shop are all one entire set of premises; they then broke the windows and the frames of the shop, after the shutters had been taken down; they then entered the shop and demolished everything; they threw the counters about, and wasted and destroyed everything; I found the stones so flying about, that our lives were in danger; a great number of persons had got into the shop; I suppose there were thirty or forty who got in; there was a great confusion and row—that is, hurraing; there was the same noise when they got into the house; in this state of things I went to the public office; between my quitting and returning to the premises an hour had elapsed; on returning I found my premises on fire; it was the shop part of the premises I found on fire; it appeared to have been

(a) See also the charge of Lord Chief Justice TINDAL, on the Bristol Special Commission, ante, vol. 6, p. 261, n.

burning for some time; the fire seemed to have burned the shop completely."

Mr. Edward Adams:—"I was in the Bull-ring on the 15th of July, at eight o'clock; I saw very large numbers of persons there; I saw large numbers coming into the Bull-ring from Holloway-head, Digbeth, and New street; stones were thrown indiscriminately into the air among the people; I went up stairs to the drawing-room window in the house of Mr. Taylor; that is part of the market-house; there was at this time a mob of from two to three thousand in the Bull-ring; they moved towards the public office, up Moor street; I could not then see them, but I could hear them; they were making a great noise; in a short time they came back into the Bull-ring, and I could then see them; I saw them commence deliberately to destroy Mr. Bourne's shutters; before that they broke his windows with a shower of stones; they used, in destroying Mr. Bourne's shutters, boughs of trees, bludgeons, rails, and pieces of iron; the pieces of iron appeared to be railings from palisades; at the next adjoining shops they broke at the same time the shutters and windows; they broke open the lower part of the shop-window of Mr. Bourne's house; they broke the shutters into splinters; I could not say who were inside, but some appeared to be on the 'bulk' of the window, handing goods to those who were outside; they appeared to be fruit-boxes; there were Chinese paintings on them; they were not boxes of tea; they carried them to near Nelson's monument, and then broke them to pieces; they passed them across the Bull-ring from hand to hand; they also got tickens from Mr. Legget's; they got in there by breaking the shutters and windows; Mr. Legget is a feather merchant, and I believe an upholsterer; they brought from his shop rolls of ticken; they unrolled them in the Bull-ring, where the boxes were; they carried them down to where they had deposited the other plunder; they put all together, made a heap, and set it on fire; I do not know how they lighted the fire, but I saw them feeding the fire and it blazing up; I saw the fire fed from time to time with wood from the shutters; the ticken was burning; I saw them carry the fire from the Bull-ring and put it inside the shops of Bourne and Legget; they then set fire to the shops of Bourne and Legget; I was about fifty-five minutes looking on at this transaction; they began at Bourne's at about seven minutes to nine o'clock; shortly before ten I went to the public office, I made my escape from Mr. Taylor's back windows; they attacked the house next to it, and the family were alarmed; when I arrived at the public office I saw the dragoons; they were galloping down towards Moor street, as if they were coming from the barrack; they began to disperse the mob instantly."

Evidence was given to show that the prisoner Howell was present at the fire at Messrs. Bourne's, and inciting the mob; and that the prisoner Roberts was also there, throwing stones; and that the prisoner Jones was there, carrying a handkerchief on a stick as a flag, and waving it about, and calling on the mob to come on.

With respect to the prisoner, Wilkes, Mr. Alfred Webb was called. He said:—"I am a stationer; I was at Holloway-head on the 15th of July last; I saw Wilkes, the prisoner; it was a little after seven in the evening when I saw Wilkes at Holloway-head; there were 2000 or 3000 persons there; I was thirty or forty yards from Wilkes; I could hear him as distinctly as I hear counsel examining me; he began by saying, that 'too much time had been lost in speaking.' Then he said (address-



ing the assembly), 'The time was now come to act, they must act now decisively;' he said he did not wish to run the people into unnecessary danger, but they must prepare themselves; he alluded to the previous riot on the Thursday week; I am only giving the substance of what he said; he added, 'It was well for the police that we were not well armed' he added, I believe, that they were not yet strong enough to meet the soldiers, but if the streets were barricaded, and the railroad destroyed, they need not fear;' he added, that 'there were 200,000 men, completely armed, ready to march and join them at Birmingham at a moment's notice;' the people said, 'We are ready now—we will go now;' Wilkes was speaking when I left; it was then about a quarter to eight o'clock; Holloway-head is not quite a mile from the Bull-ring."

In his cross-examination, Mr. Webb said:—"I have heard violent harangues in the Bull-ring, but not elsewhere in Birmingham; I was at one of Hunt's meetings in London; I believe there has been a very great excitement in Birmingham amongst the labouring classes against the London police."

Mr. Charles Bates said:—"On the 15th of July I went in the direction of Holloway-head that evening as far as Smallbrook street; it is the direct line from Holloway-head; I got there between seven and eight o'clock; I saw a large crowd coming from Exeter-road, which leads from Holloway-head; many of them had staves or bludgeons in their hands; they were advancing in the direction of the Bull-ring when I first saw them; I saw Wilkes the prisoner, there; he got on the steps very near me, and the first word he said was 'halt;' the word 'halt' was repeated by the people, and they halted; I heard him tell them to form, and go in a body on the Warwick road; they did go down Smallbrook street, and those who were going on turned back; I cannot say whether Wilkes went with them or not; as soon as he got off the steps I lost sight of him."

There was no evidence to show that the prisoner Wilkes was present at the attack on Messrs. Bourne's house and warehouse, though it was proved that, when with the mob at an earlier period, he pointed to the house.

With respect to the local situation of Messrs. Bourne's house, it was proved by Mr. Griffiths that it was situate in the parish of Birmingham; and that all Birmingham is, except for certain ecclesiastical purposes, one parish, and has one poor's rate and one church rate extending over the whole parish, but that each of the ecclesiastical divisions is called a parish.

LITTLEDALE, J.—I believe the parish of St. Marylebone is all one parish, though it is subdivided into five parishes for ecclesiastical purposes.

Mr. Collison (the clerk of assize) stated, that in indictments respecting offences committed at Birmingham, the parish was always laid as the "parish of Birmingham."

Miller submitted, that as the prosecutor, Mr. Bourne, who ought to best know the situation of his own house, had stated that his house was in the parish of St. Martin, it must be taken to be so.

LITTLEDALE, J.—It is the invariable practice to describe it as the parish of Birmingham; and if this objection is good, all the indictments are wrong.

Miller.—If the practice was wrong, your lordship would correct it.

LITTLEDALE, J.—I do not mean to say, that because the indictments are wrong they should continue so; but this was originally the parish of

Birmingham; and because it is now divided into ecclesiastical divisions, that makes no difference in a case like the present.

*Miller* addressed the jury for the prisoner Jones.—No doubt the general law of the land is this: if persons are charged with committing an offence with one common and joint intent; if they be all present and near enough to aid and abet in that offence, they are all equally guilty; but the present charge is not that they went out intending to do that which was unlawful; not that they went out intending to commit a breach of the peace; not that they went out to create a riot, or to enter into conflict with the London police, against whom great excitement prevailed; but the charge is, that, having assembled for some such riotous purpose, they did together and with one common purpose aid and abet each other in demolishing, or in beginning to demolish, with the intent of effecting that purpose, the house of the prosecutors Messrs. Bourne. If you shall be satisfied that when these persons went down Moor-street their object was to seek for a conflict with the London police, and that all having that object and not having succeeded, and afterwards, when circumstances had arisen which they could not have foreseen, after a portion had gone, and without the concurrence of others, some of them had commenced the attack, and having destroyed certain property by fire, had, for the first time, entertained the intention of destroying the house, then the offence can only have commenced, (so far as the aggravated part of it), when it first occurred to them to commence the demolition of the house: and if persons go out for a purpose that is lawful, and afterwards, without the aiding and assisting of the others, some of them commit an offence, those who went out for the lawful purpose and did not participate in the offence are not guilty of it, even though they were present, unless they encouraged it or were aiding and abetting it; and I should also submit that even if a number of persons go out for an illegal purpose, with the common intention of committing a trespass or a riot, and some of them afterwards commit a felony, those who had gone out to commit the misdemeanor only would not be guilty of the felony unless they aided and abetted the felony. My case is, that there was a feeling of hostility towards the police; and that the prisoner Jones was one of a body of persons who went to the public office for the purpose of assailing the police, and that he took no part in the demolition, or even in the attack on the house of Messrs. Bourne.

*Daniel*, for the prisoner Wilkes, submitted that although there was evidence that the prisoner Wilkes had made use of violent language at Holloway-head, yet that there was fair ground to infer that he had separated himself from the other parties before the attack on the house of Messrs. Bourne.

*Campbell*, A. G., in reply, submitted, that, from the language and conduct of the prisoner Wilkes, the jury ought to infer that there was a concerted purpose between him and the mob to do mischief, and violate the law; not at some future period, but on that very occasion; and that it was for the jury to say whether the prisoner Wilkes was not a participator in all the unlawful transactions that followed.

LITTLEDALE, J. (in summing up).—This indictment is founded on the 8th section of the stat. 7 & 8 Geo. 4, c. 30, by which it is enacted, that if any persons tumultuously assembled, to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, &c., or any house, stable, &c., every such offender shall suffer death as a felon.

Now it is proper here to remark, that that part of the act that every person committing this offence shall suffer death as a felon, remains in force. Some discussion has occurred, as to the law in cases where persons assemble for a purpose, and afterwards, in the execution of that purpose, a felony is committed; and whether all the persons who were engaged in the original purpose are guilty of that felony, even though they are not proved to have been present at the time when the felony was committed. There is a good deal applicable to this subject in our text-books, which I will state to you. Mr. Serjeant Hawkins, in his Pleas of the crown, 2 Curw. Hawk. c. 29, ss. 7, 8, & 9, says:—"It seems to have been anciently the more prevailing opinion, that those only were to be adjudged principals in felony, who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c.; and that those in the company who were only present, and abetted and encouraged the doing it, were to be esteemed accessaries, or at most, principals in the second degree only. But I take it to be settled at this day, that all those who assemble themselves together with a felonious intent, the execution whereof causes either the felony intended or any other to be committed, or with an intent to commit a trespass, the execution whereof causes a felony to be committed, and continuing together abetting one another till they have actually put their design in execution; and also all those who are present when a felony is committed, and abet the doing of it, as by holding the party while another strikes him; or by delivering a weapon to him that strikes, or by moving him to strike, are principals in the highest degree, in respect of such abetment, as much as the person who does the fact, which in judgment of law is as much the act of them all, as if they had all actually done it; and if there were malice in the abettor, and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other. It doth not seem necessary to the making an abettor a principal, that the person on whom the felony is committed should be under any terror from the abetment, and by reason thereof discouraged from making that defence which otherwise he might have made; but it seems to be sufficient for this purpose, that the person who does the fact is encouraged and embolden in it from the hopes of present and immediate assistance from the abettor, whether he be within view of the fact or not. And upon this ground it hath been adjudged, That where persons combined together to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view. Also upon the same reason it hath been adjudged, That, where a company of rogues assault a man in the highway, who escapes from them, and then one of them rides from the rest in the same highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals. And the like hath been adjudged in relation to all those who accompany one another with an intent to commit a burglary, in the execution whereof some stand to watch only in the adjacent places, and the rest actually break, and enter the house. But where divers persons accompany one another in the doing of a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide, and the rest of the company shall neither be esteemed principals nor accessaries. Also if the act intended, though unlawful, were a bare trespass, as to enter a house, and then one of

larceny, it is a felony in such offender only, because it is a crime of a nature entirely different from that intended, and not caused by the execution of it." Besides these passages, there are others in Sir W. Russell's work, 1 Russ. C. & M. c. 1, in which the authorities are collected, and it is there laid down—"In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance, if necessary; but the *presence* need not to be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes. So that, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise." It appears from these passages, that there are cases in our law, where persons setting out engaged in a particular object, and in the promotion of that object a felony was committed, though not originally intended, and where death has ensued, they have been all found guilty of murder or manslaughter.<sup>(a)</sup> If, in the pursuit of a common object, a felony is committed, the question arises on these distinctions which I have stated, whether all the parties are guilty of felony, supposing they are proved to be present and engaged with the others in the common design, though they were not present when the felony was committed, provided it was committed by some of those who were the parties engaged in the original design. A distinction has been made, where the original purpose was entirely lawful; where it was to do an act not indictable; where it was to commit a misdemeanor; and where, among other things, it was to do a felonious act; and where expressions were used which showed a general intent to do mischief, and resist all opposers. I will now consider whether any of these positions are applicable to this case, and I think it will appear that they are not, and that they have no application to the present case. I will, however, point out to you some cases in which questions would arise on the law as laid down by the text writers. Suppose a dozen or twenty persons to determine at a meeting that they would go and kill game; the game may be killed upon their own land, or by leave of the owner of the land; all that is lawful, and there would be no trespass; but if instead of that, they met for the purpose of going on other people's land without their leave, that would be a trespass: or if they went into a free warren, the act of killing game there would be a trespass. Suppose, instead of that, they agreed to go out armed at night to the number of three, and were to take game, that would be a misdemeanor. I will put a fourth case—suppose the intention expressed by them to be to go and steal poultry, and not being provided with a sufficient number of guns, they go and steal guns to be better armed. In the first case, their intention was lawful; in the second, to commit a trespass; in the third, a misdemeanor;

(a) See also the cases of *Rex v. Edmeads*, ante, vol. 3, p. 390; *Rex v. Hawkins*, Id. p. 392; *Reg. v. Whitborne*, Id. p. 394; and *Reg. v. Sheppard*, ante, p. 121, and the authorities there referred to.

and, in the fourth, a felony: and if in any one of these cases a conflict happened and death ensued, and it was murder in some of the persons engaged in these pursuits, the inquiry would arise as to the persons who were joining in the original design, but no parties to the murder. However, it appears to me that this doctrine is not, nor are these distinctions any of them applicable to the present case. The first difficulty is, as to who were present at the meeting at Holloway-head, where the original design is said to have been formed; because in the cases put by Serjeant Hawkins, and in the other cases, the parties met for some common design. Then who are the persons who concoct this design? Some come from Holloway-head, some from other places; some joined, and some left. You must not assume that they all assembled at the place from which they set out—suppose 200 met at Holloway-head, and came from that place, the numbers would, no doubt, be increased by others who joined them on the road, and who would know nothing of the original design, and it would be almost impossible to ascertain out of the 2000 persons or more that were at Messrs. Bourne's, whether any of the persons who were present at the time when the original design was formed, were present or not. Another difficulty then arises, which is, whether any of the persons who were present when the plan was formed, were the persons who actually committed the felony at Messrs. Bourne's. Then arises the further difficulty as to the intent, and in considering the matter with respect to the law as laid down by Mr. Serjeant Hawkins, you must be satisfied as to the intent of the parties when they set out to go to the Bull-ring. Now some might have had an honest and innocent intention of discussing some matter of their own, without anything to constitute an unlawful assembly; though, when they came to the place and continued, it might have become an unlawful assembly. When you come to consider the rules of law which I have stated to you, it is essential that you should be satisfied of the intent of the parties when they set out for the Bull-ring. Some might have intentions perfectly innocent, others might wish to show their force, and that, in a large assembly of people, might constitute an offence; others might be setting themselves in array, and perhaps opposing themselves to the police; others might intend plunder and burning; but we have no distinct evidence of the intention of those who set the others in motion, or whether they had any distinct or definite plan at all. I therefore think that the law, which says that a man may be convicted of a felony, who was neither present at the time it was committed, nor in any way a party aiding and abetting, but who was a party to a common object, intended for the doing of a particular act, does not apply here. Your attention, therefore, ought to be confined to the particular subject of the felony charged on this indictment; but as applicable to this, as well as every other felony, I am bound to tell you that it is not necessary, to make a party guilty of felony, that his should be the hand by which it is committed. Those who are aiding, abetting, and assisting, are principals in the second degree, and are equally guilty with the principals in the first degree, as they encourage them to go on, and prevent other people from hindering them; and it is not necessary that parties aiding should be within view of the fact, if they are so placed as to prevent persons coming to the assistance of the party injured. With respect to the demolishing of the house, the law as laid down by Baron GURNEY, in the case of *Rex v. Batt*, has been very properly cited to you. In that case it appeared that a riotous mob, having a feeling of ill-will against a coal-lumper, went to a house where he kept

his pay table, and with menaces of murdering him, they destroyed part of the house, and continued throwing stones at it till they were compelled by the police to desist; and it was decided that they might be convicted of beginning to demolish under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper; provided it was also their object to demolish the house, on account of its being used by him or his men, and although they had not any ill-will against the owner of the house personally. And there is no doubt, that if, their principal object being to injure the individual, they had also the object to demolish the house, they ought to be found guilty of feloniously beginning to demolish, although they had no ill-will against the owner of the house. Baron GURNEY refers to the case of *Rex v. Thomas*, ante, vol. 4, p. 237, decided by me. It there appeared that the prisoner and others on the 15th of March, 1830, at about midnight, came to the house of the prosecutor, and that, having in a riotous manner burst open the door, they broke some of the furniture, all the windows, and one of the window frames, and forced out a small iron bar; and that after doing this mischief they went away. It did not appear that there was anything to hinder the rioters from doing more damage if they had chosen so to do. I held in that case, "That this will not be a beginning to demolish, within the act of Parliament, unless the jury shall be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it. Now, here that is not so, for they come to do a great deal of mischief, and then go away, having manifestly completed their purpose, and done all the injury they meant to do." A nearly similar rule is laid down by Lord Chief Justice TINDAL, in a case (a) where parties pursued an individual who took refuge in a house, and broke the windows and destroyed the furniture, and then went away; and in the case of *Rex v. Batt*, Baron GURNEY says, "In the case of *Rex v. Thomas*, there was nothing to prevent the rioters from going on, and, in favour of life, it was inferred that as they left off voluntarily, they never had any intention of proceeding further. But certainly that is not so here, because there is the interference of the police, and it was after the threats of the police that the mob desisted. If you are of opinion that this mob began to do mischief to the house, intending to persist in demolishing it if they were not interrupted, the offence charged will have been committed." There is no doubt that the rule of law as there laid down is applicable to this case. If part of the object of these rioters was to destroy and demolish this house, and they began to demolish it, they are clearly guilty of this felony. The demolition in this case was by means of fire, and though there is a specific enactment as to arson, yet if burning is the means of the demolition of the house, it is just as much within this enactment as the knocking down of the house by hammers or crow-bars or anything else. If the mob went away without doing any act at all, they would not be guilty of this offence, whatever their intention might be; but if, having once begun it, they are prevented from going on with the act of demolition by the interference of the military, I am of opinion that it is a case clearly within this enactment. There was another question made as to whether this house is properly described as in "the parish of Birmingham." It appears to me on the evidence that it is, and I have also looked into the local act, (b) and am satisfied upon it; and I think that it is not less "the

(a) The case of *Rex v. Price*, ante, vol. 5, p. 510.

(b) The statute 2 Geo. 4, c. 30, s. 8, (see & page).

with the intent charged in the indictment; and if he did publish it with that intent, then the question arises, whether it be a seditious libel; and I am bound to tell you that if it is proved to your satisfaction that the defendant published this paper, and had the intention charged, it is in my opinion a seditious libel. It is for you, however, under a recent act of parliament, to decide upon the law as well as the facts; but I have told you what is my opinion, if you are satisfied as to the publication and the intent. There is in this indictment an allegation that there was an unlawful assembly, which was dispersed by the police: a great deal of evidence has been given to show that this was an unlawful assembly; and a great deal of evidence has also been given on the part of the defendant, with a view of showing that it was a lawful meeting. With respect to the intent of the defendant, a man must be taken to intend the natural consequences of what he has done; and if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel. With respect to the publication of the paper, it is proved that the paper is in the handwriting of the defendant, and that copies of the paper were printed; but there is no evidence that that was done by the direction of the defendant. However, you are to judge of that, and you will consider on the evidence that has been given, whether the defendant has published this paper or not. If you are of opinion that he has published the paper, then you will inquire whether it is a paper of the character which has been assigned to it. You will first consider, whether the introductory allegations of the indictment are proved; and if they are, whether the defendant published this paper; and whether he published it with the intent imputed to him by the indictment; and lastly, whether it be or be not a seditious libel; as to which latter question I have already given you my opinion.

Verdict—Guilty.

*Campbell, A. G., Balguy, and Waddington, for the crown.*  
The defendant in person.

ing special constables of the borough of Birmingham, in pursuance of the statute in such a case made and provided, did, by the order and direction of William Scholefield, Esq., and John Kaye Booth, Esq., justices of our said lady the queen, assigned to keep the peace, disperse, separate, and remove, and cause and procure to be dispersed, separated, and removed, the said unlawful assembly of persons, and that they the said G. M. and J. H. S., were together with the said other persons forming part of the metropolitan police force, then and there acting in the due execution of their duty as such special constables, in dispersing and causing to be dispersed the said unlawful assembly of persons; and that the defendant intending to excite divers liege subjects of the queen to resist the laws and to resist the persons so being part of the metropolitan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace, and to raise discontent in the minds of the subjects of the queen, and raise and excite tumult and disobedience to the laws, did publish a certain false, &c., libel, "of and concerning the said persons so being part of the London metropolitan police, and of and concerning the administration of law and justice within this realm, containing the false, and malicious, scandalous, seditious, and libellous matter following, that is to say :—

"Resolutions unanimously agreed to by the General Convention.

"Resolved—1st, That this Convention is of opinion, that a wanton, flagrant, and unjust outrage has been made upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation.

"2d, That the people of Birmingham are the best judges of their own right to meet in the Bull-ring or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice.

"3d, That the summary and despotic arrest of Dr. Taylor, our respected colleague, affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty, or property, till the people have some control over the laws they are called upon to obey. By order, W. Lovett, Sec.

"Friday, July 5, 1839."

There were other counts in the indictment, which were founded on different portions of the libel.

To prove the prefatory allegations, that there was an unlawful assembly in Birmingham on the 4th of July, 1839, that George Martin and John Hugh Sweeting, and others of the metropolitan police force, were sworn in as constables, and that they by the directions of the magistrates dispersed the mob, Dr. Booth, George Martin, and other witnesses, were called, and stated to the same effect as was proved with respect to those points in the case of *Regina v. Neale*, ante, p. 176; and it was also proved that by the direction of the defendant 500 copies of



the paper set out in the indictment were printed, and 300 of them posted up in various parts of the town of Birmingham.

The libel was read, and at the desire of *Goulburn*, Serjt., for the defendant, Mr. Salt (whose name was on the back of the indictment) was called: he stated that he was a town councillor of Birmingham, and that he had been one of the Convention, but had resigned, and that he was present at a meeting at Holloway-head on the 6th of August, 1838, which was a meeting to agree on the Convention, and that Mr. Alderman Muntz and Mr. Attwood (the member of Parliament) were present, and that a large body of persons were assembled.

*Goulburn*, Serjt., proposed to ask the witness as to what he said at that meeting.

*Campbell*, A. G., for the crown.—I submit that what the witness then said is not admissible in evidence in the present case. How can language used by Mr. Salt on the 6th of August, 1838, be in the slightest degree relevant to the publication of this libel in Birmingham on the 5th of July, 1839?

*Goulburn*, Serjt.—The libel arises out of it. It says—"acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." I do not put it that it is evidence, because it proves the truth of the placard; but the question for the jury being, whether this is a seditious libel, it is important for the jury to know what has preceded it.

*Campbell*, A. G.—This is an indictment for libel, which contains introductory averments, which I have called witnesses to prove, and any evidence to contradict those introductory averments is clearly admissible. The evidence proposed to be given does not go to disprove any part of the introductory averments, but merely goes to show that at some prior time A. B., J. S., or X. Y., have used inflammatory language which was not prosecuted.

*LITTLEDALE*, J.—The only way in which this could be receivable in evidence is, that the defendant has mentioned in a part of the alleged libel that these men acted on the authority of "persons who, when out of office, sanctioned and took part in the meetings of the people;" and, in order to show that sanction, Mr. Serjt. *Goulburn* asks Mr. Salt whether he did not say certain things. Now, if the evidence were admissible on that ground, it would be only as proving the truth of the statements of the libel. I therefore think that I ought not to receive the evidence.

The evidence was rejected.

*Goulburn*, Serjt., addressed the jury for the defendant, and argued that this publication was not a libel, induced as it was by the conduct of the police; and that the terms of it were not so violent as those that had been made use of by persons who had afterwards filled high situations in this country.

*LITTLEDALE*, J. (in summing up).—You will first have to consider whether the statement at the commencement of the indictment, that there was an unlawful assembly which was dispersed by the police, be true or not, and if it be true, you will then have to consider whether this publication was or was not a calm and temperate discussion of the events which had occurred; for if the object of it were merely to show that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid,

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Verdict—Guilty.

*Campbell, A. G., Balguy, and Waddington, for the crown.*  
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REGINA v. LOVETT.—p. 462.

If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant.

If a paper, published by the defendant, has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent, every one must be taken to intend the natural consequences of what he has done.

A. and B. were separately indicted for publishing the same libel; both indictments containing the same prefatory allegations. A. was tried first, and on the trial of B. such of the witnesses as had been also examined on the trial of A. had (by consent) their evidence read over to them from the judge's notes, B. being allowed to further cross-examine them.

A defendant, who surrenders to take his trial on a charge of misdemeanor, need not stand at the bar to be tried, but may be allowed a place at the table of the court.

**LIBEL.**—The indictment, which was in precisely the same form as that in the preceding case of *Regina v. Collins*, ante, p. 456, charged  
 VOL. XXXVIII.

that the defendant did "write and publish, and cause and procure to be written and published," a seditious libel. The libel was the same handbill which was the subject of the indictment, in the preceding case of *Regina v. Collins*.

The defendant surrendered in discharge of his bail, and was arraigned at the bar.

*Campbell, A. G.*, for the crown.—As Mr. Lovett defends himself, it would be probably more convenient to him to come to the table, rather than stand at the bar. I can have no objection.

The defendant left the bar and took a seat at the table. (a)

*Campbell, A. G.*, in his opening, suggested that, if the defendant had no objection, the witnesses who were called in the case of *Regina v. Collins*, to prove the introductory averments in the indictment in that case, should be now called, and their evidence read over to them from the learned judge's notes; the defendant putting any additional questions to them on cross-examination.

The defendant assented to this proposition; and those of the witnesses who were examined in the case of *Regina v. Collins*, were recalled, and the evidence given by each in that case, having been read over to him by the learned judge, the defendant was asked if he had any further question to put to them in cross-examination. (b)

It was proved that the manuscript of the alleged libel was in the handwriting of the defendant, and evidence was also given by Mr. Watson, a printer, that he had printed 500 copies from it, 300 of which another witness, named Clarke, proved that he had posted about the town of Birmingham. There was no evidence to connect the defendant with the printing or the posting, except the handwriting of the manuscript.

The alleged libel was read from the manuscript.

LITTLEDALE, J.—What is the evidence of publication? You have proved that the manuscript is in the handwriting of the defendant, but you have not proved that he gave authority to publish it, or to apply to the printer.

*Bulgy*, for the crown.—I find it laid down, 2 Stark. on Ev. 454, in this way:—"The publication may be directly proved by evidence that the defendant with his own hand distributed copies of the libel, or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, or maliciously read or sung the contents of the libel, in the presence of others; all of these facts are direct proofs of the averment that the defendant published the alleged libel. But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel, and fix him with its publication. The most usual and important piece of evidence for this purpose, con-

(a) In the case of *Regina v. Vincent and Edwards*, ante, p. 91, the defendant, Vincent, who conducted his own defence, was allowed to have a place at the table of the court, although he was in custody under his sentence in the case of *Regina v. Vincent and others*, ante p. 91. The case of *Regina v. Vincent and Edwards*, was tried on the Nisi Prius side of the assizes, the indictment having been removed by certiorari. See also the case of *Rex v. Carlile*, ante, vol. 6, p. 636. (25 E. C. L. R. 571.) As to the practice in cases of felony, where the party has been on bail, see the case of *Regina v. St. George*, post.

(b) See the case of *Rex v. Foster*, ante, vol. 7, p. 495, (32 E. C. L. R. 598.)

sists in proving that the libel published is in the handwriting of the defendant. When the plaintiff has proved this, he has, if the county be not material, made out such a *primâ facie* case as entitles him to have the contents read in evidence."

LITLEDALE, J.—In *Sir Francis Burdett's case*, 3 B. & A. 717, 4 Ib. 95, the main question was as to the county in which the libel was published.

The defendant.—It was proved there that his servant put it into the post-office.

*Balguy*.—It is further said by a great authority, (Lord Holt,) in the case of *Rex v. Beare*, cited 2 Stark. on Ev. 454, that "when a libel is produced, written in a man's own hand, he is taken in the mainer, and that throws the proof upon him, and if he cannot produce the composer, the verdict will be against him." Now, if I prove this paper to be in the handwriting of the defendant, that makes a *primâ facie* case against him. Being in his handwriting and afterwards being published, is presumptive evidence that he caused it to be published; and the mere fact of its being in his handwriting, followed by a publication, throws it upon him to discharge himself from the presumption that immediately attaches; namely, that he was the party who not only wrote but published it. I do not mean to say that it is conclusive; the defendant may say that his house was robbed and his drawers ransacked, and may prove it, (if the fact were so,) and that would rebut the presumption.

*Waddington*, on the same side.—In *Sidney's case*, the paper was found in his desk, and that was held a publication, and that doctrine has since been repudiated; but still there can be no doubt that where a writing is proved in a state of publication, and it be proved to be in the handwriting of the defendant, that is *primâ facie* evidence that it was published by him. Mr. Starkie says, 2 Stark. on Ev. 454, "The writing, or even printing, a libel does not, however, in any case amount to a publication, but is mere evidence, from which it may be inferred." If there is a publication by some one proved, the proof that the libel is in the handwriting of the defendant is sufficient to throw the negative proof on him.

*Balguy*.—There is the case of *Rex v. Beare*, 1 Lord Ray. 414, Carth. 407, 2 Salk. 417, Rep. Temp. Holt, 422, 12 Mod. 218, and also a case in the ninth volume of Coke's Reports, *Lamb's case*, 9 Co. Rep. 59, in which it was held that a libel being written in the defendant's handwriting is presumptive evidence that the publication was also by the defendant, so as to throw the negative proof on him.

*Waddington*.—Mr. Starkie goes on to say, "Though proof that the libel is in the handwriting of the party goes far in fixing him with the publication, he is still at liberty to rebut if he can the strong presumption thus raised against him, by reconciling the fact with his own innocence."

LITLEDALE, J.—I think upon these authorities that there is sufficient evidence to go to the jury.

The defendant addressed the jury, and called several witnesses, with a view of disproving the introductory averment of the indictment, that the meeting of the 4th of July was an unlawful assembly, and also with a view of showing that the policemen used unnecessary violence.

LITLEDALE, J., (in summing up.)—The first inquiry you have to make is, whether the defendant published this paper. If he did not publish it, there is an end of the case altogether. If you are of opinion that he did publish it, you will then have to consider, whether he did so

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

ROBESON and Others *v.* GANDERTON, DAVIS, and ADCOCK.—  
p. 476.

A. sued B., C., and D. in a *joint* action for an attorney's bill. B. pleaded *nunquam indebitatus*, and C. & D. suffered judgment by default:—*Held*, that in order to entitle A. to a verdict against B., the jury must be satisfied that there was a *joint* contract with A. by B., C., and D., *jointly*, and that it was not sufficient to show that there was a *separate* contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone.

DEBT for an attorney's bill. Plea by the defendant Ganderton, *nunquam indebitatus*, and as to the other defendants, judgment by default.

It was opened by *Tulfourd*, Serjt., for the plaintiff, that in the year 1826, an act of Parliament (*a*) passed for making a new turnpike road from Arrowsmith-gate to join another turnpike road, and that this new road was constructed as far as Quarrypit-lane, which adjoined the defendant Ganderton's fields, when the work was stopped for want of funds, the lane being spoiled as a road, by the carriage of the materials for the new turnpike road; and that the present plaintiffs were employed to prepare an indictment against the parish of Inkberrow, who were fined £126 for the non-repair of the lane; but the Quarter Sessions having apportioned the fine to be paid, £1 by the parish, and £125 by the turnpike trustees, an indictment was preferred against Mr. Forde the treasurer of the turnpike trust, for non-payment of the £125, which indictment failed, because the evidence given to show that Mr. Forde was treasurer was, in the opinion of Baron GURNEY, (who tried the case,) not sufficient to show that he was so, and it was for the law charges of these different proceedings, in which the plaintiffs acted as the solicitors, that the present action was brought.

It was proved that the business had been done, and that the charges were reasonable; and evidence was given to show that the proceedings were instituted on the behalf of the defendant Ganderton, but there was very little evidence as to the other two defendants, it appearing that the defendant Ganderton was the prosecutor of the indictment against the parish, and that the other two defendants appeared and pleaded to that indictment as being two inhabitants of the parish indicted.

*R. V. Richards*, for the defendant Ganderton.—The three defendants are sought to be charged on a joint contract, and unless the plaintiff establishes a joint liability in all three defendants, my client is entitled to a verdict; and even if it were shown that the plaintiffs were employed by Mr. Ganderton alone, that would not be sufficient to entitle the plaintiffs to a verdict in this action.

WILLIAMS, J., (in summing up.)—The defendant, by his plea, says that he is not jointly with the other two defendants indebted to the plaintiff; and it is for you to say on the evidence whether or not he is so jointly indebted. It is my opinion, that, in order to fix the defendant in this action, there ought to be evidence to satisfy you that all the three defendants are jointly liable. If Mr. Ganderton was singly liable, he

(a) The stat. 7 Geo. 4. c. xxiii. (loc. and pers.)

could be singly sued, but I think that the plainiffs cannot succeed against him in the present action, unless it be proved to your satisfaction that the plaintiffs were employed by all the three defendants jointly.

Verdict for the defendant Ganderton.

*Talfourd*, Serjt., and *F. V. Lee*, for the plaintiffs.

*R. V. Richards* and *Gray*, for the defendant Ganderton.

## WORCESTER CITY ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE WILLIAMS.

### FIRKIN v. EDWARDS.—p. 478.

A cause was tried at the assizes on a Monday, the commission day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorneys on whom the notice to produce was served, and also the party who was their client, lived in the assize town :—

*Held*, that the service of the notice to produce was not too late, and that the question in such cases is, whether under all the circumstances reasonable notice has been given.

**ASSUMPSIT** by the plaintiff as endorsee against the defendant as acceptor of a bill of exchange for £15, drawn by David Evans, payable to his own order, and by him ordered to the plaintiff. Plea, that the defendant gave the plaintiff three promissory notes, as payment of this bill. Replication, *de injuria*.

*W. J. Alexander*, for the defendant, began and called for the three promissory notes, under a notice to produce.

The trial took place on Monday, the 27th of July, and the notice to produce had been served on the plaintiff's attorneys on the previous Saturday; the commission day for both the city and county assize at Worcester being Thursday, the 23d of July. The plaintiff and his attorneys all lived in Worcester.

*R. V. Richards*, for the plaintiff, objected that the notice to produce had been served too late, and that it should be served before the commission day.

*W. J. Alexander*.—Not where the parties live in the assize town.

**WILLIAMS, J.**—On the circuit I formerly belonged to, (a) where assizes lasted a fortnight, notices to produce were very frequently served after the commission day. The question is, whether, under all the circumstances, reasonable notice has been given. I think this will do. (b)

Secondary evidence of the promissory notes was received; but the defendant failing on other parts of his case there was a

Verdict for the plaintiff.

*R. V. Richards* and *Whateley*, for the plaintiff.

*W. J. Alexander*, for the defendant.

(a) The Northern Circuit.

(b) See the case of *Gibbons v. Powell*, post.

## SHREWSBURY ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

MARSH v. COPPOCK.—p. 480.

On the trial of an action to recover a £500 penalty for bribery, alleged to have been committed at the election of members of Parliament for the borough of L., which was to be tried by a special jury, the attorney on each side had given to the associate a list of names of certain common jurors whom he did not wish to be called if a tales were prayed. With the omission of those jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a tales had been prayed.

*Held*, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed except for cause.

*Held*, also, that it was no cause of challenge that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury who had tried another action between other parties for bribery, alleged to have been committed at the same election.

DEBT for a penalty of 500*l.* for bribery at the Ludlow election, in 1839. Plea, *nil debet*, "by statute."

This was a special jury cause, and a full special jury not appearing, *Talfourd*, Serjt., for the plaintiff, prayed a tales.

The attorney on each side had given Mr. Platt, the associate, a list of the names of those of the common jurors on the panel, whom he wished not to be called in the event of a tales being prayed.

Mr. Platt, in taking the names from the balloting-box, whenever he came to a name which was on either of these lists, did not call that name, and with the omission of those persons, and the non-appearance of the others of the common jury, the panel was exhausted, and three more jurors were wanting.

*Ludlow*, Serjt.—I apprehend the case must stand over till the next assizes.

*Talfourd*, Serjt.—There is no challenge in a civil case except for cause.

WILLIAMS, J.—You must take the first three jurors who appear, unless they are challenged for cause.

*Ludlow*, Serjt.—I have no objection to try the case by nine jurors.

*Talfourd*, Serjt.—That would be error.

WILLIAMS, J.—Call over the jury in the ordinary way.

Mr. Platt put all the names of the jurors again into the balloting-box, and the next juror who answered was Mr. Thomas Beeston.

*Ludlow*, Serjt.—Mr. Beeston is a tenant of Lord Powis, whose interest at Ludlow is sought to be affected, and whose brother was a candidate at this very election; and, secondly, Mr. Beeston was foreman of the jury in the case of *Hall v. Coleman*, tried here on Wednesday last, which was an action for a penalty for bribery at the same election, and therefore he is not indifferent. The object of challenging is that the parties should have a jury who are indifferent.

WILLIAMS, J.—I do not think that either is a sufficient cause of challenge.<sup>(a)</sup>

*Talfourd*, Serjt.—I will waive Mr. Beeston.

*Ludlow*, Serjt.—That is courtesy.

Mr. Beeston was not sworn on the jury.

A full jury having been sworn, the case was gone into, and on the part of the plaintiff, in addition to the evidence of the person to whom the money was alleged to have been given by the defendant, an examined copy of a record of a judgment of Hilary Term, 1840, was put in. It was in a case of *Coppock v. Cook*, which was an action brought by the present defendant against a person named Cook, for a 500*l.* penalty for bribery, in which was judgment for the plaintiff by default.

*Ludlow*, Serjt.—The plaintiff has made out a defence for the defendant, by showing that he has made a discovery under the 7th section of the stat. 2 Geo. 2, c. 24, and is therefore indemnified.

*R. V. Richards*, for the plaintiff.—The person who is plaintiff in another action is not the discoverer: that was decided in the case of *Sibly v. Cuming*, 4 Burr. 2464, and *Curgenvven v. Cuming*, Id. 2504.

WILLIAMS, J.—As this would go to a nonsuit, I will give leave to move to enter a nonsuit if the Court of Queen's Bench should be of opinion that this is a good defence for Mr. Coppock; but I wish it to be understood, that I do not express any opinion at all favourable to the validity of the objection.

Verdict for the defendant.

*Talfourd*, Serjt., *R. V. Richards*, and *Godson*, for the plaintiff.

*Ludlow*, Serjt., and *Whateley*, for the defendant.

(a) See the case of *Reg. v. Geach*, post, p. 499.

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(Crown Side.)

BEFORE MR. BARON PARKE.

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REGINA v. ST. GEORGE.—p. 483. .

If a person intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger, or in any other manner," within the stat. 1 Vict. c. 85, ss. 3 & 4, as the words "in any other manner" in that statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off.

The applying a lighted match to a loaded match-lock gun, or the striking the percussion cap of a percussion gun, would be sufficient attempts within these enactments.

If a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life, if the pistol had gone off, *semble*, that this is an assault, even though the pistol were, in fact, not loaded.

On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself.

A. presented a loaded pistol at B., but was prevented from pulling the trigger:—*Held*, that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B.

A person who surrenders to take his trial on a charge of felony at the assizes, must be tried at the bar of the court, and cannot take his trial at any other part of the court, even with the consent of the prosecutor.

On the trial of A., for attempting to discharge loaded arms at B., B. (with a view to discredit



the paper set out in the indictment were printed, and 300 of them posted up in various parts of the town of Birmingham.

The libel was read, and at the desire of *Goulburn*, Serjt., for the defendant, Mr. Salt (whose name was on the back of the indictment) was called: he stated that he was a town councillor of Birmingham, and that he had been one of the Convention, but had resigned, and that he was present at a meeting at Holloway-head on the 6th of August, 1838, which was a meeting to agree on the Convention, and that Mr. Alderman Muntz and Mr. Attwood (the member of Parliament) were present, and that a large body of persons were assembled.

*Goulburn*, Serjt., proposed to ask the witness as to what he said at that meeting.

*Campbell*, A. G., for the crown.—I submit that what the witness then said is not admissible in evidence in the present case. How can language used by Mr. Salt on the 6th of August, 1838, be in the slightest degree relevant to the publication of this libel in Birmingham on the 5th of July, 1839?

*Goulburn*, Serjt.—The libel arises out of it. It says—"acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." I do not put it that it is evidence, because it proves the truth of the placard; but the question for the jury being, whether this is a seditious libel, it is important for the jury to know what has preceded it.

*Campbell*, A. G.—This is an indictment for libel, which contains introductory averments, which I have called witnesses to prove, and any evidence to contradict those introductory averments is clearly admissible. The evidence proposed to be given does not go to disprove any part of the introductory averments, but merely goes to show that at some prior time A. B., J. S., or X. Y., have used inflammatory language which was not prosecuted.

LITTLEDALE, J.—The only way in which this could be receivable in evidence is, that the defendant has mentioned in a part of the alleged libel that these men acted on the authority of "persons who, when out of office, sanctioned and took part in the meetings of the people;" and, in order to show that sanction, Mr. Serjt. *Goulburn* asks Mr. Salt whether he did not say certain things. Now, if the evidence were admissible on that ground, it would be only as proving the truth of the statements of the libel. I therefore think that I ought not to receive the evidence.

The evidence was rejected.

*Goulburn*, Serjt., addressed the jury for the defendant, and argued that this publication was not a libel, induced as it was by the conduct of the police; and that the terms of it were not so violent as those that had been made use of by persons who had afterwards filled high situations in this country.

LITTLEDALE, J. (in summing up).—You will first have to consider whether the statement at the commencement of the indictment, that there was an unlawful assembly which was dispersed by the police, be true or not, and if it be true, you will then have to consider whether this publication was or was not a calm and temperate discussion of the events which had occurred; for if the object of it were merely to show that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid,

full, and free discussion. If the language of this paper was intended to find great fault with the police force, even that might not go beyond the bounds of fair discussion; and you have to say, looking at the whole of this paper, whether or not it does so. With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, (for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters on which they felt no interest,) that would be no libel; but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution, it is no sedition to say, that the people of Birmingham had a right to meet in the Bull-ring, or anywhere else; but you are to consider, whether the words, that they "are the best judges of their own power and resources to obtain justice," meant the regular mode of proceeding, by presenting petitions to the crown, or either house of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder. The third resolution refers to the arrest of Dr. Taylor; and if the arrest of Dr. Taylor was considered to be illegal, the defendant had a right to discuss it in a calm, quiet, and temperate manner; and if Dr. Taylor had been arrested in a manner wholly illegal and improper, we may allow for some warmth of expression. I have already said that the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent, and if he did so, it is in my opinion a seditious libel. It seems that on former occasions a great deal of strong discussion has taken place; but if that be so, it is no justification of the defendant that other libels have been published that have not been prosecuted.

Verdict—Guilty.

*Campbell, A. G., Balguy, and Waddington, for the crown.*  
*Goulburn, Serjt., for the defendant.*

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REGINA v. LOVETT.—p. 462.

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**LIBEL.**—The indictment, which was in precisely the same form as that in the preceding case of *Regina v. Collins*, ante, p. 456, charged

yourself, and knew what language a gentleman should use;’ the prisoner said he should like to fight me; I was bound over to keep the peace to his brother; the prisoner jostled me and grinned in my face, and asked me to fight; I was leaning on my stick, and he snatched the stick out of my hand and was going to strike me; I ran in upon him, and, as he could not use the stick, he threw it over my shoulder; my brother gave me my stick again; the prisoner said he should like to give me a good licking; he rubbed his fingers across my nose several times, and then struck me right and left on the left nostril and the body; I said, ‘I can stand this no longer, he has struck me and you are witnesses;’ I struck at him and missed him, but my wrist struck his chin and knocked him down, and I struck him again as he was falling; as he was getting up he put his hand into his coat pocket and took out a pistol; he instantly put the butt end of the pistol to his chest to cock it; the moment I saw the pistol I put my hand upon it; he pushed the muzzle of the pistol against my trousers, and I unbuttoned three buttons in pushing it away; he had his finger on the trigger, and the pistol was cocked but not full cocked; my hand, I think, prevented him from cocking it; if it had not been for my hand the pistol would have gone off, and I should have been shot through the body; I saw him cock it against his chest; as he fell, he said, ‘Blast you, I will finish you,’ or, ‘I will settle you;’ I can’t say whether the pistol was on full cock or not; my hand was on the guard, so that the prisoner could not get at the trigger: my brother Augustus and a man named Wedge laid hold of the pistol with me; Wedge said, ‘Don’t shoot him—don’t shoot him;’ a man named Harley said, ‘I will not stand by and see them shot;’ he said this to my father’s coachman; there was a scuffle between them; Harley endeavoured to take the pistol; I tried to strike the prisoner with my stick; I grazed his hat, but I drew in my blow as my brother’s head was in the way, and as the blow fell it struck my brother Augustus’s hand.

In his cross-examination Mr. B. E. A. Durant said (inter alia) “I had been on ill terms with my father, and I did say that my father was a hoary old villain; I told him my mother said she died a murdered woman, and he was starving all her children, and that he ought to be tied to a cart’s tail and flogged through the village.”

In his re-examination, *Phillimore*, for the prosecution, proposed to ask the witness how Mr. Durant, senior, had acted towards him before he made use of the expressions above mentioned.

*Ludlow*, Serjt., for the prisoner.—I apprehend that the conduct of Mr. Durant, senior, is not evidence in this case.

PARKE, B.—You have made it so by your cross-examination. To discredit the witness you ask him, whether he did not use violent language towards his father, and he admits that he did; and his counsel to explain that evidence may ask him how his father acted towards him with a view of showing that the language was not without provocation.

The evidence was given, and the witness stated that his father had locked him up for five or six days, in a room at the top of Tonge Castle, saying that he was deranged, and after that put him to live at a small farm where he was boarded, lodged, and clothed at 10s. a week.

The evidence of Mr. B. E. A. Durant was confirmed by that of his brother Mr. Augustus Durant, who, as to attempting to fire the pistol, said, “The prisoner took out a small pistol, and said, ‘I will settle you,’ or, ‘I will do you;’ the prisoner either half or full cocked the pistol, and

pointed the muzzle at my brother and against his trousers; I rushed at the pistol, and put my right hand over the muzzle of the pistol, and my other hand over the cock; I found the prisoner's finger pulling; his finger was on the trigger; I plainly felt the finger of his right hand on the trigger, and my hand did not allow the trigger to go back; the people interfered, and they were separated."

In the cross-examination of Mr. Augustus Durant, *C. Phillips* proposed to ask him as to what his brother, the prosecutor, had said on other occasions than the time of the alleged offence.

PARKE, B.—I think that that cannot be asked of this witness, and that it is only matter for the cross-examination of the person who is supposed to have used the expressions imputed.

The question was not put.

It was proved that two small percussion pistols were, on the 10th of June, given to the superintendant of police by Mr. St. George, the one loaded with powder and ball and the other with powder and bits of lead.

PARKE, B.—It appears to me that the charge of felony cannot be supported, as it is not proved that the prisoner drew the trigger. The words "in any other manner," in the statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Suppose, for instance, you had a matchlock, and put a match to it, and the gun did not go off, that would be a case within the act of Parliament; but here is no proof that the prisoner drew the trigger, though he put his finger to it, and he cannot, therefore, be convicted on those counts which charge him with so doing, or which charge him with a felonious attempt to discharge the pistol, for it must be an attempt *ejusdem generis*; the consequence is, he cannot be convicted of a felony, but he may be convicted of an assault.

Ludlow, Serjt.—I submit that the prisoner cannot be convicted of an assault, unless the jury are satisfied that the pistol was loaded.

PARKE, B.—It seems to me that it is an assault to point a weapon at a person, though not loaded, but so near, that if loaded, it might do injury. I think the offence of pointing a loaded gun at another does involve an assault, unless it is done secretly; and I think that the presenting a fire-arm, which has the appearance of being loaded, so near that it might produce injury if it was loaded and went off, is an assault.

Phillimore.—The clause in this act says, that if a party shall attempt, by drawing the trigger, *or in any other manner*, to discharge a loaded arm, he shall be guilty of the offence. If, therefore, a man puts his hand on a trigger, in order to fire the pistol, and cannot do it because the pistol happens to be at half-cock, that would, as I submit, be within the meaning of the statute.

PARKE, B.—Here was a trigger to be drawn, and it is not drawn. It seems to me that the object of this act was to punish proximate attempts: that is, those attempts which immediately lead to the discharge of loaded arms; therefore, if a person drew the trigger, and the gun was loaded, in that case the offence would be complete, though the gun did not go off, and though it did not happen to strike the percussion cap; and the act also provides for the case of fire-arms which do not go off with the ordinary lock. Suppose, therefore, a man was to come with a matchlock, and attempt to discharge it by putting a fusee or a brimstone match to the touch-hole, that would be an attempt to discharge it within the meaning of this act; and so since the newly-invented fire-arms, if a man

with a hammer were to strike the cap, that would be a felony under this act of Parliament; and, as I thought a point of this kind would be taken, I have availed myself of an opportunity which I had of consulting my Brother WILLIAMS, who agrees with me in opinion. The question, whether the pistol was loaded or not, will be material with respect to the punishment, but it is not in my judgment necessary to constitute the common law offence that the fire-arm should be loaded, though it is essential to the statutable felony.<sup>(a)</sup>

*Ludlow, Serjt.*—The question of the assault, in point of law, will not depend on the presentation of the pistol merely.

*PARKE, B.*—My idea is, that the prisoner can only be found guilty under this act of Parliament of that assault which was involved in, and connected with, the presentation of a loaded pistol. Suppose there was a common assault committed in the course of a dispute between the prisoner and the prosecutor, I do not think that the prisoner could be found guilty of that assault on an indictment charging him with felony. I had occasion to lay down the same rule in a case at Worcester,<sup>(b)</sup> which was the case of an assault upon a female. There was some question about the crime itself having been committed, but there was no doubt that a great number of assaults had been committed in the course of the same evening; the learned counsel for the prisoner suggested that if the jury were not satisfied of the assault, which was connected with the felony charged, the prisoner could not be found guilty of other assaults committed on the same evening, which were unconnected with the crime, and I was of that opinion. It appears to me that the prisoner can only be found guilty of the assault involved in the felony charged.

*Ludlow, Serjt.*—Of the assault, which would be an ingredient in the crime.

*PARKE, B.*—The crime charged here is an attempt to discharge a loaded pistol; if a pistol was presented close to the person of the prosecutor, that is an assault, and it is included in the charge.

*Ludlow, Serjt.*—That renders it unnecessary for me to advert to anything besides the presentation of the pistol. I need not refer to the other acts which were done.

*PARKE, B.*—Nor to the blows.

*Ludlow, Serjt.*—It is necessary that the pistol should be a loaded pistol.

*PARKE, B.*—I think not.

*Ludlow, Serjt.*—There was an action tried at Oxford, in which Mr. Justice ERSKINE laid down the law, that it would not amount to an assault unless the pistol was loaded. It did not accord, certainly, with my views at the time, and I obtained a verdict on the other points in the case.

*PARKE, B.*—I do not know that I should have felt much difficulty about it, but for the high authority which you have cited. My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and

<sup>(a)</sup> In the case of *Rez v. Carr*, R. & R. C. C. 377, it was held, that in order to constitute the felony of attempting to discharge a loaded fire-arm under the stat. 43 Geo. 3, c. 58 (now repealed), the fire-arm must have been so loaded as to be capable of doing the mischief intended. But in the case of *Rez v. Elliott*, O. B. 1787, cited 1 Russ. C. & M. B. 3, ch. 10, it was held to be sufficient if that fact appeared from the general circumstances of the case. See also the case of *Reg. v. Coates*, ante, vol. 6, p. 394.

<sup>(b)</sup> The case of *Reg. v. Guttridge*, ante, p. 228.

said to the party, "This is an empty pistol," then that would be no assault; for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent. I think that if, in this case, it should be proved that the prisoner presented a pistol purporting to be a loaded pistol, and the jury are satisfied that it was so near as to produce danger to life if the pistol had gone off, that that would be an assault in point of law, and that the prisoner might be convicted of that assault upon this indictment.(a)

His Lordship left the case to the jury as to the assault, and desired them to inform him whether the pistol was loaded, and whether it was presented at the prosecutor so near him as to have seriously injured him if it had been discharged.

Verdict—Guilty of an assault; the foreman of the jury adding, "We think that he presented the pistol with intent to discharge it, the pistol being loaded."

*Talfourd*, Serjt., *R. V. Richards*, and *Phillimore*, for the prosecution.

*Ludlow*, Serjt., *C. Phillips*, and *Allen*, for the prisoner.

(a) See the cases of *Reg. v Lewis*, post, p. 523; and *Blake v. Barnard*, post.

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## HEREFORD ASSIZES.

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(*Civil Side.*)

BEFORE MR. BARON PARKE.

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DOE on the several demises of HUGHES and CORBETT v.  
DERRY.—p. 494.

A., being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12s. a week, "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months' notice or three months' wages:—

*Held*, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services:—

*Held*, also, that no notice to quit was necessary, if the service was put an end to.

Whether in ejectment the lessor of the plaintiff must have a certificate under the stat. 3 & 4 Vict. c. 24, to entitle him to costs—*quære*.

EJECTMENT to recover a farm at Bishop's Frome.

It appeared that the farm had originally belonged to the defendant, and that by a written agreement, dated on the 10th of December, 1838, the defendant, as owner, and Mr. Holland, as mortgagee, had let the farm to Mr. Corbett, one of the lessors of the plaintiff, for seven years;

and on the same day Mr. Corbett and the defendant entered into the following agreement:—

“An agreement made the 10th day of December, 1838, between John Fletcher Corbett, of the city of Worcester, gentleman, of the one part, and Nathaniel Derry, of Bishop's Frome, in the county of Hereford, farmer, of the other part, as follows: The said N. D. agrees with the said J. F. C. to manage the farm at Bishop's Frome, now in the occupation of the said N. D., which he has this day, with the consent of the mortgagee, let to the said J. F. C. from the 25th of December, on the following terms, namely, the said N. D. is to manage and take care of the stock and crop on the said premises, and the team of horses, and do every necessary work on the said farm, and the wife of the said N. D. is to manage the dairy thereon for the said J. F. C., the said J. F. C. paying or allowing to the said N. D. the sum of 12s. per week, and *allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent*, and the said N. D. hereby agrees to the terms above mentioned, either party to put an end to this agreement on giving three months' notice, or paying or receiving three months' wages, the said N. D. to keep and render monthly to the said J. F. C. a just and true account of all articles sold and moneys received and paid by him the said N. D., on account of the said J. F. C., relating to the said farm. As witness the hands of the parties the day and year aforesaid.

JOHN FLETCHER CORBETT,  
NATHANIEL DERRY.”

This agreement bore a £1 stamp.

*Gray*, for the defendant.—I submit that this paper cannot be received in evidence, as it does not bear a 1l. 15s. stamp. It is a lease, and the stamp of £1 on leases at a rent under £20 applies to money rents under that amount; and this not being for a rent in money the stamp of 1l. 15s. is necessary under the provision as to leases not otherwise charged.

PARKE, B.—If this be a lease the stamp is not sufficient; it should be 1l. 15s. But it seems to me that this is not a lease at all, and that this is only a mode of remunerating the defendant as bailiff. The words “allowing him and his family to reside and have the use of the dwelling-house,” might import a lease; but, I think, taking the whole of the instrument together, they must be taken to be a reward for services.

The agreement was received in evidence.

It was proved by Mr. Corbett, jun., that on the 14th of December, 1839 (which was more than three months before the present ejectment), he, by the direction of his father, the lessor of the plaintiff, told the defendant he must seek a fresh master and a fresh house at Lady Day.

PARKE, B.—I don't think that notice to quit was necessary, if the service was put an end to. The plaintiff is entitled to a verdict on the second demise.

*Whitmore*, for the plaintiff.—I have evidence on the other demise.

PARKE, B.—You cannot recover on both.

Verdict for the plaintiff on the second demise, and for the defendant on the first.(a)

*Whitmore* applied for a certificate under the stat. 3 & 4 Vict. c. 24, that a right came in question.

(a) A verdict of this kind for defendant gives him some small amount of costs. See ante, vol. 8, p. 358.

PARKE, B.—I will give it, as there may be a question whether it is necessary.(a)

(a) By the stat. 3 & 4 Vict. c. 24, s. 1, the stat. 43 Eliz. c. 6, "so far as it relates to costs in actions of trespass or trespass on the case;" and so much of the stat. 22 & 23 Car. 2, c. 9, "as relates to costs in personal actions," are repealed; and by sect. 2 of the stat. 3 & 4 Vict. c. 24, it is enacted, "that if the plaintiff in any action of *trespass*, or *trespass on the case*, brought or to be brought in any of her majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury *less damages than forty shillings*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, *any costs whatever*, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately afterwards certify* on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to *try a right* besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the *trespass or grievance* in respect of which the action was brought was *wifful and malicious*." And by sect. 8 of the same statute it is provided and enacted, "that nothing herein contained shall extend to, or be construed to extend to, deprive any plaintiffs of costs in any action or actions brought for a *trespass* or trespasses over any *lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises* in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

It should be observed, that these provisions only extend to actions of *trespass* and *trespass on the case*, and not to any other form of action; but ejectments "being actions of trespass in ejectment" [3 Bl. Com. ch. 11], it may be a question whether they are or are not included in these provisions.

### SEABORNE v. MADDY.—p. 497.

No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so.

Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action.

ASSUMPSIT for the board and lodging of the defendant's illegitimate child. Plea, non assumpsit.

It appeared that the child had been placed with the plaintiff by the defendant, in the year 1831, at 2s. a week, and it was admitted that the amount had been paid, down to the month of April, 1838. It was proved that the child had remained with the plaintiff down to April, 1839, and evidence was given of a conversation in the month of May, 1839, in which it was alleged that the defendant had promised payment of the amount claimed.

For the defendant, witnesses were called who stated that in April, 1838, the defendant paid the plaintiff up to that time, and that the defendant then said the plaintiff was to give up the child either to Mr. Parkes or the union, for he would pay no longer. Evidence was also given, that on several occasions, when asked for payment, the defendant refused to pay any thing, and there was also contradictory evidence as to the conversation in May, 1839.

PARKE, B., (in summing up).—No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. In the present case there had been a contract in 1831, which was put an end to in 1838. However, on the part of the plaintiff, it is contended that a new contract is to be inferred from the conversation with the de-



fendant in the year 1839. This is for you to consider. But you must also bear in mind that the defendant has on several occasions distinctly refused to pay any thing, and that as to one of the conversations, the evidence is contradictory. (a)

Verdict for the defendant.

*F. V. Lee*, and *Hoskyns*, for the plaintiff.

*Godson*, for the defendant.

(a) In the case of *Mortimore v. Wright*, Law Journ., vol. ix., Excheq. p. 156, it was decided that a father is not liable for debts incurred by his son while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation that he is under to provide for his children imposes no such liability; and in that case Lord Abinger, C. B., said, "In point of law a father who gives no authority, and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger would be. If a father does any specific act, from which it may be reasonably inferred that he has authorized his son to contract a debt, then he may be liable in respect of the debt so contracted; but the mere moral obligation upon a father to maintain his child (which I by no means dispute) affords no inference of a promise to do so, and I think we ought to be careful not to put upon his acts an interpretation which, abstractedly, and without reference to such moral obligation, they do not warrant. In order to bind a father for a debt incurred by his son, you must prove that he has contracted to be bound in the same manner that you would prove such a contract against any other person, and it ought not to be left to juries to make the law in each particular case according to their own feelings or prejudices; for that would be to permit the law to be frittered away." And Parke, B., said, "It is a clear principle that a father is not under any legal obligation to pay his son's debts unless he has contracted to do so, except, perhaps, under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability." "Whatever the moral obligations of parties may be, juries must not be allowed to make them contract without legal evidence." In the case of *Mortimore v. Wright*, the authority of the cases of *Law v. Wilkin*, 6 A. & E. 718, (33 E. C. L. R. 193;) and *Nichole v. Allen*, ante, vol. 3, p. 36, (14 E. C. L. R. 198.) was much questioned by Lord Abinger, and in the same case, Rolfe, B., expressed a doubt, whether in the case of *Blackburn v. Mackey*, ante, vol. 1, p. 1, (11 E. C. L. R. 295,) there was any evidence to go to the jury. See the cases of *Fluck v. Tollemache*, ante, vol. 1, p. 5, (11 E. C. L. R. 296;) *Cameron v. Baker*, id. p. 268, (11 E. C. L. R. 389;) and *Rolfe v. Abbott*, ante, vol. 6, p. 296, (25 E. C. L. R. 400.)

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### REGINA v. GEACH.—p. 499.

If on the trial of a case of felony the prisoner peremptorily challenge some of the jurors, and the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and as each juror then appears, for the counsel for the prosecution to state their cause of challenge, and if they have sufficient cause and the prisoner does not challenge, for such juror to be sworn.

It is no cause of challenge of a juror by the counsel for the prosecution in a case of felony, that the juror is a client of the prisoner, who is an attorney.

Nor that the juror has visited the prisoner as a friend since he has been in prison.

In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification.

If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser; and the fact that the bill has been since paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering.

**FORGERY.**—The prisoner was charged with having forged, and also with having uttered a forged acceptance on a bill of exchange.

The prisoner pleaded to the indictment, but before any of the jury were called, the prisoner said, "At the beginning of the present year I

was concerned for a very serious offence; (a) great prejudice was excited, and that has extended itself to me, and the way in which the present jury has been impanelled realizes my worst fear. In *Bolam's case*, (b) the trial was postponed, in order to give the sheriff time to summon double the number of jurors; and it being represented to Baron MAULE, that twenty-five of the jurors came from the immediate neighbourhood, his lordship directed that they should not be called. Newport and Pontypool were the places in which the peaceable inhabitants were most alarmed by the late disturbances, and forty-one out of the sixty jurors in the present panel are from that neighbourhood."

PARKE, B.—Yours is a very different case from *Bolam's*. It is impossible that there should be any prejudice against you, as the attorney of Mr. Frost.

The prisoner.—Only a fortnight ago there was a report of my examination, and in it negatives were put for affirmatives.

PARKE, B.—I am unwilling to deviate from the usual practice. The jury will not connect your case with those in the spring.

The prisoner.—In *Watson's case*, (c) 300 jurors were summoned, and in *Bolam's case*, 150; and if the crown challenge a considerable number, they will drive me to be tried by those who are prejudiced against me.

PARKE, B.—This case must proceed in the ordinary way. The crown may challenge without showing cause till the panel is gone through, and if there is not a full jury they must show cause. I much regret that the established practice has been ever deviated from, as it leads to those instances being quoted as precedents.

The jury panel contained the names of sixty jurors, of whom one was excused at the commencement of the assizes, and the whole panel was called over by Mr. Bellamy, the clerk of assize, from the beginning to the end, in regular order, commencing with the name which stood No. 1 on the panel. When the panel had been gone through, the prisoner had challenged thirteen jurors peremptorily; and the crown had challenged thirty-seven without showing any cause, some of the remaining jurors who were called did not answer to their names, and when the panel had been gone through, there was not a full jury.

Ludlow, Serjt., for the prisoner.—The first juror should be called who was challenged for the crown.

Mr. Bellamy.—The juror No. 1 on the panel was challenged by the prisoner.

PARKE, B.—The proper course will be to call the panel over in the same order as before, calling those who did not answer before, and omitting to call those who have been already peremptorily challenged by the prisoner.

On the second calling over of the panel, Mr. Gilbert, who had been challenged by the crown, answered to his name and appeared.

PARKE, B.—Mr. *Richards*, have you any cause of challenge as to Mr. Gilbert?

*R. V. Richards*.—My cause of challenge is that Mr. Gilbert is a client of the prisoner.

(a) The high treason cases on the Monmouth special commission.

(b) *Bolam* was tried at Newcastle, before Baron Maule, in the summer of 1839, for the murder of Mr. Milley. The prisoner and deceased were both clerks in the Savings' Bank at Newcastle.

(c) 32 State Trials, p. 2; 2 Stark. N. P. C. 116; (3 E. C. L. R. 273.)

PARKE, B.—That is no sufficient cause of challenge.

Mr. Gilbert was sworn on the jury.

Mr. Lewis, who had also been challenged for the crown, answered to his name and appeared.

*R. V. Richards.*—Mr. Lewis has been visiting the prisoner as his friend since he has been in prison.

PARKE, B.—That is no good cause of challenge.

Mr. Lewis was sworn on the jury.

The prisoner.—I have not seen Mr. Lewis.

Some more jurors were peremptorily challenged by the prisoner; and Mr. Bellamy then informed the court that the prisoner had peremptorily challenged twenty of the jurors.

Mr. Morris, a juror who was called, answered to his name, and appeared.

PARKE, B.—The prisoner having now challenged his full number peremptorily, if this person is challenged on either side, it can only be for cause.

The prisoner.—May I examine him as to his qualification?

PARKE, B.—Certainly.

Mr. Morris stated his qualification to be leasehold, of more than sufficient value, and he was sworn on the jury. (*a*)

A full jury having been sworn, the prisoner was given in charge in the usual manner.

It appeared that the prisoner, who had been for some years an attorney at Pontypool, had, in the year 1831, opened a banking account with Messrs. Williams, who are bankers at Newport, and that from that time to the year 1838, Messrs. Williams had discounted bills for him to a very large amount, and that on the 28th of July, 1837, the prisoner sent them the bill of exchange in question, of which the following is a copy:—

"1057*l.* 6*s.* 9*d.*

Pontypool, July 27th, 1837.

"One month after date pay to my order one thousand and fifty-seven pounds, sixteen shillings and nine-pence, for value received.

"W. F. GEACH.

Across the bill was the following acceptance:—

"Accepted at Messrs. Cox, Biddulph & Co., Bankers, London.

"EDMUND WILLIAMS."

It was proved by Mr. William Williams, one of the bankers, that this bill came to them in a letter from the prisoner, and was discounted by their firm for him. In his cross-examination, Mr. William Williams said, "We should not have advanced money to the prisoner on his own credit; he never asked it; since the bill in question was paid to us, we have had other bills from the prisoner, more than equal to the amount; Mr. Geach did not have back his satisfied securities, they were left with us; he had any that he chose to send for." Several letters of the prisoner to Messrs. Williams were given in evidence, and in them the

(*a*) The leading authority on the subject of challenges is that of Lord Coke, [1 Inst. 155, *a.* et seq.]; and it is referred to as being so by Lord Hale, [2 H. P. C. 272.]; Lord Chief Baron Comyns, [Com. Dig. tit. *Challenge*, C. 2.]; and Mr. Serjt. Hawkins, [2 Cur. Hawk. ch. 43.] Several decisions as to challenge of jurors are referred to in Mr. Jardine's Index to the State Trials, tit. "*Challenge*;" and a summary of the law on this subject will be found in Burn's Justice, vol. 3 tit. "*Jurors*."

prisoner stated that Mr. Edmund Williams had consented to give him (the prisoner) his bills for £2000, and that Mr. Edmund Williams owed him £2500, and interest on a mortgage property sold to Mr. Guest; but it was proved by Mr. Edmund Williams, that the acceptance was neither written by him nor by his authority; that he never owed the prisoner £2000, nor any sum at all except for business done by the prisoner as an attorney, nor ever sold any property to Mr. Guest. It also appeared, that the prisoner had become bankrupt in 1838, and that Messrs. Williams had proved other bills under the fiat.

*Ludlow*, Serjt., addressed the jury for the prisoner.—The bill, which is the subject of the present indictment, has been satisfied, and has become waste paper; and is it not too hard to rake up the ashes of this bill for the purpose of overwhelming a young man who has already had the misfortune to become bankrupt? If it were to be taken that this was not a genuine acceptance, and that Mr. Geach uttered it without being able to show that he had fair grounds to believe that he might use Mr. Williams's name, there remains the still more important question, whether Mr. Geach had any intent to defraud. It has been said that the inference of fraud is an inference of law. For example, if one person fired a pistol at another, and killed him, it would be an inference of law that he intended to do so; but yet that inference might be rebutted by the surrounding circumstances, as by showing that the pistol went off by accident, or the like. Here is a person in credit, who wanted no other names to enable him to get money at this bank. The bill was paid in and was discharged without any application to any one, and it lay for two years at the bankers among Mr. Geach's vouchers, which he might have called for at any time that he chose. If it is a fair argument that if a fraud has been committed, a fraud was intended; so it is equally a fair inference, that if no fraud has been committed, no fraud was intended. That no fraud has been committed in this case is clear, as the bankers have been paid, and Mr. Edmund Williams has never been called upon. Here is an alleged forgery in 1837; a bankruptcy in 1838, when all the transactions of Mr. Geach must have been gone into, and yet Mr. Geach has remained in the country. Was that the conduct of a guilty man? The *malus animus*—the guilty mind, is what creates the offence, and yet Mr. Geach has invited the bankers to go before the commissioners, and exhibit their bills, of which this was one. Taking it for granted that the *prima facie* inference of guilt arises from the issue of a forged document, yet it is for the jury to say on the whole of the case whether that presumption is rebutted.

*PARKE*, B., in summing up.—Upon the questions, whether the acceptance is a forgery, and whether the prisoner knew it to be so, there can be no question, if you believe the evidence of Mr. Edmund Williams; and with respect to the intent to defraud, I have no doubt that you will take the law from me, which is this, that a person is guilty of forgery, notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If, in the present case, you are satisfied that the prisoner knew this acceptance to be forged, and uttered it as true, and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the pri-

soner; but that will make no difference, if the offence has been once completed at the time of the uttering.

Verdict—Guilty.(a)

*R. V. Richards, C. Phillips, and W. J. Alexander*, for the prosecution.

*Ludlow and Talfourd*, Serjts., for the prisoner.

(a) See the cases of *Reg. v. Beard*, ante, vol. 8, p. 143; *Reg. v. Hill*, Id. p. 274; and *Reg. v. Cooke*, Id. pp. 582, 586.

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## GLOUCESTER ASSIZES.

(Civil Side.)

BEFORE MR. BARON PARKE.

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### LAMBERT v. HALE.—p. 506.

If an insolvent debtor in his schedule describe a debt due by him to be for “drawing deeds,” that will be taken to include not the mere drawing only, but also the stamps, journeys, taking instructions, and everything else respecting them.

If in assumpsit the defendant plead his discharge under the Insolvent Debtors’ Act, and no other plea, and the plaintiff by his replication deny the plea, the defendant must begin.

If an insolvent in his schedule state a debt due from him to be £10, and it be really £32, whether this mis-statement, if arising from mistake, be aided by the 63d section of the Insolvent Debtors Act, 7 Geo. 4, c. 57—*Quære*.

ASSUMPSIT for work and labour.—Plea, that the defendant was discharged under the Insolvent Debtors Act.

Replication, denying the plea.

PARKE, B.—On these pleadings the defendant must begin.

It was opened by *Thomas*, for the defendant, that the plaintiff was an attorney at Chalford; and that the defendant, when discharged under the Insolvent Debtors Act, in the year 1837, had inserted the plaintiff’s debt in his schedule as being about 10*l.*, and that it was to be contended on the part of the plaintiff, that that was no answer to the present action, as the plaintiff now claimed 32*l.* 7*s.* 6*d.*, and not 10*l.* He submitted that if it were really the same debt, and the amount had been inaccurately stated from mistake, the discharge of the defendant under the Insolvent Debtors Act was a bar to the present action; and that if the debt was put in the schedule at too small a sum, the plaintiff should have got it rectified by the Insolvent Debtors Court under the 35th section of the Insolvent Debtors Act, 7 Geo. 4, c. 57. He relied on the 63d sec-

tion of the statute as to debts being inaccurately described in the schedule of insolvents.(a)

The order for the defendant's discharge under the Insolvent Act, dated the 28th of June, 1837, was put in, and also the defendant's petition and schedule, filed on the 24th of May, 1837. In the schedule the plaintiff's debt was thus described:—

<i>Names and Descriptions of Creditors and Claimants, and their present or last Residences.</i>	<i>Amount. £. s. d.</i>	<i>When contracted.</i>	<i>Admitted or disputed.</i>	<i>Nature and Consideration of the Debt and Securities, if any; also, if the Debt is disputed the Reason thereof.</i>
Mr. T. W. Lambert, attorney, Chalford, Gloucestershire.	About £10.	1836.	Admitted.	For drawing deed of assignment and other documents.

PARKE, B.—This, *prima facie*, answers any demand up to May, 1837.

*McLean*, for the plaintiff.—The claim of the plaintiff is 32*l.* 7*s.* 6*d.* for drawing and engrossing deeds, and for stamps, letters, journeys, &c.; and the items relating to the deed of assignment alone are 10*l.* 6*s.* 7*d.* The 63d section of the Insolvent Debtors Act could never be intended to apply to a case like this, the expression in that Act being, when the amount “is not exactly the actual amount.” I admit that a small variation of amount might not vitiate the description; but if a difference between 10*l.* and 32*l.* is to be allowed to pass, there is no reason why a person might not put down 5*l.* in the schedule when 500*l.* was due. In the case of *Taylor v. Buchanan*, 6 D. & R. 491, it was held, that the discharge only relieves the party from such specific debts as are described in the schedule, and in that case a debt of 44*l.* was described in the insolvent's schedule as 8*l.*, and the court held that by this only 8*l.* of the debt was extinguished. That case was decided on the Insolvent Debtors' Act, 1 Geo. 4, c. 119.

PARKE, B.—Was there a similar clause as to mistakes in that Act?

*Francillon*, for the defendant.—There is no other section of that act which would at all apply, except the 16th.(b)

*McLean*.—An insolvent debtor who does not inquire as to the amount of the debts he owes, so as to insert them in his schedule correctly, is guilty of culpable negligence, if not of fraud and evil intention.

A clerk of the plaintiff was called, who proved that in the year 1837 he wrote circular letters to the defendant's creditors, with a view to the executing a deed of assignment, and that the plaintiff made a journey to Cheltenham on the business.

(a) In that section, after reciting that “whereas it may sometimes happen that a debt of, or claim upon, or balance due from such prisoner aforesaid may be specified in his or her schedule so sworn to as aforesaid, at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud or evil intention on the part of such prisoner;” it is enacted, “that in such case the said prisoner shall be entitled to all an full benefit and protection of this act; and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by this act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding.”

(b) That section relates to the Insolvent Court inquiring into the truth of the schedule, but does not specifically relate to mistakes in describing debts.

PARKE, B.—You have no evidence of anything beyond £10.

*M'Lean*.—The schedule admits the preparing of the deeds, and we have proved a journey and letters.

PARKE, B.—The journey may be respecting the deeds. I consider that if a person puts in his schedule a debt for “drawing deeds,” he is to be taken to mean, not merely the actual drawing of the deeds, but also stamps, journeys, taking instructions, and everything else respecting them.

Nonsuit.

*M'Lean* and *Greaves* for the plaintiff.

*Thomas* and *Francillon* for the defendant.

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(*Crown Side.*)

BEFORE MR. JUSTICE WILLIAMS.

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REGINA v. BOWEN.—p. 509.

Before the Spring Assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the Summer Assizes, on the ground, that B. was too ill from his wounds to be able to attend to give evidence. Before the Summer Assizes B. died, and at those assizes a true bill for the murder of B. was found against A., and application was made on the part of the prosecution to postpone the trial to the next Spring Assizes, on the ground of the illness of a material witness. The Judge granted the application, and held that A. was not entitled to his discharge under the 7th section of the Habeas Corpus Act.

MURDER.—The prisoner was indicted for the murder of Richard Yarworth, by shooting him with a pistol.

The prisoner had been committed for trial before the Spring assizes, 1840, on a charge of having shot Mr. Yarworth, and a true bill found; but the trial had been postponed to the present assizes, on the ground that Mr. Yarworth was too ill from his wounds to be able to attend the assizes. Since that time Mr. Yarworth had died. As soon as the prisoner had pleaded to the indictment for the murder, *W. J. Alexander*, for the prosecution, applied to postpone the trial till the next assizes, upon an affidavit, that Thomas Sharp, a material witness against the prisoner, upon the indictment for the murder of Mr. Yarworth, was too ill to attend these assizes without endangering his life.

*Maclean*, for the prisoner, urged the great hardship of postponing the trial till the next assizes, the prisoner's trial having been once previously postponed.

*Greaves*, on the same side.—This application is entirely novel and unprecedented, and no instance can be cited of a similar application having been granted, and I submit, that, in point of law, the trial cannot be postponed; but the trial *must* take place, or the prisoner be discharged.

The question is one of great importance, and depends on the 7th section of the habeas corpus act, 31 Car. 2, c. 2, which enacts, "That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer, or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer, or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the court of king's bench and justices of oyer and terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions, or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the king could not be produced the same term, sessions, or general gaol-delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer and general gaol-delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment." Now this case would be precisely within the words of the act, if the prisoner had applied to be tried on the 1st day of the assizes, and his having omitted to do so can afford no reason for ousting him of the benefit of such a provision, which ought to be liberally construed in favour of personal liberty. In point of law the whole of the assizes are considered as only one day, and any act done, or judgment given, at any period during the assizes, is, in contemplation of law, the same as if it had taken place on the first day of the assizes. A demand, therefore, to be tried, may well be held to be within the meaning of the statute, although made at a later period than the first day of the assizes. Besides, it is the constant practice to do no criminal business on the first day of the assizes, and prisoners are never brought into court on that day, and have, therefore, on that day no opportunity of applying. Again, the commission may be opened so late in the day (of which a remarkable instance occurred in this very court), that there may be no time to make any application at all. Again, if the prisoner here be not entitled to the benefit of the clause, he can never hereafter claim its advantage, for the clause applies only to the second assizes. Besides, in this case, the prosecutors have so acted, as to lead him necessarily to conclude that they would try the case at these assizes. I submit, therefore, that the case is to be looked at as if the application had been made on the first day of the assizes. Then, if that be so, I submit that the prisoner is entitled now either to be tried, or to be discharged. The power of postponing the trial on the absence of the witnesses for the crown, is clearly limited by the earlier part of the section to the first assizes after the commitment; and it is clear, that at the second assizes the trial must take place, or the prisoner be discharged; for the case of a prisoner, tried and acquitted, and of a prisoner not tried, are put in the same position; and, as in the former case it is obvious the prisoner must be discharged, so it is in the latter. There are also the strongest reasons for so construing the act. The witnesses on the part of the



crown having been examined in the presence of the prisoner, their depositions, in case of their death, are evidence against the prisoner; but in case any of his witnesses die, or are absent, he will wholly lose the benefit of their testimony; and in this very case, the life of the prisoner may be sacrificed by postponing the trial, as his funds are wholly exhausted by twice bringing witnesses from Worcester to Gloucester.<sup>(a)</sup> Besides the additional delay must necessarily prejudice the case of the prisoner, which is an alibi, as facts which are now fresh in the minds of the witnesses will become more indistinct the longer the trial is postponed. At all events, if the statute be not strictly applicable, no better authority can be found for guiding the discretion of the court in postponing the trial.

WILLIAMS, J.—I am bound to postpone this trial. Who can prevent such an occurrence as this? I have as great a respect as any man for the habeas corpus act; but it is a human law, and must be humanly interpreted. The proviso is, that the prisoners should be indicted and tried at the second assizes: now he is indicted, but his trial must be subject to human contingency.<sup>(b)</sup>

Trial postponed.

*W. J. Alexander and Skinner*, for the prosecution.

*M'Lean and Greaves*, for the prisoner.

(a) The prisoner had been discharged by the magistrates at Cheltenham when first apprehended, upon proof of an alibi by witnesses from Worcester, and had afterwards been committed by other magistrates. The same witnesses, who had attended at Cheltenham, had attended at both the assizes at Gloucester.

(b) See the case of *Reg. v. Chapman*, ante, vol. 8, p. 558.

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### REGINA v. MEEK.—p. 513.

A. was indicted for perjury, alleged to have been committed on the trial of B. for perjury.

The indictment against A. averred that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment against B. was afterwards reversed on writ of error:—*Held*, that the reversal of the judgment against B. was no ground of defence for A., as showing that his evidence could not have been material, and that it did not negative the allegation, that B. had been convicted.

PERJURY.—The indictment charged the defendant with having committed perjury on the trial of a person named Burraston, on an indictment for perjury. In the present indictment it was stated that Burraston was convicted.

It appeared that Burraston was tried before Mr. Justice WILLIAMS, at the Gloucester Summer Assizes, 1839, and convicted, and that judgment of twelve months' imprisonment was given against him; but that that judgment was, in Easter Term, 1840, reversed in the Court of Queen's Bench on writ of error.

*W. J. Alexander and Gray* for the defendant.—This prosecution must fail. The evidence of the defendant never could have been material, as

the indictment against Burraston was held bad on a writ of error. In the case of *Mullett v. Hunt*, 1 C. & M. 752, which was an action on the case against a witness for disobeying a subpoena, Lord LYNDHURST, C. B., said, "No evidence could be material in the cause, unless the plaintiff had a good cause of action," and Baron BAYLEY says, "The first objection in this case is, that it is not averred, in this declaration, that the plaintiff had a good cause of action in the action brought by him in the King's Bench [the case in which the defendant had been subpoenaed,] I agree that it is essential that such fact should appear on the declaration." (a) There is also another objection, which is, that the allegation in the indictment, that Burraston was convicted, is negatived; as that conviction was reversed on writ of error.

WILLIAMS, J.—I do not think there is anything in either of the objections. It would be rather too much to say, that whether a witness had committed wilful and corrupt perjury or not, could depend on the validity in point of form of the indictment as to which he gave evidence. I think also that the other allegation is satisfied by the proof.

The defendant was acquitted on the merits.

*Greaves and Talbot*, for the prosecution.

*W. J. Alexander and Gray*, for the defendant.

(a) In the case of *Davis v. Lovell*, 4 M. & W. 678 (which was also an action against a witness for not obeying a subpoena), PARKE, B. said, "The next objection is, that there is no averment that the plaintiff had a good cause of action in the original suit. It is not necessary in the present case directly to decide, whether such an averment is material or not; possibly, as the attendance of a witness, in obedience to a subpoena, is a duty cast upon him by law, the service of the subpoena may of itself impose upon the witness the duty of obedience. If, on the other hand, it be not sufficient for the party to have brought an action, but he must moreover have had good cause of action for bringing it, as appears to be the opinion of Lord LYNDHURST and BAYLEY, B., in *Mullett v. Hunt*; still, the averments in the declaration are such as would on the authority of that case impose upon the plaintiff proof of the existence of such good cause of action."

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## READING ASSIZES, 1840.

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(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

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READ *v.* THOYTS, Esq.—p. 515.(a)

In an action against a sheriff for removing goods taken under a *fi. fa.* without paying a year's rent, which was due to the landlord, the tenant against whom the execution issued is a competent witness for the plaintiff.

In such an action the defendant pleaded that no rent was in arrear, and that the sheriff had no notice that any rent was in arrear, thus admitting the execution and the taking by the

(b) This case was omitted in its proper order.

defendant. It was proved that the goods were actually taken by M., and had never been taken except on that occasion:—*Held*, that as there had been no other seizure, this sufficiently showed M. to have acted by the authority of the defendant, without proof of any warrant.

In such an action there was, in addition to the special count, a count in trover to which the defendant pleaded not guilty, and that the plaintiff was not possessed; and the plaintiff, in addition to the proof that a year's rent was due, gave in evidence an absolute bill of sale, by which the tenant, before any rent had become due, assigned all his goods (including those taken in the *fi. fa.*) to the plaintiff for a debt, the tenant remaining in possession of the goods:—*Held*, that there being no evidence on the latter count to connect the sheriff with the taking of the goods, the plaintiff must fail on that count; but that if the jury thought the bill of sale void, as against the execution creditor, they might find for the plaintiff on the first count for the amount of the year's rent; and the jury having found for the plaintiff on the first count, and for the defendant on the second count, the judge would not certify under the stat. 4 Anne, c. 16, s. 5, to exempt the defendant from costs on the pleas pleaded by him to the first count of the declaration.

**CASE.**—The first count of the declaration stated that on the 12th day of June, 1839, and for a year then last past, one Taylor had occupied a certain messuage, as tenant to the plaintiff, at a certain rent; and that on that day the sum of £10, for and on account of the rent so payable by Taylor to the plaintiff for the same, for one year of the said tenancy, ending at and upon that day, became due and remained in arrear and unpaid; and that on the 18th day of June, 1839, the defendant, being sheriff of Berkshire, by virtue of a writ of fieri facias, issued on the suit of Charles James Barnes, took in execution the goods and chattels of Taylor, then being in the said messuage so being in his occupation as aforesaid; and that though the defendant had notice that the said year's rent was in arrear to the plaintiff as aforesaid, the defendant removed the said goods out of the said messuage, without paying the said rent to the plaintiff; and the count went on to aver that the rent was still unpaid, and that the plaintiff had lost the benefit of a distress; 2d, a count in trover for all the goods which were taken. Pleas, 1st, to the whole declaration, not guilty; 2d, to the first count, that the plaintiff gave no notice to the defendant that the rent was in arrear; 3d, to the first count, that the rent was not due as therein alleged; 4th, to the second count, that the plaintiff was not possessed of the goods as of his own property.

On the part of the plaintiff, Taylor was called.

*Ludlow*, Serjt., and *Tyrwhitt*, for the defendant, objected that he was not a competent witness, on the ground, that, if the plaintiff obtained a verdict, Taylor would get rid of the plaintiff's claim on him for rent. They cited the case of *Thurgood v. Richardson*, 5 M. & P. 266. (a)

**PATTESON, J.**—That case is very different from the present. I think that as the record states the issuing of the fieri facias at the suit of Mr. Barnes, it shows that money was due to him from Taylor, who would remain liable for that, although the plaintiff should obtain a verdict in this action against the sheriff.

The witness Taylor was, however, released by the plaintiff, and he stated, that on the 18th of June, 1839, a person named M<sup>c</sup>Graw took

(a) In that case, which was an action by a landlord against a sheriff for removing, under an execution, the goods of his tenant, without reserving a year's rent, as required by the stat. 8 Anne, c. 14, the tenant was called as a witness to prove the rent due, and on his being objected to on the ground of interest, the landlord gave him a general release, and it was held that the landlord was not thereby precluded from recovering against the sheriff the amount of rent; as it was the misconduct of the sheriff in not reserving the rent, which made the release necessary.

away the goods which were in his (Taylor's) possession, in the house which he rented of the plaintiff, after M'Graw had been told by the witness that the goods were not his, but the plaintiff's under a bill of sale. This witness also stated, that a sum of 10*l.* was due to the plaintiff for rent, and that the goods were only seized under this one execution.

*Ludlow*, Serjt., and *Tyrwhitt*, for the defendant, objected, that even if the defendant was estopped by the pleadings from denying that he, as sheriff, had taken the goods of Taylor at the suit of Mr. Barnes, yet it was neither admitted nor shown that M'Graw was the person who so took them by the authority of the defendant, so that there was nothing even in the notice of Taylor to M'Graw, or in any declaration of M'Graw, to show any connexion between him and the defendant, who had denied all wrongful seizure by his plea of not guilty.

*PATTESON*, J.—I think that this objection is not well founded. As the execution at the suit of Mr. Barnes is admitted on the pleadings, and no other execution appears, M'Graw must be taken to have seized the goods for Taylor's debt due to Mr. Barnes, and I think that M'Graw is therefore sufficiently shown to have acted under the sheriff without further evidence. This point was a good deal considered in the case of *Barsham v. Bullock, Esq.*, 2 P. & D. 241. (a)

It was further proved by the witness Taylor, that he became tenant of the plaintiff, and entered on the house (which was used as a beer-shop) on the 12th of June, 1838, and not on the 24th of June in that year, and that on the 23d of February, 1839, he owed the plaintiff £66 for beer, and gave him a bill of sale of all his effects as a security for this debt, but was suffered to remain in possession of the house and goods as before.

The bill of sale was put in. It was an absolute bill of sale to the plaintiff of all the goods and effects of Taylor. Notice had been given to the defendant to produce the writ of fieri facias; but it was not produced, nor was any evidence given of it. No notice had been given to produce any warrant, nor was M'Graw subpoenaed to produce it; and no evidence was given either of any warrant issued by the defendant to M'Graw, or even that M'Graw was a sheriff's officer. The goods seized were proved to be worth more than £10.

*Ludlow*, Serjt., for the defendant.—The second count, if sustained, is destructive of the first count, the gist of which is, that the plaintiff has been deprived by the defendant of the power of distraining on his tenant's goods for his year's rent, secured to him by the stat. 8 Anne, c. 14, s. 1, (b) whereas, in order to recover on the second count, the goods

(a) That was an action of debt for a penalty against the sheriff for taking the plaintiff, who had been arrested by the defendant, to a public drinking-house without the plaintiff's consent; the plea traversed the taking of the plaintiff to the drinking-house without his consent. Evidence was given at the trial, that the same officer of the defendant, who arrested the plaintiff, also took him to the drinking-house against his consent, and it was held that, as the plea admitted that the officer who arrested was the defendant's agent, and the evidence showed that the same officer took the plaintiff to the drinking-house, it was not necessary to produce the warrant to make the defendant liable.

(b) In the case of *Hodgson and others, assignees of Sralon, v. Gascoigne*, 5 B. & A. 88, (7 E. C. L. R. 35;) where the growing crops of a tenant having been seized under a writ of fieri facias, a writ of habere facias possessionem was subsequently delivered to the sheriff in an ejectment at the suit of the landlord, founded on a demise made long before the issuing of the fieri facias; it was held, that the sheriff was not bound to sell the growing crops under the fieri facias, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter

must all have belonged to plaintiff under the bill of sale at the time they were seized. The plaintiff is bound by the bill of sale, as he is a party to it, and as no rent was due at the time of the bill of sale, (a) he cannot recover on the first count; and with respect to the second count, the plaintiff clearly cannot recover upon that, as the only pleas to that count deny the plaintiff's property in the goods, and also the taking; and upon the issues on those pleas the plaintiff has given no evidence to connect the sheriff with the actual taking of the goods. The only thing to connect him with the taking being an admission made with respect to other issues, which are applicable in the first count of the declaration only.

PATTERSON, J., (in summing up.)—The plaintiff has, in this case, adopted two inconsistent statements of his claim; but he will, notwithstanding that, be entitled to succeed upon either, if it be established. It appears, that, on the 23d of February, 1839, no rent being then due to him, he received from Taylor a bill of sale of all Taylor's goods as a security for a debt for beer; but after the seizure at the suit of Mr. Barnes, he seems to have thought the continued possession of the goods by Taylor down to that event on the 18th of June, might affect the validity of the bill of sale, and he then puts in a claim as landlord for his rent, treating the goods as Taylor's still. Taking the case on the second count, and taking the goods to be the plaintiff's on the bill of sale, there is no evidence to show that any writ was sent to the defendant at the suit of Mr. Barnes, or that he ever gave a warrant to M'Graw; and as there is no evidence to connect M'Graw with the defendant, the plaintiff must fail as to that count. With respect to the first count, the plaintiff is entitled to a verdict for the amount of the rent due, if you are satisfied that the goods, at the time of the seizure, belonged to Taylor by reason of the bill of sale being void, as being a fraudulent bill of sale, as against the execution creditor; this not being one of the many cases where the continued possession by the vendee is consistent with the terms of the bill of sale. [His lordship left it to the jury to say whether the year's rent was due to the plaintiff, and whether the bill of sale was fraudulent and therefore void.]

Verdict for the plaintiff on the first count of the declaration, with £10 damages—the jury finding the bill of sale to be fraudulent; and verdict for the defendant on the second count.

*F. V. Lee*, and *Beudon*, for the plaintiff.

*Ludlow*, Serjt., and *Tyrwhitt*, for the defendant.

*Tyrwhitt* afterwards applied to the learned judge to certify under the stat. 4 Anne, c. 16, s. 5, that the defendant had probable cause for pleading his pleas to the first count, as the goods mentioned in both counts were really the same. He cited the case of *Robinson v. Messenger*, 3 N. & P. 583. (b)

being a trespasser from the day of the demise laid in the declaration; and it was also held, that the sheriff had no right to allow the landlord a year's rent under the stat. 8 Anne, c. 14, that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment.

(a) In the case of *Huskins v. Knight*, 1 M. & S. 245, it was held, that the landlord of premises upon which the goods of his tenant are taken in execution, can only claim from the party suing the execution, the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession.

(b) In that case it was held, that the rule of H. T. 4 Will. 4, No. 7, has not repealed the stat. 4 Anne, c. 16, s. 5, as to the judge's power to certify, so as to exempt the defendant from the

PATTESON, J., after taking time to consider, refused the application. (a)  
In the ensuing term *Ludlow*, Serjt., applied to the Court of Exchequer for a new trial, but the court refused a rule.

costs of an issue found against him, where he has pleaded several matters; and that where, to an action of assumpsit on the warranty of a horse, the defendant pleaded, first, non assumpsit, and secondly, that the horse was sound, and a verdict having been found for the defendant for the first plea, and against him on the second, the judge who tried the cause certified that he had probable cause for pleading the second plea, the defendant was held to be exempted by the statute from paying any costs in respect of it.

(a) This certificate, if granted, would have exempted the defendant from the costs of the issues to which it applied.

## CENTRAL CRIMINAL COURT.

JULY SESSION, 1840.

BEFORE MR. JUSTICE PATTESON.

REGINA v. JAMES ALLEN.—p. 521.

A prisoner was convicted on an indictment for a rape, which charged that the prisoner, "in and upon E. F.," "feloniously and violently did make [omitting the words 'an assault,'] and her, the said E. F., then and there, and against her will, violently and feloniously did ravish and carnally know; against the form of the statute, &c.,—*Held*, that the omission of the words "an assault" was no ground for arresting the judgment.

THE prisoner was indicted for a rape on Ellen Fitzgerald. The indictment was in the following form;—"Central Criminal Court, to wit.—The jurors for our lady the queen, upon their oaths present, that James Allen, late of the parish of Hornsey, in the county of Middlesex, and within the jurisdiction of the said court, labourer, on the 1st day of July, 4 Vict., with force and arms, at the parish aforesaid, and within the jurisdiction of the said court, in and upon Ellen Fitzgerald, in the peace of God and our said lady the queen then and there being, violently and feloniously did make, (a) and her, the said Ellen Fitzgerald, then and there and against her will violently and feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity."

After the jury had been charged with the prisoner,

PATTESON, J., discovered the omission of the words "an assault;" but his lordship allowed the case to proceed, and the jury found the prisoner

Guilty.

His lordship respited the judgment, in order that it might be considered by the fifteen judges, whether the judgment ought to be arrested, because of the omission of the words "an assault."

In Michaelmas Term, 1840, the case was considered by the judges;

(a) The words "an assault" were omitted.

and ten were of opinion that the judgment ought not to be arrested; and at the November Sessions the prisoner had judgment of death recorded against him. (a)

(a) The stat. West. 1, (3 Edw. 1.) c. 13, has the words—"The king prohibiteth that none do *ravish* any woman against her will," and inflicts two years' imprisonment and fine: and by the stat. of West. 2, (13 Edw. 1.) c. 34, "it is provided, that if a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member." The stat. 18 Eliz. c. 7, made it felony, without benefit of clergy, "to commit or do any manner of felonious rape, ravishment, or burglary." By sect. 1 of the stat. 9 Geo. 4, c. 31, all these enactments are repealed; and by sect. 16 of that statute it is enacted, "that every person convicted of the crime of rape shall suffer death as a felon." The crime of rape was a felony at common law, the punishment having been varied by statute as already mentioned. By the stat. 7 Geo. 4, c. 64, s. 21, it is enacted, "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute." Lord Hale says,—(1 H. P. C. 632.) "the indictment [for a rape] ought to have these three ingredients: 1st, it must be felonice; 2d, it must be rapuit et carnaliter cognovit; 3d, it must conclude contra formam statuti." But in 2 Curw. Hawk. 249, it is said, "that in an appeal of rape the fact seems to be sufficiently declared, by showing that the defendant felonice rapuit the woman, without adding the words carnaliter cognovit, or any others tantamount." In the case of *Rex v. Pelfryman*, 2 Leach, 641, it was held, that the omission of the word "feloniously" before the word "did make an assault," is fatal to an indictment for robbery.

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BEFORE MR. SERJEANT ARABIN.

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REGINA v. RICHARD LEWIS.—p. 523.

An indictment on the 7 W. 4 & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with *attempting to discharge* at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. It appeared that the prisoner, on a refusal by the prosecutor to give him up some tiddeeds, addressed him in these words: "Then you are a dead man," and immediately unfolded a great coat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, and was discovered between the lining of the great coat:—*Held*, that the evidence was not sufficient to sustain the charge in the indictment.

THE indictment, in the first count, stated, that the prisoner, on the 3d of July, in and upon Henry Evans did make an assault, and feloniously did attempt to discharge at and against him a certain blunderbuss, loaded with gunpowder and divers leaden shots, with intent feloniously, wilfully, and of his malice aforethought, to kill and murder him. (a) The second count charged the intent to be to maim and disable.

From the evidence for the prosecution, it appeared that the prisoner, who was the brother-in-law of the prosecutor, went to his house about

(a) The stat. 7 W. 4, and 1 Vict. c. 85, s. 3, enacts, inter alia, that whosoever shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person with intent to murder, shall be guilty of felony, and be liable to be transported for life, or for not less than fifteen years, or imprisoned for any term not exceeding three years.

In the case of *Rex v. Carr*, Russ. & Ry. 377, which was an indictment on the 43 Geo. 3, c. 58, for attempting to discharge a loaded blunderbuss with intent to murder, the jury found the prisoner guilty, but added, that the blunderbuss was not primed at the time when he crew the trigger. A majority of the judges considered the verdict of the jury as equivalent to a finding by them that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn; and therefore, in point of law, it was not loaded within the meaning of the statute. See the case of *Reg. v. St. George*, ante, p. 193.

six o'clock in the evening of the 3d of July, and asked him for some title-deeds which he held as a security. The prisoner said he wanted them. The prosecutor told him it was no use making any words about them, as he could not let him have them till he saw himself righted for the two bills that he was liable for. The prisoner upon this rose up and said, "Then you are a dead man," and unfolded a great coat which he had on his arm, and took out a blunderbuss. The prosecutor's account of the remainder of the transaction was given in his evidence as follows:—"I saw him take it from the coat; he could not get it out readily; there was some little difficulty; he held it with both his hands; he was on the opposite side of the room to where I was; the muzzle of the blunderbuss was towards the side of the room where I was, but it was not pointed at me; it was not up to his shoulder; it was as low as a person could hold it; a person who was near him seized him by the two arms, and I rose from my chair, seized him by the collar, and threw him down on the sofa; he was secured. The blunderbuss was never pointed towards me; whatever the prisoner's intention was, it was prevented by Hazlehurst laying hold of him; I cannot say whether the blunderbuss was thrown down or not; Mrs. Evans took it, but whether from the prisoner's hand or not, I cannot say."

The witness Hazlehurst stated, that, before the blunderbuss was pointed at the prosecutor, he seized the prisoner, and prevented his doing any thing.

The policeman stated that the blunderbuss was primed and very heavily loaded, but that there was not any flint in it; and a flint, which evidently belonged to it, was found between the lining in the coat from beneath which the prisoner took the blunderbuss.

On the part of the prisoner, it was contended that the charge in the indictment of an attempt to discharge the blunderbuss, was not made out, but rather disproved by the evidence.

ARABIN, Serjt., after consulting with PATTESON, J., told the jury that they were both of opinion, that, to sustain the indictment, there must be something more than the mere presenting of the blunderbuss, and that some act must be shown to have been done by the prisoner, to satisfy the jury that he did, in fact, attempt to discharge the blunderbuss.

Verdict—Not guilty.

*C. Phillips*, for the prisoner.

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BEFORE LORD DENMAN, C. J., MR. BARON ALDERSON, AND MR. JUSTICE PATTESON.

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REGINA *v.* EDWARD OXFORD.—p. 525.

If in an indictment for treason, it be stated as an overt act that the prisoner discharged at the sovereign a pistol loaded with powder and a certain bullet, and thereby made a direct attempt on the life of the sovereign: the jury must be satisfied that the pistol was a loaded pistol: that is, that there was something in it beyond the powder and wadding; but it seems it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet.

If to such a charge the defence set up be insanity, the question for the jury will be whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing: or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime.



If the jury in such a case are of opinion that the prisoner did not in fact do all that the law deems essential to constitute the offence charged, they must find him not guilty generally; and the court have no power to order his detention under the 39 & 40 Geo. 3, c. 94, s. 2, although the jury should be clearly of opinion that the prisoner was in fact insane, such a state of circumstances appearing to be *casus omissus* in the act.

THE indictment stated in substance that the prisoner being a subject of our lady the queen, on the 10th of June, as a false traitor, maliciously and traitorously did compass, imagine, and intend to bring and put our said lady the queen to death; and to fulfil, perfect, and bring to effect his treason and treasonable compassing and imagination, he, as such false traitor, maliciously and traitorously did shoot off and discharge a certain pistol loaded with gunpowder and a certain bullet, which pistol he held in one of his hands, at the person of our said lady the queen, with intent thereby and therewith maliciously and traitorously to shoot, assassinate, kill, and put to death our said lady the queen, and thereby traitorously made a direct attempt against the life of our said lady the queen. And further, to fulfil and bring to effect his treason and treasonable compassing, &c. aforesaid, he, as such false traitor, on the 10th of June, maliciously and traitorously did shoot off and discharge a certain other pistol loaded with gunpowder and a certain bullet, which he held in one of his hands, at the person of our said lady the queen, with intent thereby maliciously and traitorously to shoot, assassinate, kill, and put to death our said lady the queen, and thereby traitorously made a direct attempt against the life of our said lady the queen; against the duty of his allegiance and against the statute, &c.—The prisoner pleaded not guilty. (a)

*Campbell*, A. G., for the crown.—By the stat. 25 Edw. 3, c. 2, which regulates the law of high treason, it is enacted that when a man doth compass or imagine the death of his majesty, and thereof be probably attainted of open deed by men of his condition, it shall be judged treason. The statute speaks of the offence and an overt act. The offence charged is the compassing and imagining the death of the sovereign, and the charge is to be made out by the act that was done. The act of Parliament 39 & 40 Geo. 3, c. 93, (b) was intended to give the life of the sovereign the same protection that is given to the meanest subject in the land. For, before the passing of that statute, even where the death of the sovereign was occasioned, there were required many formalities which were very proper in cases of rebellion or other political treason. There will be two questions in this case:—first, Whether supposing the prisoner to be accountable for his actions, he, in point of fact, committed the offence imputed; and secondly, Whether at the time he committed the act, he was accountable for his actions. The burden of proof with respect to the first rests wholly on the prosecution; the other is to be

(a) The prisoner had pleaded at the last session; but his trial having been postponed to the present session, he was called upon to plead *de novo*.

(b) The statute provides that in all cases of high treason, in compassing and imagining the death of his majesty, and misprison of such treason, where the overt act or acts thereof alleged in the indictment for such offence shall be assassination and killing of his majesty, or *any direct attempt against his life* or against his person, whereby his life may be endangered, or his person suffer bodily harm, the persons charged therewith may be indicted, arraigned, tried, and attainted in the same manner and course of trial, and upon like evidence, as if such person stood charged with murder; and none of the provisions of the 7 & 8 W. 3, c. 3, or 7 Anne, c. 21, [for which see *R. v. Frost*, ante, p. 129.] touching trials in cases of treason, shall extend to any indictment for high treason or misprison of treason, where the overt act alleged therein is as aforesaid, but on conviction, judgment and execution shall be done as in cases of high treason.

proved by the prisoner. It will appear from the evidence, that he had deliberately formed a plan to make an attempt on the life of the sovereign. In the early part of May he bought a pair of pistols and a powder-flask, and practised shooting at several shooting galleries. On the 3d of June he bought some copper caps, inquired where he could buy bullets, and said he had some gunpowder. On the evening of the 9th of June he was in possession of a pistol, and said that it was loaded. He was asked what he meant to do with it, and refused to tell, but said he had been firing at a target. On Wednesday, the 10th of June, about six o'clock in the evening, the queen and Prince Albert left the palace in a low open carriage, drawn by four horses, with two out-riders before, and no other attendants. The queen sat upon the left side, and Prince Albert on the right; they drove up Constitution Hill, and about a third of the way between the palace and the triumphal arch was the prisoner, watching their approach: he was walking backward and forward with his hands under the lappels of his coat; he was on the right hand side, and as the carriage approached he turned round and nodded, and discharged a pistol; *the ball was heard to whiz by on the opposite side.* The carriage went on; he then looked back and aimed another pistol at her majesty; the queen stooped on seeing him; *the ball from this pistol was heard to whiz on the opposite side;* the queen then drove to the residence of the Duchess of Kent; there were a number of persons on the left hand, between the road and the gardens of Buckingham Palace; another man was at first seized and accused by mistake, when the prisoner said "It was me, I did it, I surrender myself." He was taken to the station-house, and when there he asked whether the queen was hurt, and after being told she was not, *he was asked if there were not bullets in the pistols, and he admitted that there were;* his lodgings were searched, and in his box was found a sword and scabbard, two pistol bags, a bullet-mould, a black crape, a razor, a powder-flask containing about three ounces of powder, *five leaden bullets,* and fourteen percussion caps; there was also a pocket-book containing various papers: he said he had intended to destroy the papers in the morning before he went out; the first paper was without date; it was headed "Young England," &c.; the contents were as follows:—"Rules and Regulations. 1. That every member shall be provided with a brace of pistols, a sword, rifle, and a dagger; the two latter to be kept at the committee-room. 2. That every member must, on entering, take the oath of allegiance, to be true to the cause he has joined. 3. That every member must, on entering the house, give a signal to the sentry. 4. That every officer shall have a factitious name; his right name and address to be kept with the secretary. 5. That every member shall, when he is ordered to meet, be armed with a brace of pistols, (loaded,) and a sword to repel any attack, and also be provided with a black crape cap to cover his face, with his marks of distinction outside. 6. That whenever any member wishes to introduce any new member, he must give satisfactory accounts of him to the superiors, and from thence to the council. 7. Any member who can procure 100 men shall be promoted to the rank of captain. 8. Any member holding communications with any country agents must instantly forward the intelligence to the secretary. 9. That whenever any member is ordered down the country, or abroad, he must take various disguises with him, as the labourer, the mechanic, and the gentleman; all of which he can obtain at the committee-room.

10. That any member wishing to absent himself for more than one month, must obtain leave from the commander-in-chief. 11. That no member will be allowed to speak during any debate, nor allowed to ask more than two questions. All the printed rules kept at the committee-room.—List of principal members—Factitious names—*President*: Gowrie. *Council*: Justinian, Ernest, Alowan, Augustia, Coloman, Ethelred, Kenneth, Ferdinand, Godfrey, Nicholas, Hanibal, Gregory. *Generals*: Fredeni, Otho, Augustus, Anthony. *Captains*: Oxonian, Louis, Mildon, Amadeus. *Lieutenants*: Hercules, Mars, Neptune, Albert. Marks of distinction: *Council*, a large white cockade. *President*, a black bow. *General*, three red bows. *Captain*, two red bows. *Lieutenant*, one red bow. A. W. Smith, Secretary.”—The first of the letters found in the pocket-book was dated May 16, 1839, and addressed “Mr. Oxford, at Mr. Minton’s, High street, Marylebone.” It was in these words, “Young England.—Sir, Our commander-in-chief was very glad to find that you answered his questions in such a straight-forward manner. You will be wanted to attend on the 21st of this month, as we expect one of the country agents to town on business of importance. Be sure and attend. A. W. Smith, Secretary.—P. S. You must not take any notice to the boy, nor ask him any questions.” The second letter was dated Nov. 14, 1839, and addressed “Mr. Oxford, at Mr. Parr’s, Hat and Feathers, Goswell street.” It was in these words, “Young England.—Sir, I am very glad to hear that you improve so much in your speeches. Your speech the last time you were here was beautiful. There was another one introduced last night, by Lieutenant Mars, a fine, tall, gentlemanly looking fellow, and it is said that he is a military officer; but his name has not yet transpired. Soon after he was introduced, we were alarmed by a violent knocking at the door. In an instant our faces were covered, we cocked our pistols, and with drawn swords stood waiting to receive the enemy. While one stood over the fire with the papers, another stood with lighted torch to fire the house. We then sent the old woman to open the door, and it proved to be some little boys who knocked at the door and ran away. You must attend on Wednesday next. A. W. Smith, Secretary.” The last of the letters was dated April 3d, 1840, and addressed “Mr. Oxford, at Mr. Robinson’s, Hôg in the Pound, Oxford street.” It was as follows: “Young England.—Sir, You are requested to attend to-night, as there is an extraordinary meeting to be holden, in consequence of having received some communications of an important nature from Hanover. You must attend; and if your master will not give you leave, you must come in defiance of him. A. W. Smith, Secretary.”

Under these circumstances, if the prisoner was accountable for his actions, it will be for you to say whether you can entertain any reasonable doubt of his guilt. I must inform you, that the balls have not been found; but I apprehend nobody can doubt that the pistols were loaded. I do not attach much weight to the mark on the wall, but rather suppose that the balls must have gone over the wall into the garden. Then will come the second question, whether the prisoner was insane at the time he did the act—whether he was unconscious of what he was doing, so that he did not know right from wrong. If he was labouring under some delusion, and did not know the consequence of what he was doing—if he was insane at the time, then he is not an accountable agent. It is said the law of England, in ancient times, was, that in-

sanity was not a defence to a charge of attempting the life of the sovereign; and an act passed in the reign of king Henry the Eighth, seems to countenance that view of the subject; (a) but that act is wholly repealed. Still, however, in order to excuse the prisoner, must be shown, not only that at times there was eccentricity displayed or violence committed by him, but they must show that, at the time, he was unconscious that he was committing an offence. It would be very dangerous if some degree of weakness of intellect, some degree of eccentricity, and even violence at *other* times, should prevail as a defence, if the prisoner was not in a state of insanity at the time when the offence was committed. There must, by the law of England, be proof of a greater aberration of mind in criminal than in civil cases. In criminal cases, the evidence of insanity must be connected with the particular act. I will call your attention to the authorities—Lord COKE says, 3d Institute, p. 6, “He that is not compos mentis, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing and imagining the death of the king; for furiosus solo furore punitur: but it must be *an absolute madness and a total deprivation of memory*.” But his words are not to be literally taken, but with great latitude, as total absence of memory is not to be found even in a furious maniac. But though I mention this, I rely on Lord HALE’s opinion. He says, 1 Pleas of Crown, p. 30, ch. 4, s. 2, “There is first a partial insanity of mind; and, second, a total insanity. The former is either in respect to things, quoad hoc vel illud insanire; some persons that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects, or applications, or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason: and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for, doubtless, most persons that are felons of themselves and others, are under any degree of partial insanity when they commit the offences: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest on circumstances duly to be weighed and considered both by the judge and jury.” In Alison’s Principles of the Criminal Law of Scotland, p. 654, (and there is no difference between the law of England and the law of Scotland with reference to insanity,) it is said, “to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts.” In *Arnold’s case*, How. St. Tr. 764, 765, and Collinson on Lunacy, p. 475, Mr. Justice TRACEY observed, “that the defence of insanity must be clearly made out; that it is not every idle or frantic humour of a man, or something unaccountable in his actions, which will show him to be

(a) In Coke’s 3d Institute, p. 6, it is said, “It was further provided by the said act of 33 H. 8, that if a man attainted of treason became mad, that, notwithstanding, he should be executed, which cruel and inhuman law lived not long, but was repealed.”

such a madman as to exempt him from punishment.”—In *Lord Ferrer’s case*, 19 How. St. Tr. 886, the prisoner was unanimously found guilty by the House of Peers, though many witnesses stated, that they considered him insane, and it appeared that several of his relations had been confined as lunatics; it being contended on the part of the prosecution, that the complete possession of reason was not necessary, in order to render a man responsible for his acts; it was sufficient if he could discriminate between good and evil. In *Bowler’s case*, Collinson on Lunacy, 673, (n.) Mr. Justice LE BLANC told the jury that it was for them to determine “Whether the prisoner, when he committed the offence, was capable of distinguishing between right and wrong, or under the influence of any illusion in respect to the prosecutor, which rendered his mind at the moment insensible of the nature of the act which he was about to commit; since, in that case, he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that, when he committed the offence, he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law.” In that case, Mr. Warburton, the keeper of a lunatic asylum, said he had no doubt of the prisoner’s insanity, and a commission of lunacy was produced, dated the 17th June, 1812, with a finding that the prisoner had been insane from the 30th of March. When the offence was committed does not appear from the report. The jury, after considerable deliberation, pronounced the prisoner guilty.

ALDERSON, B.—Bowler was executed, I believe; and very barbarous it was.

Campbell, A. G.—I will not refer to *Bellingham’s case*, as there are some doubts as to the correctness of the mode in which that case was conducted; but I will refer to *Hadfield’s case*, Collinson on Lunacy, 480, and 1 Russ. 11. In that case the learned judge who tried the prisoner, said that “as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim: and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet there being no reason for believing the prisoner to have been at that period a rational and accountable being, he ought to be acquitted. And the attorney-general of that day, (as I hope the party representing the crown at any time would do,) immediately yielded to the opinion of the judge, and the jury at once acquitted the prisoner. But in that case there were very extraordinary circumstances. The law, as stated by Mr. Erskine, who conducted the defence, and which was approved by the court, and has been acted on ever since, is, that the prisoner “must appear to the jury to be non compos mentis, in the legal acceptance of the term; and that, not at any *anterior period*, which can have no bearing upon any case whatever; but *at the moment* when the contract was entered into, or the crime committed.” 27 How. St. Tr. p. 1312. Such being the law upon the subject, it will be for you to say, whether Edward Oxford was, at the time when he shot at her majesty, in a state of insanity. I should have rejoiced if such a defence could have been made out; but, as far as I am yet aware, I know no reason for concluding that the prisoner, at the time he did the act, was in a state of mind to make him not responsible. He

is not an idiot ; on the contrary, he is rather of quick intellect. He has not received any wound. It is said it can be shown that his father was insane : that would most likely be considered as evidence by their lordships, and I should not object. The father's insanity will not excuse the son, unless they show that the son was insane at the time when the act was done. The prisoner was never put under restraint by his friends as insane. Suppose he had entered into a contract on the morning of the day, or gone to vote at an election, would he have been held incompetent ? At present I am not aware that he was at any time insane so as to have his acts avoided. Suppose a commission of lunacy were issued, or under an act of Parliament he was sent to confinement, would he not recover damages ? suppose he was examined by commissioners of lunacy, and stated what he has stated with reference to this act, would it sustain the commission ? Before the Privy Council he was asked if he had any thing to say ; and, having cross-examined the witnesses, he said, " A great many witnesses are against me : some say I shot with my left hand, others with my right ; they vary as to the distance ; after I fired the first pistol, the prince got up as if he would jump out of the coach, and sat down again, as if he thought better of it ; then I fired the second pistol : this is all I shall say at present." If as to all civil matters the prisoner was responsible, a fortiori, is he answerable in a criminal case.

The witnesses for the prosecution having substantially proved the case, according to the statement made in the *Attorney-General's* opening,

*J. Sydney Taylor* addressed the jury for the prisoner.—There is but one count in this indictment ; but it alleges two overt acts. Hadfield, whose case has been referred to by the *Attorney-General*, was protected by those forms of the law which have since been taken away. The provision in the statutes of Ann. & Will. was a wise provision, and was so styled by Mr. Erskine in that case. The case of attempting to murder the sovereign is not parallel with the case of attempting to murder a subject. The case is prejudged by addresses to the crown, and by thanksgivings in the churches. If you are not satisfied that the overt acts have been proved, you cannot convict the prisoner of the treason charged in the indictment. That the prisoner discharged the two pistols seems to be placed beyond all question ; but if that was not done with the intention of taking away the queen's life, it will not be enough. An intention to do her majesty some grievous bodily harm would not be enough—it is not a direct attempt on the life of the sovereign, and would be a species of treason entitled to the protection of the statutes. You must be satisfied that the pistols were pointed at the queen, and that they were loaded with balls. There is no direct evidence that there were any balls. In the case of *Blake v. Barnard*, post, which was an action of assault and false imprisonment, tried before Lord ABINGER at the London Sittings yesterday, the declaration stated an assault with a pistol loaded with powder, ball, and shot ; and the plea as to the assault was, not guilty. Lord ABINGER was of opinion, that it lay on the plaintiff to satisfy the jury that the pistol was loaded ; for if it was not loaded, there was no assault. (a) As to the prisoner's declarations on the subject, you must take into account the circumstances under which they

(a) But see the case of *Regina v. St. George*, ante, p. 483.

were made, in answer to questions by the police improperly put, and perhaps incorrectly remembered on account of the excitement and confusion of the time. With respect to Lord COKE's opinion on the subject of insanity, medical science was in a very imperfect state then compared with what it is now. In the case of *Margaret Nicholson*, who was charged with attempting to stab the king, there was contrivance, yet the Privy Council sent her to Bedlam, and did not try her. In *Hudfield's case* there was more apparent motive than in the present. Here there is a great offence; and it is important to consider whether there was any motive. The definitions of insanity by Lord COKE and Lord HALE, are inconsistent with the cases in which insanity has been held to be a defence to a criminal charge. The papers found at the prisoner's lodgings show that he insanely imagined himself connected with a political society, which had, in fact, no existence. If such a society had really existed, it would have been discovered. They have not traced him to any association of disaffected persons whatever; the letters addressed to himself, and praising his own speech, will be shown to be in his own handwriting. The existence of these things show previously a state of mind evidently being unsound. Then there are the circumstances of the case itself. Would he, if he had been sane, have acted so as to show that he courted publicity? He does not take any precaution to favour his escape. Would he have said, "I am the person," if he had been sane? He delivers himself up to the immediate vengeance of the people. I shall produce evidence of a tendency to that insane state, which burst out in a paroxysm. The prisoner's age is that at which the taint of hereditary insanity would be most likely to break out. The act itself may be the first decided indication of insanity; and we cannot, therefore, produce evidence of positive acts of insanity before the time of its commission. In a case tried before Mr. Justice PARKE, at Aylesbury, where the prisoner was charged with the murder of his grandfather, I defended him; and though there was no proof of previous acts of insanity, yet the jury inferred insanity from the circumstances of the case, and he was acquitted on that ground. In the present case, the prisoner's grandfather died in a lunatic asylum, and his father also was mad. The absence, too, of the ordinary motives which induce sane criminals to commit crimes, is a strong argument in favour of the notion of the prisoner's insanity. There is an extraordinary case of delusion mentioned in the case of *Hudfield*, 27 How. St. Tr. p. 1316, by Mr. Erskine, as having been related to him by Lord MANSFIELD:—"A man of the name of Wood had indicted Dr. Monro for keeping him as a prisoner. He underwent the most severe examination by the defendant's counsel without exposing his complaint; but being asked what was become of the princess whom he corresponded with in cherry juice, he showed at once what he was; he said there was nothing at all in that, for having been (as everybody knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry juice, no river, no boat; but the whole was the inveterate phantom of a morbid imagination." So, in the present case, as respects the prisoner at the bar, there existed, in fact, no society called "Young England," no president, no secretary, no council; but all, like the tower,

the cherry juice, the river, and the boat, was the inveterate phantom of the prisoner's morbid imagination. As to the case of *Earl Ferrers*, there was not the absence of motive, which distinguishes that case from the present. He acted from ungovernable rage, arising not from an unreal state of circumstances, but from real facts. The prisoner in the present case had no animosity against the queen; he had not suffered from prosecution or imprisonment; he had no political associates; he could not have any motive for injuring her majesty.

On the part of the prisoner, several witnesses, relatives and connexions of the family, were called to prove the state of mind of the prisoner's grandfather. They all stated, that, in their judgment, he was of unsound mind; but most of the instances they gave were rather instances of great violence of temper, and occasionally great excitement, especially after drinking, to which, being a seafaring man, he was somewhat addicted. However it appeared, that, towards the close of his life, when he was a pensioner in Greenwich Hospital, he had a complaint in his head, and sometimes he used to call himself the Pope of Rome, and at other times used to say that he was St. Paul, and that he had suffered the Pope of Rome to make his escape. This was when he was on duty at the gates of the hospital. It also appeared that he was in the habit of talking to himself for a considerable time, &c. The prisoner's mother was then called, and deposed to various acts of an extraordinary character committed by the prisoner's father, both before and after her marriage to him; such as burning a roll of bank notes, pulling out at different times a pistol, a razor, and a paper of oxalic acid, and threatening to kill himself in her presence; making grimaces at her when she was pregnant, and jumping about like a baboon. She stated that her second child, which she suckled at the same time as the prisoner, was a confirmed idiot, but that it lived nearly two years and a half; that it never spoke or walked, and showed no signs of understanding; that its cry was not human, and that it put out its tongue as the father had done when he made the grimaces. She further added, that on one occasion, her husband knocked her down and fractured her head: and on another occasion, stuck a file into her breast, which caused milk to flow out from the wound. With respect to the prisoner himself, the witness said, "The prisoner was born on the 19th of April, 1822; for the first seven years of his life he was under my care; he would burst out a crying when there was no one near him, and he was always very troublesome; it was different to the mere waywardness of childhood, and he has continued through life to cry without any apparent cause; he had a great many other very singular habits: he would get into a violent rage without any cause, and deliberately break any thing, &c.; after gloomy fits, and fits of violent passion, he would laugh hysterically—it is an involuntary laugh; at times he was very affectionate, and at other times the contrary; he would break out unawares, &c.; he was sometimes very gloomy, he would sit for a long time with his hand to his head, and not speak; he was brought home one night by a policeman, who informed me he had been taken to the station-house; he had got behind a carriage, and had frightened a lady who was in it by making a great noise, and she was pregnant, and her husband, who was a solicitor, was exceedingly alarmed and angry; that was stated in his presence; I went next morning to inquire after the lady's health and apologise; he took no notice when he heard this account; he did not appear conscious of



having done wrong, &c.; he has behaved violently towards me; the day before I went to Birmingham he made my nose bleed by a blow from his fist; I was playing with him, and turned round, and he hit me on the nose; that was not in the course of the play, it was after; he turned round suddenly as he was going through the door, and struck at me; it hurt me very much; I screamed out; the landlady came up stairs, and she said, 'If I was to strike my mother, I should expect my hand to drop off.' He appeared very sullen."

Several witnesses were called, who corroborated the mother's statement, both as to the prisoner and his father. The most material evidence as to the prisoner was given by an inspector of police, named Tedman, who saw him frequently for about eighteen months, during which he was barman at Mr. Minton's, the Shepherd and Flock public-house. Being asked upon what fact he founded his opinion that the prisoner was of unsound mind, he said, "I have gone in of a morning, and found him crying very much, with his hands before his face, and his apron before his face, with his hands up; I saw that frequently; I have asked him what was the matter; he said, 'Nothing, now it is all over;' I asked him if any one had ill-used him; he said, 'No;' at other times I have found him laughing very much: I have asked him why he was laughing; he said, 'The old women drank so much gin, it would make any one laugh;' I said, 'There is no old women here now;' he said, 'No, there is not;' he was by himself: on another occasion, a gentleman came in and ordered some stout, and Mr. Minton requested the prisoner to bottle it; he got the bottles all upside down in the basket, and was putting the funnel and stout in at the wrong end of the bottle, the bottom end; that was about eleven o'clock in the morning; I asked him what he did that for; he said, 'It is a jolly good *lark*;' he was filling the stout out of a can into the funnel; it ran all over the basket; there was no one with him; he was doing it without any one to look on; I think that is about two years ago; I told Mr. Minton he was acting like an idiot about the place, and he had better send him away; and he did leave in a day or two afterwards; he was at times very violent in his temper, and at other times very quiet, and would scarcely speak to any person."

Several eminent medical men were also called for the prisoner. They were Dr. John Birt Davis, a physician of Birmingham, and coroner for that borough; Dr. Hodgkin, a lecturer on morbid anatomy, and author of several medical works; Dr. John Connolly, physician to the Hanwell Lunatic Asylum; Dr. Chowne, physician of Charing Cross Hospital; and Mr. J. F. Clarke, honorary secretary to the Westminster Medical Society. This last witness had been in the habit of attending the family of the prisoner, and had known the prisoner himself for two years. They all gave it as their decided opinion that he was of unsound mind. (a)

*Wilde, S. G.*, in reply.—The defence rests on three points: 1st, Whether the queen was the object of the attack; 2dly, Whether the pistols were loaded with ball; and 3dly, What was the prisoner's condition of mind at the time when the act was done. As to the first two points, I do not think the question of insanity will have any considerable effect upon

(a) No medical men were examined on the part of the prosecution, though it appeared that Mr. Maule, the solicitor to the treasury, was present at an interview which those who were examined for the prisoner, had with him in Newgate.

them; the commission of the fact is totally distinct from the responsibility that will result. As to the first point, whether the queen was the object of attack, consider her situation in the country, and his question, "Is the queen hurt?" If the prisoner was led by inordinate vanity, a desire of distinction, and to be the subject of popular report, he would assail the life of the queen. There is nothing in the evidence pointing to any other individual. Then supposing that the queen was the object of attack, were the pistols loaded with ball or not? The supposition of insanity would rather bear against the prisoner on this point. But consider what had been his previous conduct with the pistols; consider the purchase by him of the caps and balls, and the finding of balls and bullet-moulds in his box. The case of *Blake v. Barnard*, cited for the defence on the subject of the pistols being loaded, has no analogy with the present case; because there was in that case the absence of all evidence of the possession of powder and balls, &c., which is not so here. The firing of the second pistol is a circumstance to show that the intention was to produce death, and therefore that the pistols must have been loaded. But these circumstances are followed up by a direct admission that they were loaded with ball. The prisoner's remark, "If your head had come in contact with the ball, you would have found there was a ball in the pistol," tends to show that the pistols were loaded. There is also the evidence of two persons who heard something whizzing. It is difficult, under such circumstances, to find the balls, and therefore the non-production of them is no evidence. As to the defence on the ground of insanity, the rule, as I understand it, is not subject to much ambiguity, and any difficulty that may arise will be in its application to the facts. Mr. Erskine's speech is considered by medical men as correct; and you may take the rule from what he said in defence of Hadfield. Lord LYNTHURST has correctly laid down the rule in *R. v. Offord*, 5 C. & P. 168, (24 E. C. L. R. 259.) (a) Did the prisoner know that he was committing an offence against the law of God and nature? Mr. Erskine, in his speech in *Hadfield's case*, says: "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct, would be an emancipation from criminal justice." He afterwards says, "to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind; but still I think, that, as a doctrine of law, the delusion and the act should be connected." The question in this case will be, whether the prisoner, at the time he did the act, was in a situation to know right from wrong—to know that the act was one calculated to inflict death, and that its performance would subject him to punishment. This is put for the defence—1st, On

(a) His lordship in that case told the jury, that they must be satisfied before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be with reference to the crime of murder. The question was—"Did he know that he was committing an offence against the laws of God and nature?"

the act itself; 2dly, On hereditary taint, as it is called; and 3dly, On the acts of the prisoner himself. As to the first branch, the test is that laid down by Mr. Erskine. Where will you find any delusion in connexion with the act? Evidence brought forward, when so serious a charge is made, ought to be received with great watchfulness, especially when given with reference to a person who has not been previously treated as a madman. With respect to the hereditary taint, the grandfather was treated in the Petworth affair as a criminal, and not as a lunatic, and was allowed to be discharged on a promise that he would go to London. On another occasion, he had a fever, and was put into a strait waistcoat. He was a drunken violent seaman. Is the descendant of such a man to be exempt from criminal responsibility? And as to the prisoner's father, from the evidence of the mother it does not appear that she considered him insane; because she married him, and his acts after she married were similar to his acts before. The prisoner himself was not treated as of unsound mind at any of the places where he lived. No medical man was consulted as to his state. He goes from one situation to another, remaining in one a year, and taken again, and going away afterwards with an excellent character, suiting in every respect except that he had a habit of laughing. Mr. Parr, with whom he lived six months, considered him of sound mind. The propensity to indulge in uncontrolled laughter was an ailment which left him free to discharge his social duties, liable on his civil contracts, and amenable to the criminal law for any offence he might commit. In all the four services in which he lived, on what can the mind rest to relieve him from his civil contracts? On what can the mind rest to relieve him from his criminal responsibility? As to the documents found in the prisoner's box, they were evidently written to induce a belief that there was some extensive conspiracy existing. They show that there was no imbecility—no idiocy, whatever it may be said there was of insanity. The prisoner may have been influenced by a morbid desire for distinction, but that will not excuse him from responsibility. He had not been shown to have spoken to anybody about the society or his beautiful speech, which he would have done if he had been labouring under any delusion as to the existence of such a society. Hadfield's delusion was, that he was commissioned by Heaven to make himself a sacrifice to public justice. This is the best instance of the kind of delusion which relieves a man from responsibility; and the defence was, that although he shot in the direction of the king, yet he did not do so with an intention to kill him. Mark, therefore, the connexion, as Mr Erskine put it, of the delusion with the act. If the prisoner in this case did the act, knowing it was a guilty act, for the sake of public notoriety, he is responsible, and must be found guilty. It is evident he knew that he was breaking the laws of God; let us see whether he knew that he was liable to punishment. His answers before the Privy Council show that there was no imbecility. What you will have to say, therefore, will be, whether the prisoner was under any delusion when he committed the act, which delusion alters the character of the act. If he thought he was doing an innocent act, and did not know that he was doing an illegal act which would subject him to criminal punishment, he must be acquitted; but otherwise, not. It is no matter what delusion he laboured under, if it was not a delusion connected with the act. In the case of Wood and the cherry juice, if he had

committed a murder, would he not have been responsible? The letters written by the prisoner do not show that the writer was deceived, but that he was trying to deceive others. The laughing and crying had no connection with his mind; they were not shown to spring from any supposed cause altogether imaginary. If, as I contend, the law requires that the prisoner should be shown to have been in a state in which he did not know right from wrong—in which he did not know the nature and quality of the act he was committing—where is the evidence of his being in such a state? As to the medical witnesses, they do not give any evidence of his labouring under any delusion. They speak of a want of sensibility and emotion, but this you would naturally expect to find in a person who would commit such an offence as attempting the life of the sovereign.

Lord DENMAN, C. J., (in summing up, after stating the crime and the overt acts,) said:—The questions for your consideration on the facts are, whether the prisoner did fire the pistols or either of them at her majesty, and whether those pistols or either of them were, or was loaded with ball, at the time when they were so fired. These are the matters of fact; and if you think they are proved, then you will have further to inquire whether the prisoner was in possession of his reason, so as to be responsible for what he did. These matters are quite distinct, and I think it will be the better way to abstain from making any remark upon the defence, until I have gone through the facts proved on the part of the prosecution, as to the commission of the act itself. [His lordship read the evidence for the prosecution, commenting occasionally on it as he passed along. On the point as to whether the pistols were loaded or not, he observed]—one witness says, “the prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention; and I had a distinct whizzing or buzzing before my eyes, between my face and the carriage:” and another witness says, “it seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what, I could not say.” This is the only direct evidence. I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it, and couple it with the other facts of the case. With respect to the letters written by the prisoner, whether he really believed in the existence of any such society as is mentioned in them, or was only amusing himself with supposing the existence of such a society, is a matter which we cannot determine otherwise than by conjecture. Then the very important question comes, whether the prisoner was of unsound mind at the time when the act was done? Persons *prima facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. Many cases have been referred to upon the subject. But it is a sort of matter in which you cannot expect any precedent to be found. It is the duty of the court to lay down the rule of the English law on the subject; and even that is difficult, because the court would not wish to lay down more than is necessary in the particular case. As to *Had*

*field's case*, Mr. Erskine would lose nothing by laying down the rule most widely. It must not therefore be said, that the admission of the counsel is to decide the matter. On the part of the defence it is contended, that the prisoner at the bar was non compos mentis, that is, (as it has been said,) unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong. As to the grandfather, two points will arise, whether his conduct was evidence of insanity or only of violence of disposition; and if of insanity, whether the insanity was or was not hereditary? [His lordship read the evidence of the medical and other witnesses on the subject of the insanity, and said]—It may be that medical men may be more in the habit of observing cases of this kind than other persons; and there may be cases in which medical testimony may be essential; but I cannot agree with the notion that moral insanity can be better judged of by medical men than by others. As to the father of the prisoner, the question will be, whether there was a real absence of the power of reason—the power of controlling himself, or whether it was only a violent, or even a cruel disposition: and then, upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane at the time when the act was done—whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. With respect to the letters and papers, they may be brought forward on either side of the question.

The jury retired for some time, and then brought in the following verdict, which the foreman read from a paper:—

“We find the prisoner Edward Oxford guilty of discharging the contents of two pistols at her majesty; but whether they were loaded with ball or not, there is not satisfactory evidence, and that the prisoner was of unsound mind at the time of committing the offence.

Upon this a question arose as to whether the prisoner could be kept in custody or not, the *Attorney-General* requiring that he should be detained, and the prisoner's counsel contending that the verdict was a general acquittal, which entitled the prisoner to his discharge.

LORD DENMAN, C. J., told the jury that if they had not considered the question as to the loading of the pistols distinctly and separately, they had better retire again and consider it, and find the prisoner either guilty or not guilty.

The jury at first said they had so considered it, but afterwards expressed a willingness to retire again.

LORD DENMAN, C. J.—You will consider whether the prisoner discharged a loaded pistol.

One of the jury—Loaded with a bullet?

LORD DENMAN, C. J.—Or a ball.

ALDERSON, B.—Not with powder and wadding only. (a)

The jury retired to reconsider their verdict, and during their absence a discussion took place as to what was to be done in the event of their finding the prisoner not guilty upon the facts.

Campbell, A. G.—The stat. 39 & 40 Geo. 3, c. 94, s. 1, provides that, if upon a trial for treason, murder, or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether the prisoner was insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the court must order him to be kept in custody till her majesty's pleasure be known. Now, I will assume for the purposes of the argument, that the jury have acquitted the prisoner, still I contend that these questions must be asked by the court.

ALDERSON, B.—The statute speaks of "the commission of the offence;" now the jury say, that there has been no offence committed.

Campbell, A. G.—Those words mean the act done.

ALDERSON, B.—What act done?

J. S. Taylor, for the prisoner.—The act done is the compassing the queen's death. The overt act is not the offence, it is only the evidence of it.

PATTESON, J.—The word "offence," cannot mean crime, because, if the party was insane, he cannot have committed a crime.

Bodkin, for the prisoner.—Suppose the jury had found that the prisoner discharged the pistols, but not at the queen at all.

ALDERSON, B.—Suppose they had found that he was not the person?

Lord DENMAN, C. J.—My view of the case is this: the statute must mean that the jury are to find, that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic.

ALDERSON, B., (to the *Attorney-General*.)—The construction you contend for would lead to this, that if a man were charged with an offence, and the jury thought that no offence had been committed at all, yet he must be handed over to the mercy of the crown, perhaps for his life.

J. S. Taylor.—Suppose the charge were one subjecting the party only to six months' imprisonment if convicted?

Campbell, A. G.—If no evidence of insanity had been given, then the prisoner would have been entitled to his discharge; but if a prisoner sets up the defence of insanity, he does it at the peril of the finding of the jury.

PATTESON, J.—Then the latter part of the clause is wholly useless.

ALDERSON, B.—The word "offence" must mean that which in a sane person would be an offence.

Lord DENMAN, C. J.—That, it seems to me, must be the meaning. But none of us mean to be bound by what we now say; it is much too important a matter. (b)

(a) In the case of *Rex v. Hughes and Worsley*, ante, vol. 5, p. 126, (24 E. C. L. R. 241,) it was decided, that if an indictment for shooting another with intent to murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal.

But see the case of *Rex v. Kitchen*, Russ. & Ry. C. C. R. 95, cited in a note to *Rex v. Hughes*, and the case of *Rex v. Martin*, ante, vol. 5, p. 128, (24 E. C. L. R. 242.)

(b) Notwithstanding this statement made at the moment by the learned chief justice, the words of the statute seem on consideration to be so clear on the point, that we have not thought it right to omit the discussion, being satisfied that there is no probability of the opinion expressed being overruled.

The jury, soon after this discussion ended, returned again into court, and found the prisoner—

Not guilty, he being insane at the time. The court ordered him to be detained in prison.

*Campbell, A. G., Wilde, S. G., Sir F. Pollock, Adolphus, Wightman, and R. Gurney, for the crown.*

*J. Sydney Taylor, and Bodkin, for the prisoner.*

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AUGUST SESSION, 1840.

BEFORE MR. BARON GURNEY.

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REGINA v. JOHN PHETHEON.—p. 552.

The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem and restore it, is a defence not to be generally encouraged; though, if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be that, if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly, by the receipt of money, to take it out and restore it, he ought to be acquitted; but otherwise, not.

THE prisoner was indicted for stealing, on the 26th of February, 1840 four salt-cellars and other articles of silver plate, of the value altogether of 18*l.* 5*s.*, the goods of Thomas Robert Baron Hay, his master, in his dwelling-house.

It appeared that the prisoner was under-butler to Lord Hay, and while he was in the service pledged the articles mentioned in the indictment.

The jury found the prisoner guilty; but recommended him to mercy, on the ground that they believed he intended to replace the property.

*C. C. Jones*, for the prisoner, submitted that this finding amounted in law to a verdict of not guilty.

GURNEY, B., without expressing any opinion upon the point, directed that the prisoner should be tried upon another indictment which had been preferred against him.

The prisoner was accordingly charged with stealing on the 6th of November, 1839, one silver saucepan of the value of 2*l.* 10*s.*, the goods of the same prosecutor.

It appeared from the testimony of a servant of Lord Hay, who was more generally known by his Scotch title of Earl of Kinnoul, that the saucepan mentioned in the indictment, was last seen by him upwards of two years previous, at Duplin Castle, in Perthshire, where it was in use in Lady Kinnoul's apartment.

A witness proved, that, on the 16th of July, 1840, the prisoner called upon him, and left a parcel with him, which, on being opened, was found to contain ten pawnbroker's duplicates, from one of which it appeared that the silver saucepan was pledged at the shop of a pawn broker, named Mills, in the Edgeware Road, for 2*l.* 10*s.*, by a young woman.

The prisoner was in the service of Lord Kinnoul, at Duplin Castle, at the time the saucepan was in use there, and followed the family to England, in the month of April, 1838; and a witness stated that, in the natural course of things, the saucepan would come to England with the other property.

*C. C. Jones*, in his address to the jury for the prisoner, asked them to consider whether the prisoner took the article in question feloniously, or whether he took it, intending at the time he sent it to the pawnbroker's, to redeem it as soon as he could. He argued, that the fact of the prisoner's having kept the duplicate was a strong circumstance to show that he intended to redeem the property.

GURNEY, B., in his summing up, after stating the facts, observed: You will say whether the prisoner stole this property or not. I confess I think, that if this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined.

The jury found the prisoner guilty, and he was sentenced to be transported for fourteen years.

*Bodkin and Ballantine*, for the prosecution.

*C. Chadwicke Jones*, for the prisoner.

In Carrington's Supplement to the Criminal Law, p. 278, 3d edition, the following case is reported:—On an indictment for larceny by a servant in stealing his master's plate, it appeared, that, after the plate in question was missed, but before complaint made to the magistrate, the prisoner replaced it; and it was proved by a pawnbroker, that the plate had been pawned by the prisoner who had redeemed it: and the pawnbroker also stated, that the prisoner had on previous occasions pawned plate and afterwards redeemed it. Hullock, B., (Holroyd, J., being present) left it to the jury to say whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that in the latter case it was no larceny. The jury acquitted the prisoner: *R. v. Wright*, O. B., 1828, MS.

This decision has given rise to much discussion in various cases; and much difficulty has been found in applying the doctrine it lays down, to the facts of particular transactions. In some instances, where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly, by the receipt of money, to take it out of pawn, juries under the advice of the judge have acted upon the doctrine and acquitted. But in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and have convicted.

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## OCTOBER SESSION, 1840.

BEFORE MR. JUSTICE ERSKINE.

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REGINA v. SIMON LYONS.—p. 555.

Whether a person charged as a principal in the same indictment with a person charged as accessory, is a competent witness against the accessory, without being first either acquitted or confessing and suffering his punishment:—*Quære?* Whether a statement that the principal felon stole the property, which statement is in the usual form of an indictment for larceny, except that it gives no addition to the prisoner's name, and does not contain the words *contra pacem, &c.*, is in law an indictment against the principal, or merely inducement



to the statement of the charge against the accessory?—*Quære?* But semble that it is an indictment.

THERE were three indictments against the prisoner, which were the same in all respects except the time.

The first indictment stated, that James Edward O'Brien [not giving him any residence or addition] on the 18th September stole seven sovereigns, the moneys of David O'Brien, in his dwelling-house, [and not concluding *contra pacem*, &c.,] and that the prisoner feloniously incited him to commit the felony. There was also a count charging the prisoner as receiver.

C. C. Jones, for the prosecution, which was instituted by the father of James Edward O'Brien, stated to the learned judge, that the lad in his (Mr. Jones's) absence had been arraigned and pleaded guilty, and he was desirous, on the part of the prosecutor, of getting rid of that confession, and examining the lad as a witness against Lyons, without his being under the stigma of a conviction of felony.

ERSKINE, J., doubted if this could be done.

C. C. Jones.—A person may be examined as a witness previous to conviction.

ERSKINE, J.—Not where he is indicted in the same indictment. I never heard of such a thing.

C. C. Jones.—But this is not an indictment as against the principal, but an indictment against the accessory for a substantive offence.

ERSKINE, J.—I have great difficulty in saying that the principal is not indicted.

C. Phillips, for the prisoner Lyons.—In what other form could O'Brien be indicted? (a)

C. C. Jones.—I admit that the indictment is in the usual form, except in the omission of the description of O'Brien, and of the *contra pacem*. (b) But I submit that there was no other way in which the offence could be stated. I submit, that it is not an indictment against the principal, but merely inducement to the statement of the charge against the accessory.

ERSKINE, J.—This question does not arise at this time. If the lad himself desires it, I will allow him to retract his plea of guilty, and not call on him to plead again now. It may not be necessary. When he is called as a witness then will arise the question, whether he, being himself charged in the same indictment, can be a witness or not. The boy may have a nominal sentence passed on him, and then he will be a competent witness.

C. C. Jones.—In Roscoe's Crim. Dig. p. 117, it is said, as to accomplices—"Even where the accomplice has been joined in the same indictment with the prisoner, he may still be called as a witness before he is convicted," and reference is made to Hale, P. C. b. 2, 46, s. 95. There

(a) The statement on the record, as it related to O'Brien, though not in strictness of law a perfect indictment, was yet in a form on which, if no objection were taken before verdict, a prisoner might be convicted and punished. For the reasons for this opinion see note (b). It seems also to come within the definition of an indictment, which is "a written accusation of one or more persons of a crime, preferred to and presented on oath by a grand jury."

(b) The want of an addition to a prisoner's name is an objection to an indictment; but it is provided by the stat. 7 Geo. 4, c. 64, s. 19, that if the objection be pleaded by the prisoner, the court may order the indictment to be amended. As to the omission of the words "against the peace," &c., it is provided, by the 7 Geo. 4, c. 64, s. 20, *inter alia*, that no judgment shall be stayed or reversed on account of such omission.

is also this further statement—"It is said, that an accomplice indicted with another is an admissible evidence, *if he be not put on his trial*. 2 Stark. Ev. 2d edit. ; 2 Russell, 597. In strictness, however, there does not seem to be any objection to the admitting of the witness at any time before conviction."

ERSKINE, J.—It goes on to add, "The party that is the witness, says Lord HALE, is never indicted; because that much weakens and disparages his testimony, but probably does not wholly take away his testimony." And at p. 118, it is said, "When the accomplice has been joined in the indictment, and before the case comes on it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted." And again, "Where a party had been joined in the indictment, and it was intended to call him as a witness for the prosecution, it was formerly the practice to enter a *nolle prosequi* as to him." (a)

The lad was then asked by the officer of the court, whether he wished to retract his plea of guilty; he answered in the affirmative, and was allowed to do so.

ERSKINE, J., then said,—the course will be, that the lad will be put into the witness-box, and then the objection will be made that he is not competent, being himself charged in the same indictment; and your answer to that objection will be, first, that he is not so charged; and secondly, that if he is, yet still he is a competent witness: and I shall admit the witness, and reserve the question for the opinion of the judges.

C. C. Jones then inquired what was to become of the lad till the questions were ultimately decided, and being informed by his lordship that he must remain in prison, stated that he would rather, under such circumstances, that he should plead guilty and receive a nominal punishment.

This was accordingly done, the lad pleaded guilty to all three charges, and was sentenced to imprisonment for one day on each.

The trial of Lyons then proceeded, and the lad was examined as a witness against him.

The jury found him guilty, and he was sentenced to be transported for ten years.

C. Chadwick Jones, for the prosecution.

C. Phillips, for the prisoner.

(a) All the passages above cited are under the head of accomplices. At page 118, under the head of "Principal Felon," it is said upon an indictment against a receiver, "the principal felon, when not convicted, may be admitted as a witness against the defendant. This was allowed on the repealed stat. 22 Geo. 3, c. 28:—*Putnam's Case*, 2 East, P. C. 782; and in a prosecution on the stat. 4 Geo. 1, c. 11, for taking a reward to help to stolen goods. *Wild's Case*, lb. 783; 1 Leach, 21, (n); *Haslam's Case*, lb. 782; 2 Leach, 467."

## COURT OF QUEEN'S BENCH.

*Adjourned Sittings in London after Trinity Term, 1840.*

BEFORE LORD DENMAN, C. J.

## RAINY v. VERNON.—p. 559.

The plaintiff was employed to sell ground-rents by auction, on the terms of receiving a commission of one per cent. "on sale." After he had advertised the sale, but before the day of sale, the defendant sold the ground-rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency.

The question left to the jury was, whether this custom was *so notorious*, that the defendant must have known it; and that, if so, it was engrafted in the contract.

The jury found for the plaintiff for the full commission.

ASSUMPSIT for the "work, labour, care, and diligence and attendance of the plaintiff, by him then done and performed and bestowed, in and about the business of the defendant, and at his request;" with counts for money paid, and on an account stated.

Pleas.—1st, As to all but the sum of 47*l.* 6*s.* 6*d.*, non assumpsit; 2dly, as to that sum, payment of it into court; 3dly, a set-off for money had and received.

Replication—accepting the money paid into court in satisfaction of the causes of action in the introductory part of the second plea mentioned, and denying the set-off.

It was opened by Sir *W. Follett* for the plaintiff, that the only real question in the cause was, whether the plaintiff, who was an auctioneer, was entitled to commission on the sale of certain ground-rents, which he had been employed to advertise and had announced for sale by auction, but which had been sold by private contract by the defendant's solicitor, after they had been announced for sale by auction. He cited the case of *Driver v. Cholmondeley*,<sup>(a)</sup> and submitted that, after the defendant had employed the plaintiff to sell by auction, and after the plaintiff had accordingly offered the property for sale, the defendant had no right to say that the plaintiff was to have any thing less than his full commission.

On the part of the plaintiff a letter from Mr. Garrard, the solicitor of the defendant, addressed to the plaintiff, was given in evidence, and by

(a) The case of *Driver and another v. Cholmondeley and another*, was tried in the Court of Queen's Bench before Lord Denman and a special jury, at the sittings after Michaelmas Term, 1835. The plaintiffs claimed commission on the sale of property sold by private contract by one of the defendants for £128,500, after the plaintiffs had been employed to sell it. The commission claimed was one per cent. One of the principal points relied on for the defendants was, that, admitting the plaintiffs to have been employed upon the terms of receiving one per cent. as their commission on the purchase-money, the true meaning of the agreement was, that such commission was not to become payable unless the sale was effected by the plaintiffs themselves, and that the agreement for the sale, having been made by one of the defendants, the plaintiffs had not become entitled to their commission. The verdict was for the plaintiffs.

this letter the plaintiff was authorized to offer the ground-rents for sale by auction, and by it Mr. Garrard acceded to the terms mentioned by the plaintiff in a former letter,—that the plaintiff was to receive a commission of one per cent. “on sale.”

It was proved by a clerk of the plaintiff that the plaintiff had caused particulars of the ground-rents to be printed, and also had caused advertisements for the sale of them to be inserted in the newspapers, and handbills to be printed, and had also answered inquiries respecting them; and it was proved by Mr. Baker, a solicitor, that he had applied to the plaintiff for the particulars and price of the ground-rents on the behalf of a lady named Beecham, who afterwards became the purchaser of them for £21,500, the purchase being completed through the agency of Mr. Garrard, the solicitor of the defendant, and not through the agency of the plaintiff; it being stated by Mr. Baker, in his cross-examination, that he went to Mr. Garrard because his client was anxious to leave town.

To prove the usage with respect to auctioneers' commissions, Mr. Winstanley was called. He stated that he had been engaged as an auctioneer for forty years, and that, where an auctioneer was employed and a sale advertised, and before the sale the property was sold by the owner himself, the usage was for the auctioneer to receive his commission; and in his cross-examination he said, “If the particulars are prepared before the auctioneer is employed, that makes no difference. It would be the same as if the auctioneer had received the information and prepared them. If the auctioneer inserts advertisements, and calls the attention of the public to the property, and brings forward a person who eventually becomes the purchaser, the auctioneer always is paid his commission.”

The evidence of Mr. Winstanley was confirmed by that of Mr. Shuttleworth, and Mr. Hoggart, both of them auctioneers of considerable experience; and the latter said, “The usage is for the auctioneer to receive his commission after he is employed, however the property may be sold. The amount of commission does not depend on whether the auctioneer does much or little. The usual course of proceeding is to advertise and send out particulars. A good deal is done by connexion.—The plaintiff has large connexion.”

*Thesiger* addressed the jury for the defendant.—I may admit, that, where the whole trouble is taken by the auctioneer, he may be entitled to his commission; but here the particulars were prepared by Mr. Garrard, and the plaintiff had in fact very little to do. It is quite unreasonable that the plaintiff should be paid one per cent. under these circumstances, and if he is to be paid for his actual trouble, a sum of fifty guineas has been paid to him for that, beyond the expenses that the plaintiff has incurred.

For the defendant, Mr. Garrard was called. He said, “In the year 1838 the defendant consulted me respecting the sale of the ground-rents. I prepared particulars, which were printed and a great many distributed. In February I applied to the plaintiff at the defendant's request. I sent the plaintiff the particulars, which he divided into several lots: the plaintiff was not authorized to sell for less than £23,000. Nothing was said respecting my selling by private contract, and nothing was said as to what was to be done if the sale was by private contract. If there was no sale at all, the plaintiff was not to be paid any thing. I consider 51*l.* 10*s.* more than a remunerative price for the plaintiff's trouble.”

Sir *W. Follett*, in reply.—Mr. Garrard's evidence does not vary the case at all. The plaintiff was employed in the ordinary way. I do not offer evidence as to the value of the work, and there are no means before you of knowing it. I rely on the contract made on the usage to receive commission, and the implied contract founded on the usage cannot be varied without an express stipulation.

Lord DENMAN, C. J., (in summing up.)—This is an action for commission on the sale of ground-rents; and if you think the plaintiff is entitled to commission, the verdict ought to be for him. If there was an express contract that could not be varied; but that is not so here, and the plaintiff wishes to engraft on the contract this custom of the trade, by which, on a sale, although not by the auctioneer, the full commission is payable, and the three auctioneers who have been called prove this to be the custom. Now if you are satisfied that those three gentlemen prove a usage so notorious that the party must have known it, then it becomes a part of the contract. If the custom, however, is not so notorious, it would not be engrafted on the contract, and then a fair value only for the plaintiff's services is to be given, and you will say what is in your judgment a reasonable remuneration, whether 5*l.* 10*s.* or any greater sum. If, however, you think that the witnesses called for the plaintiff have, by their evidence, made out a case of usage so notorious that the defendant was aware of it, then the custom is engrafted on the contract, and the plaintiff is entitled to his commission.(a)

Verdict for the plaintiff for the amount of the commission.(b)

Sir *W. Follett*, and *Montague Smith*, for the plaintiff.

*Thesiger*, and *F. Robinson*, for the defendant.

(a) See the case of *Wood v. Wood*, ante, vol. 1, p. 59, (11 E. C. L. R. 312)

(b) Sir Edward Sugden says, (Vend. & Pur. 10th ed., vol. 1, p. 71,) "The auctioneer is, of course, entitled to a fair remuneration for his labour; the amount must generally depend upon private agreement, although, where there is no special agreement, and there is a particular commission commonly charged, and the seller was aware of the custom, that would undoubtedly, in most cases, be the measure of the allowance. It would be difficult in any case to recover an unwarrantable or exorbitant commission. Upon large sales this difficulty is mostly obviated by making a contract beforehand with the auctioneer. Mr. Justice Lawrence, upon one occasion, observed (in the case of *Tomkins v. White*, K. B., 1806, reported, 3 Smith Rep. 440,) that, 'considering the great sums of money which auctioneers were paid for preparing particulars and selling estates, they ought to be more correct. They contended some time ago (he added) that they were entitled to have the full sum of £5 per cent. commission, even if a man advertised an estate to be sold by auction, and it was afterwards sold by private contract, and then they contended for half the full commission.' If several land agents are employed to sell an estate, one who finds a purchaser may be entitled to a commission for so doing, although the purchase is made of another of the agents who receives his commission; but the jury are not bound to give what is termed the usual commission for finding a purchaser, viz., £2 per cent. If an agent for sale of an estate is to be paid a per centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If therefore it is paid into the bank under an act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained; and it is owing to his wilful default that he has not received it." See also the case of *Murray v. Currie*, ante, vol. 7, p. 584, (32 E. C. L. R. 641.)

BEFORE MR. JUSTICE COLERIDGE.

*(Who sat for Lord Denman, C. J.)*

POPE and Another v. ANDREWS.—p. 564.

IN an action for goods sold the defendant pleaded that the defendant and M. had agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication—denying the agreement, and denying that the plaintiffs had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action Mr. L. who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt, and it was proposed to give evidence of what Mr. L. had said after he had so written and before the action;—*Held*, that such evidence was not receivable without further proof of the agency of Mr. L. It was afterwards proved by Mr. L. that M. had asked him to propose to the plaintiff to accept his guarantee, and that Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks and then returned it. *Held*, that if the plaintiffs did not return the guarantee within a reasonable time they must be taken to have accepted it, and that unexplained—three weeks was an unreasonable time:—*Held*, also, that if M. was worth nothing, and was a mere man of straw, that fact would make no difference on these pleadings, as the plaintiffs had not replied fraud, but had denied that they had accepted the guarantee.

DEBT by the plaintiffs, as surviving partners of Samuel Pope, for goods sold, and on an account stated. Pleas—as to all except 15*l.* 14*s.*, *nunquam indebitatus*; and as to that sum there was an agreement entered into between the plaintiffs, (by Lewis Grave and Co., their agents,) George Maddick, and the defendant, that the sum of 15*l.* 14*s.* should be paid by the defendant to Lewis Grave and Co., by instalments of 5*s.* a fortnight, the first instalment to be payable on the 1st of February, 1840, and that, in consideration of the plaintiffs' so accepting payment, the instalments should be guaranteed by George Maddick; and the plea went on to aver that Maddick, by a memorandum in writing, guaranteed the payment of the instalments, and that the defendant and Maddick gave and entered into the guarantee and agreement in full satisfaction of the sum of 15*l.* 14*s.*, and of all damages sustained by the detention thereof. The plea also averred a tender of the instalment due on the 1st of February, and that the defendant was at all times ready to pay it, (concluding with a verification.) Replication:, as to all but the sum of 15*l.* 14*s.*, a *nolle prosequi*, and as to that sum a denial of the agreement mentioned in the plea, and of the acceptance of the guarantee and agreement in satisfaction and discharge of the sum of 15*l.* 14*s.*, and of all damages for the detention thereof, in manner and form &c., (concluding to the country.)

The defendant's counsel began, and it was opened by *Platt*, for the defendant, that this debt which had been due from the defendant to the plaintiffs, who had retired from business, had been assigned (with other debts) to Messrs. Grave & Co., and that a friend of the defendant named Maddick, had agreed with Mr. Lake, the attorney for Messrs. Grave & Co., to give a guarantee for payment of this debt by instalments, and that that guarantee was accordingly given; but that after the Messrs. Grave & Co. had kept it three weeks they returned the guarantee and wished to break the bargain, which he submitted they could not do.

It appeared that the present action was commenced on the 22d of

February, 1840; and it was proposed on the part of the defendant, to give evidence of what Mr. Lake, the plaintiff's attorney on the record, had said before the action was brought.

*W. H. Watson*, for the plaintiffs.—I submit that what the attorney on the record said before the action was brought, is not receivable in evidence. In the case of *Wagstaff v. Wilson* it was held, that a letter written to the plaintiff's attorney before action brought by the attorney, who afterwards appeared as attorney on the record for the defendant, was not evidence of a fact admitted therein, without further proof that the defendant authorized the communication, 4 B. & Ad. 339, (24 E. C. L. R. 70.) (a)

*Platt*.—I will put in the letter of Messrs. Farrar and Lake, demanding payment of the money.

The letter was put in: it was a letter from Messrs. Farrar and Lake to the defendant, dated the 8th of January, 1840, demanding payment of the debt, and stating, that if it was not paid within a week, legal proceedings would be commenced.

*G. T. White*, for the plaintiff, now proposed to go into evidence of what Mr. Lake had said, after the writing of this letter and before the bringing of the action.

*W. H. Watson*.—That is not made evidence by the letter which has been put in.

*Platt*.—It is shown that Messrs. Farrar and Lake wrote to demand payment.

*COLERIDGE, J.*—You must carry it to this extent, that if Messrs. Farrar & Lake had compromised the matter, the plaintiffs would have been bound by it. You must show an acquiescence in this agreement for a guarantee by the plaintiffs, or by Messrs. Grave & Co. The guarantee being kept by Messrs. Farrar & Lake would come to nothing, except you show an authority from either the plaintiffs or Grave & Co. for making the agreement, or a ratification afterwards.

The evidence was not given.

On the part of the defendant Mr. Lake was called. He said,—“We were concerned for Messrs. Grave & Co. to procure payment of this debt; on the 25th of January, 1840, a person named Maddick came and asked for indulgence, and I told him we could not agree to an offer he had made—of paying half-a-crown a week; on the 30th he came again and offered five shillings a fortnight; he wished me to make the offer to the plaintiffs; I at first said it was of no use, but at last consented to do so, and sketched out a guarantee and Maddick signed it; I don't remember that it was mentioned when I was to give an answer; I communicated this to Messrs. Grave & Co. on the next day, and sent them the guarantee; I did not receive the guarantee back from them till the

(a) In the case of *Marshall v. Cliff*, 4 Camp. 133, which was an action against the owners of a ship, it was held to be sufficient *prima facie* evidence of ownership, to put in an undertaking to appear for them before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he described them as owners; but in the case of *Wagstaff v. Wilson*, Mr. Justice J. Parke says, “In *Marshall v. Cliff* the attorney's letter relied on to prove the joint ownership of the defendants contained an undertaking to appear for them. That was a step in the cause. In *Roberts v. Lady Gresley*, [ante, vol. 3, p. 380.] (14 E. C. L. R. 358.) the party whose letter was produced and whose agency was relied upon, had already acted as agent for the defendant, and Lord Tenterden thought there was evidence to go to the jury that he continued so when the letter was written.” See the cases of *Wilmut v. Smith*, ante, vol. 3, p. 453, (24 E. C. L. R. 386;) *Peyton v. Governor of St. Thomas's Hospital*, Id., p. 363, (24 E. C. L. R. 349;) *Roberts v. Lady Gresley*, Id., p. 380, (24 E. C. L. R. 358.)

20th of February, and never notified the repudiation of it to the defendant or to Maddick till the 21st."

*W. H. Watson.*—The guarantee was only accepted conditionally, and Messrs. Grave afterwards repudiated it. During the three weeks from the 30th of January to the 21st of February no communication takes place.

*COLERIDGE, J.*—It appears to me on Mr. Lake's evidence to stand thus:—Mr. Lake had no authority *proprio marte* to bind either the plaintiffs or Messrs. Grave & Co., but when Maddick makes the proposal Mr. Lake says he will submit it to the plaintiffs, and they keep the guarantee for three weeks. It seems to me, that unexplained, that is too long a time, and as they had not returned it before they cannot do so then.

*W. H. Watson* addressed the jury for the plaintiffs, and called witnesses with a view of showing that Maddick was a person who had no property, and whose guarantee was therefore valueless, but one of the witnesses stated that he informed Messrs. Grave & Co. of this as early as the 9th of February.

*COLERIDGE, J.* (in summing up.)—The question is, whether the plaintiffs have accepted this guarantee. As to any oral assent or any assent in writing, it is not even suggested; but a party may assent by act as well as by word, and the defendant here alleges, that the plaintiffs by their act have accepted this guarantee. If a person offers a guarantee, and more still, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it just the same as if he had assented to it by words; and if he has ever accepted it either by word or by act, he cannot afterwards retract. It appears in the present case, that this debt was due from the defendant to Pope & Co., who retired from business and assigned this debt to Grave & Co., and that on the 8th of January Messrs. Farrar & Lake apply for payment, and threaten legal proceedings if the money is not paid. After this a person named Merrick wishes Mr. Lake to propose to Messrs. Grave that the money should be paid by instalments on Maddick's guarantee. Mr. Lake at first declines to make the proposal, but at last says that he will do so, and draws a guarantee which Maddick signs, and which is dated on the 30th of January. The question then is, whether the plaintiffs accepted this guarantee. The plaintiffs now say that Maddick was a mere man of straw; but even if that be so, it is unimportant on these pleadings, as the plaintiffs do not reply that they were induced to accept the guarantee by misrepresentation and fraud, but they deny that they ever accepted it at all. You will therefore consider whether the plaintiffs have kept this guarantee so long a time without repudiating it, that they must be taken to have accepted it. At an earlier stage of the cause I gave an opinion that they have, and I still am of that opinion. It is stated by one of the witnesses, that he informed Messrs. Grave & Co. that Maddick was worth nothing as early as the 5th of February; but, instead of returning the guarantee on that day, Messrs. Grave & Co. kept it till the 21st: and I own that it seems to me that they have kept it for an unreasonable time; for, according to their own statement, they on the 5th of February had had the in-



formation on which they determined not to accept it, and yet they don't return it to Mr. Lake to send back to the defendant till the 21st.

Verdict for the defendant.

*W. H. Watson*, for the plaintiffs.

*Platt*, and *G. T. White*, for the defendant.

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*First Sitting at Westminster in Michaelmas Term, 1840.*

BEFORE MR. JUSTICE PATTESON.

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BURLING v. PATERSON.—p. 570.

Goods were taken under a *fi. fa.* as the goods of Sophia W., and on an issue directed to try whether the goods were the property of J. B., it was proved that the goods, prior to 1836, belonged to Martin W. when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W. with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid £128 to the official assignee for Martin W.'s interest in the goods. Early in 1839, Martin W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a *fi. fa.* against Sophia W. The goods always had remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never was in possession of them:—*Held*, that on these facts J. B. had made out his property in the goods, and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent.

*Held*, also, that the fact, that the assignment was kept at Martin W.'s house, was immaterial, and that it was also immaterial that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them would pass by the execution of the deed.

Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence, whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it.

ISSUE directed by the Court of Queen's Bench to try whether certain goods were, on the 2d of March, 1840, the property of James Burling.

It appeared that the goods in question had been seized by the sheriff of Middlesex, under a writ of *fieri facias*, which had been sued out against Sophia Wray, and it was proved that the goods in question had originally, and before the year 1836, belonged to a person named Martin Wray, who kept a shop in Holborn for the sale of medicines, at which place the goods were seized. It was also proved, that, in the year 1836, the goods were distrained on for rent due from Martin Wray, and that the amount of the distress was paid in the name of Sophia Wray, and, as was proved by Martin Wray, with the money of the plaintiff. It further appeared that Martin Wray had become bankrupt in the year 1837, and that after his bankruptcy the plaintiff had purchased the assignee's interest in the goods, and paid the official assignee £128, and that early in the year 1839, Martin Wray took the benefit of the Insolvent Debtors' Act. It did not appear that the assignee under that insolvency ever claimed the goods, although Martin Wray continued to be the ostensible owner of them at the time of his insolvency, and also down to the 2d of March, 1840. On the part of the plaintiff a deed of assignment dated on the 20th of November, 1839, between Sophia Wray of the one part, and the plaintiff of the other part, was given in evidence, by which, in consideration of 248/.

13s.. Sophia Wray assigned the goods mentioned in a schedule to that deed (the goods in question) to the plaintiff. The attestation of the deed was in the usual form, but the attesting witness (a female servant of Martin Wray) could only recollect seeing Sophia Wray sign the deed, and could not recollect whether any other form was observed, and this witness also could not recollect when it was that she saw the deed signed, any further than that it was about ten months before the trial. (a) There was no evidence to show that Sophia Wray had ever been in possession of any part of the goods, Martin Wray always appearing as the ostensible owner. It was also proved that the deed of the 20th of November was kept in a cupboard at the house of Martin Wray, in which the goods were seized by the sheriff on the 2d of March, 1840.

*Platt*, for the defendant, addressed the jury, and contended that the goods never were the property of the plaintiff, and that the bill of sale, which was not distinctly proved to have been executed before the 2d of March, 1840, was fraudulent.

*PATTESON, J.*, (in summing up.)—The question is, whether these goods, on the 2d of March, 1840, were the property of the plaintiff, the goods having been on that day seized by the sheriff of Middlesex, as being the goods of Sophia Wray; however, if they were neither the property of the plaintiff nor of Sophia Wray, the plaintiff will not be entitled to recover on this issue. The case on the part of the plaintiff is, that the property in these goods passed to him by the deed of the 20th of November, and the plaintiff asserts that there was no fraud or false credit in Sophia Wray, as Martin Wray always appeared as the owner of the goods. As regards the creditors of Martin Wray, the plaintiff could not perhaps hold these goods as against them; but as they do not claim the goods, and the execution in the present case was for a debt due from Sophia Wray, and not for a debt due from Martin Wray, the possession of Martin Wray appears to me to be immaterial, though it is singular that the assignees under Martin Wray's insolvency should never have claimed the goods. Then, as to the bill of sale, if Sophia Wray really executed the bill of sale before the 2d of March, 1840, she transferred the goods to the plaintiff, and the property in them was passed by it. There is no evidence that Sophia Wray was ever in the ostensible possession of these goods, or ever gained any false credit by them, the possession of them having always been in Martin Wray. Then, did Sophia Wray sign, seal, and deliver the deed? The witness recollects her signing it, which is the least material point; (b) however, you will say whe-

(a) In cases where the precise time of the execution of a deed is important, it might be often convenient for the date of the execution of the deed to be inserted in the attestation, and for the attesting witness to insert the date in his own handwriting.

(b) Very ancient deeds were never signed; and before the Statute of Frauds, (29 Car. 2, c. 3.) it is quite clear that even conveyances of land did not require a signature, and were rendered valid by the seal only, and in the case of *Lemayne v. Stunley*, 3 Lev. 1, North, C. J., and Wyndham and Charlton, J., were of opinion that the testator putting his seal to a will, was signing within the Statute of Frauds, but Levinz, J., doubted, and in the case of *Warneford v. Warneford*, 2 Str. 764, Lord Raymond held at Nisi Prius that "sealing a will is a signing within the Statute of Frauds and Perjuries." Royal charters have at this day no signature; the warrant under the royal sign manual, on which each of them is made out, standing in much the same relation to the charter itself as the agreement for the sale of an estate does to the deed of conveyance. Many of us have no doubt seen pictorial representations of King John signing Magna Charta, without recollecting that they are founded on error. Magna Charta was sealed, but was not signed; and even the articles for that charter, entered into between the barons and King John, commencing "Ista sunt capitula que Barones petunt et Dominus Rex concecit," (now remaining in the British Museum,) are under seal, but not signed; and it seems to be a matter

ther this evidence satisfies you that Sophia Wray authenticated the seal, either by touching it or the like, and also whether she delivered the deed, all which is very likely to have occurred, though the witness does not remember it. If this deed was executed by Sophia Wray upon the 2d of March, I see nothing to impeach it, as, if executed by Sophia Wray, it would pass the property, unless there was some fraud; and as the goods were never left with Sophia Wray; and as no false credit was given to her by the possession of them, I think that there is nothing from which you can infer fraud. If the whole matter was fraud from beginning to end, the case would be different; but we find that the distress was paid out in the name of Sophia Wray, but with the money of the plaintiff, and that the plaintiff also paid £128 to the official assignee. It therefore appears to me that there is no pretence for saying that there was fraud. It is proved that the plaintiff had not the possession of the deed, and that it was kept at Martin Wray's; but I think that that is not material. There is also no evidence of any delivery of possession of the goods to the plaintiff, as by giving a chair in the name of the whole, or the like: however, that is not necessary, though sometimes done, as the property in the goods would pass by the mere execution of the deed. If this deed was executed by Sophia Wray upon the 2d of March, 1840, it appears to me that the plaintiff has made out his case.

Verdict for the defendant. (a)

*Byles*, for the plaintiff.

*Platt*, for the defendant.

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On a subsequent day, *Byles* applied to the court for a new trial, on affidavits, and also on the ground that the verdict was against evidence; and the court granted a rule to show cause.

of some doubt whether King John could write, as no royal autograph of any English monarch is known to be in existence earlier than that of Richard the Second, whose reign commenced 161 years after the death of King John; and since that time the series of royal autographs is complete. The charter of the foundation of Battle Abbey by William the Conqueror, which is in the British Museum, (Harl. Char. 83, A. xii.,) has evidently had a seal attached to it, which has been lost, but it has now at the foot of it the *mark* of William the Conqueror, the marks of the two archbishops, of four bishops, and of six of the temporal nobility. The cross of each has the name written against it thus, "Wille + lmus Rex; Lanfr + ancus arch. Cant.; Tomas + archiep. Ebor." &c., but the names are manifestly not signatures. This charter is in a very plain and good handwriting, and is in perfect preservation. The leases of colleges and other corporations aggregate are always under their common seal, without any signature at all being affixed to them.

(a) See the case of *Riches v. Evans*, Esq., post.

*Second Sittings at Westminster in Michaelmas Term, 1840.*

BEFORE MR. JUSTICE PATTESON.

## MASON v. NEWLAND and ROSIER.—p. 575.

A mare was distrained, damage feasant, by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. & B. joined in selling the mare for the keep:—*Held*, in an action of trover, by the owner of the mare against A. & B., that if they *bonâ fide* and honestly *intended* to sell the mare under the provisions of the stat. 5 & 6 Will. 4, c. 59, s. 4 (the cruelty to animals' act), they were entitled to notice of action, and to have the venue laid in the proper county: but on these facts the judge would not nonsuit, but left it to the jury to say whether the defendants meant *bonâ fide* to act upon the provisions of that statute, and that if they did the defendants were entitled to their verdict.

If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment.

If a defendant does not add the words "by statute" on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of Parliament, which allows a plea of not guilty; but if at the end of the plaintiff's case it appear that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea.

*Seemle*, that under the 4th section of the stat. 5 & 6 Will. 4, c. 59, the person who is bound to supply food to impounded cattle is the distrainer or person at whose suit they are impounded, and not the pound-keeper; but if the pound-keeper supplies the food at the request of the distrainer, or the distrainer joins with the pound-keeper in a subsequent sale of the cattle under this act, the pound-keeper and the distrainer are for this purpose to be considered as one.

*Seemle*, that the 4th section of this statute excludes any right in the owner of the cattle to supply them with food while in the pound. Under the provisions of this statute the distrainer who supplies the food, may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food, if the owner of the cattle was willing to supply the food himself.

If cattle be sold under this provision of the stat. 5 & 6 Will. 4, c. 59, the distrainer can only get the single value of the food, and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food, and the expenses of the sale, is to be returned to the owner of the cattle.

The 5th section of the stat. 5 & 6 Will. 4, c. 59, does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle without being liable to an action for doing so.

**TROVER** for a mare.—Pleas by the defendant Newland: 1st, Not guilty; 2d, that the defendant Newland was keeper of a common pound, and that the defendant Rosier had taken the mare in a close of his doing damage, and had delivered her to this defendant to be impounded, and that he did impound the mare for the cause aforesaid. Pleas by the defendant Rosier: 1st, Not guilty, "by statute;" and, 2d, that he took the mare damage feasant, and caused her to be impounded. (a) New assign-

(a) As the forms of the defendants' special pleas may be useful in practice, we have subjoined them:—

"And for a further plea in this behalf, the defendant A. N. says, that before and at the time when, &c., he, the defendant A. N., was and still is the keeper of a common and open pound, situate in the parish of M., in the county of S., to wit, the pound of the manor of V. there, and the defendant T. B., just before the said time when, &c., to wit,

ment to the second plea of the defendant Newland, that the plaintiff commenced his action for that this defendant on other and different occasion, and for a different purpose, took and converted the mare to his own use: there was also a similar new assignment to the 2d plea of the defendant Rosier.

It appeared that the plaintiff's mare had been turned out on Mitcham Common on the 26th of June, 1840, and that the mare had on that night got into the field of the defendant Rosier, who had sent her to the other defendant, who was the pound-keeper, to be impounded; and that the mare was kept in the pound for several days, and fed by the defendant Newland. It further appeared, that the plaintiff offered 2s. 6d. for the damage, and 2d. for the impounding, but that the defendant Newland said that he was to receive 10s. for the damage, and would not deliver up the mare. It also appeared that printed hand-bills were posted up, for more than three days, announcing that the mare would be sold at Croydon market for its keep on the 10th of July, and that it was sold accordingly for 4l. 10s., the defendant Rosier being present. It was also proved that the mare was worth £7 or £8.

*E. James*, for the defendant Newland.—I submit that the defendant Newland was entitled to notice of action. The defendant Newland acted as the pound-keeper, and he supplied food to the mare while in the pound, and he was therefore justified in selling her under the stat. 5 & 6 Will. 4, c. 59, s. 4, (a) which is an act for preventing cruelty to ani-

on the day and year aforesaid, had taken and detained the said cattle in the declaration mentioned, in a close of him, the said defendant T. R., situate in the parish, county, and manor aforesaid, doing damage there to the defendant T. R., and had then delivered the same to the defendant A. N., as keeper of the said pound, to be impounded in the said pound. And the defendant A. N., as keeper of the said pound, then and just before the said time when, &c., took and received the said cattle of and from the defendant T. R., for the purpose aforesaid, and then, at the request of the defendant T. R., impounded the same as such distress as aforesaid in the said pound, and then, as keeper of the said pound, and at the request of the said defendant T. R., kept and detained the same from the plaintiff until and at the said time when, &c., so impounded as such distress as aforesaid in the said pound, and at the said time when, &c., refused to deliver the same to the plaintiff, the same being detained by him the defendant A. N., as keeper of the said pound as aforesaid, for and at the request of the defendant T. R., as he the defendant A. N. might for the cause aforesaid, which is the same supposed conversion in the declaration mentioned, and whereof the plaintiff hath above complained; and this the defendant A. N. is ready to verify, &c.

(Signed), JAMES WATSON.

"And for a further plea to the grievances in the declaration mentioned, so far as they relate to the said mare therein mentioned, the defendant T. R. says, that he the defendant T. R., before and at the said time when, &c., was lawfully possessed of a certain close with the appurtenances, called the Wildford-lane Field, situate at M., in the county of S., and because the said mare before and at the said time when, &c., was wrongfully in the said close of the said defendant T. R., eating and depasturing the grass and herbage of the defendant T. R. there then growing, and doing damage to the defendant T. R., he the defendant T. R. seized and took the said mare in the said close so doing damage thereon as aforesaid, as a distress for the said damage, and led the said mare out of the said close to the common pound in M. aforesaid, and there impounded and kept impounded the same as it was lawful for the defendant T. R. to do for the cause aforesaid, which are the same grievances in the declaration mentioned, so far as they relate to the said mare therein mentioned; and this the defendant T. R. is ready to verify, &c."

(Signed), H. H. PYKE.

(a) By which, after reciting that "Whereas great cruelties are practised by reason of keeping and detaining horses, asses, and other cattle and animals impounded and confined without food, frequently for many days," for remedy whereof it is enacted, "That from and after the passing of this act, every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any enclosed place, shall, and he is hereby required to find, provide, and supply such horse, ass, and other cattle or animal so im-

mals; and by sect. 19 of that act, it is enacted, "that all actions and prosecutions which may be brought or commenced against any person for anything done in pursuance or under the authority of this act, shall be commenced within one calendar month next after the fact committed, and not afterwards, and shall be brought and tried in the county or place where the cause of action shall arise, and not elsewhere, and notice in writing of any such action, and specifying the cause thereof, shall be given to the defendant fourteen clear days at least before the commencement of any such action; and the defendant in such action may plead the general issue, and give this act and any other matter or thing in evidence at any trial to be had thereupon: and if the cause of action shall appear to arise from or in respect of any matter or thing done in pursuance and by the authority of this act, or if any such action shall be brought after the expiration of one calendar month, or shall be brought in any other county or place than as aforesaid; or if notice of such action shall not have been given in manner aforesaid, or if tender of sufficient amends shall have been made before such action commenced, or if a sufficient sum of money shall have been paid into court after such action commenced, by or on behalf of the defendant, the jury shall find a verdict for the defendant:" and this action, if brought at all, ought to have been brought in Surrey instead of Middlesex.

*Montagu Chambers*, for the defendant Rosier.—The defendant Rosier was entitled to have notice of action, and the venue in the proper county. The action is not for the taking or putting in the pound, but is for the subsequent sale. It is shown that the animal was fed in the pound, and the sale either was, or was evidently intended to be, in strict compliance with the provisions of the 4th section of the stat. 5 & 6 Will. 4, c. 56.

PATTESON, J.—The enactments as to the supply of food under the 4th section do not appear to me to be intended to apply to the pound-keeper. It seems to me that the person who, under those enactments, is bound to supply the animal with food, is the person at whose suit (if I may use the expression) the animal is put in the pound.

*Montagu Chambers*.—There is also no conversion proved against the defendant Rosier, except the putting in the pound.

PATTESON, J.—The 5th section of the statute 5 & 6 Will. 4, c. 56,

pounded or confined daily, with good and sufficient food and nourishment, for so long a time as such horse, ass, or other cattle or animal shall remain and continue so impounded or confined as aforesaid; and every such person who shall so find, provide, and supply any such horse, ass, or other cattle or animal with such daily food and nourishment as aforesaid, shall and may, and he and they are hereby authorized and empowered to recover of and from the owner or owners of such cattle or animal not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace, within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture or any damage or injury may be recovered under and by virtue of any of the powers or authorities in this act contained, and which value of the food and nourishment so to be supplied as aforesaid, such justice is hereby fully authorized and empowered to ascertain, determine, and enforce as aforesaid, and every person who shall have so supplied such food and nourishment as aforesaid, shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass, or other cattle or animal, openly at any public market (after having given three days' public printed notice thereof) for the most money that can be then got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal."

does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle, without being liable to an action for doing so. I cannot nonsuit the plaintiff; because the 19th section of the act says, that if there is no notice of action, or the venue is not in the proper county, the verdict shall be for the defendant. I think that the selling of the mare was a conversion distinct from the taking, but I think also that that was intended to be a sale under the 4th section of the statute 5 & 6 Will. 4, c. 59; and it therefore appears to me that the defendants are within the protection of the 19th section, if they acted *bonâ fide*; and the question whether they acted *bonâ fide* or not, is the question that I must leave to the jury.

*E. James* addressed the jury for the defendant Newland. A pound-keeper is not the person to determine whether cattle shall be impounded or not; he must impound if the cattle are brought to him. In the case of *Brandling v. Kent*, 1 T. R. 60, (a) Mr. Justice BULLER says, "It has been decided in the case of a pound-keeper that he is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not." And if the defendant Newland had discharged the animal for the 2s. 6d. offered, the other defendant might have sued him for the difference. The question is, whether the defendant Newland acted *bonâ fide*? He fed the animal, and believed he had a right to sell it for its keep.

PATTESON, J.—I doubt whether the pound-keeper is bound to feed an animal in the pound; but if he does it by the direction of, and in conjunction with the person who caused the cattle to be impounded, they are then to be considered as one.

*Montagu Chambers* addressed the jury for the defendant Rosier, and contended that the defendant Rosier had acted *bonâ fide*.

*Charnock*, for the plaintiff.—The plea of not guilty, which was pleaded by the defendant Newland to the declaration, is not a plea "by statute," (b) neither is his plea of not guilty to the new assignment. The plea of the defendant Rosier to the new assignment is also not "by statute," and it is on that plea that the present trial proceeds.

*Chambers*.—This objection cannot apply to the want of notice of action; and with respect to the defendant Rosier, his plea to the declaration is "by statute."

PATTESON, J.—With respect to the defendant Rosier, there is certainly nothing in the objection. His plea of not guilty to the declara-

(a) In the case of *Badkin v. Powell*, Cowp. 476, Lord MANSFIELD, C. J., said, "The pound-keeper is bound to take and keep whatever is brought to him at the peril of the person who brings it. There is no judgment, no direction, no written warrant or examination to be had by him." "He only takes the cattle as he is obliged to do, at the peril of the persons who bring them. If wrongfully taken, they are answerable, not *he*. It would be terrible if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable in another action for not letting them go. If he goes one jot beyond his duty, and assents to the trespass, that may be a different case." "When cattle are once impounded he cannot let them go without a replevin, or without the consent of the party. Upon their being released, he is entitled to legal fees. If he is guilty of extortion, there is another remedy." See the case of *Rex v. Bradshaw*, ante, vol. 7, p. 238.

(b) By the rule T. T. 1 Vict. "It is ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he shall insert in the margin of such plea, 'By statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue and the *nisi prius* record."

tion is "by statute;" and it was held in the case of *House v. The Thames Commissioners*, 6 Moore, 324, that the plea of the general issue to the declaration goes also to the new assignment, even though there was judgment by default on the new assignment.

*Chadwicke Jones*, for the plaintiff.—Does not your lordship think that the new assignment gives the go-by to the former pleas?

PATTESON, J.—No; only to the justification. You join issue on the general issue by saying, "and the plaintiff doth the like."

*Chadwicke Jones*.—The defendant Newland does not refer to any statute on the margin of any of his pleas.

PATTESON, J.—I think it is quite clear that for want of the marginal reference the defendant Newland could not have gone into evidence to bring himself within the act of parliament. The rule only is that he shall not give special matter in evidence. The defendant Newland has given no evidence, and he has not proposed to give any. But this is a failure on the plaintiff's case; because, as it appears that this was a case within the act of Parliament, the plaintiff was bound to give some evidence to show that he had given notice of action, and had laid the venue in the proper county.

*Chadwicke Jones*.—That being your lordship's opinion, I can only ask your lordship to leave it to the jury on the bona fides.(a)

PATTESON, J. (in summing up).—The only question is, whether these defendants sold this mare bona fide, to reimburse themselves for its keep while it was in the pound; for if in selling this mare they were intending to proceed on the provisions of this act of Parliament, the plaintiff should have given notice of action, and laid his venue in Surrey. It is not essential that the defendants should have precisely, and in every respect, pursued the enactments of the statute; it is sufficient if they intended to proceed actually and honestly on its provisions; and if they did, you, as a jury of the county of Middlesex, have no jurisdiction. It is not necessary here to consider whether the pound-keeper is the person bound to supply food to impounded cattle—I rather think that he is not, and that the person who causes them to be impounded is the person who is bound to supply them with food; but if the pound-keeper supplies them with food, and the distrainer joins in selling them for their keep, the distrainer and the pound-keeper are for this purpose to be considered as one. The 4th section seems to exclude any right in the owner of the cattle to procure food for them while in the pound; but it also does not absolutely give the distrainer double the value of the food supplied by him, but only empowers a justice of the peace to allow a sum not exceeding double the value; and I am quite sure that no justice would allow more than the actual value of the food if the owner of the cattle was willing to supply it himself. The distrainer may either go before a justice to have a sum allowed, or he may sell; but if the distrainer sells he can only get the single value of the food, and not

(a) In the case of *Wedge v. Berkeley*, 6 Ad. & E. 668, it was held, that under the stat. 24 Geo. 2, c. 44, s. 1, a magistrate sued for detaining goods on a suspicion of felony, is entitled to notice of action, if he proceeded under a bona fide belief that he was executing his duty, although it be proved that he has no reasonable ground of suspicion, and the bona fides, as well as the reasonableness of the suspicion, is a question for the jury; and if the plaintiff seeks to maintain his action without having given notice, it lies on him to cause the question of bona fides to be put to the jury. See also the case of *Reed v. Cowmeadow*, ante, vol. 7, p. 821.



the amount of the damage for which the cattle are distrained, as he is to return to the owner of the cattle all the overplus beyond the value of the food and the expenses of the sale;—a strange provision, but so it is. Here the defendants chose the latter alternative, and have sold; and the question is, whether they *bonâ fide* intended to sell under this act of Parliament. If they acted honestly, though perhaps mistakenly, they are entitled to a verdict; but if you think that they did not act *bonâ fide*, and that the sale was all a pretence to injure the plaintiff, then the plaintiff is entitled to your verdict.

Verdict for the plaintiff—Damages £7.

*Chadwicke Jones*, and *Charnock*, for the plaintiff.

*E. James*, for the defendant *Newland*.

*Montagu Chambers*, for the defendant *Rosier*.

On a subsequent day a new trial was applied for by *Montagu Chambers*; on the ground that the question of intention or of *bona fides* did not arise, inasmuch as all the requisites of the statute to justify a sale of the mare had been proved to have been complied with on the part of the defendant *Rosier*; and by *E. James*, for the reasons urged at the trial: but the court refused a rule, as the damages were under £20.

*Sittings at Westminster after Michaelmas Term, 1840.*

BEFORE MR. JUSTICE COLERIDGE.

GUY v. GREGORY.—p. 584.

In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character: the plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription:—*Held*, that there was evidence to go to the jury in support of the allegation in the declaration.

The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—*Held*, that the plaintiff could not go into evidence to show that his wife was a respectable person, as on these pleadings she must be taken to be so:—*Held*, also, that the plaintiff could not go into evidence to show that his wife had become ill, and died soon after the publication of the libels.

**LIBEL.**—The declaration stated, that before and at the time of the committing of the grievances, the plaintiff, together with his wife and family, was the occupier and possessor of a certain house known by the name or sign of the Cocoa Tree, for the purpose of opening the same as a club-house, and carrying on the business of a club-house tavern and coffee-house keeper, and had opened the same as a club-house, and carried on the said business there; and that divers persons had paid divers annual sums for the privilege of using and frequenting the said house; and that the defendant, in a certain newspaper called the *Satirist*, on the 22d of March, 1840, published a libel on the plaintiff. This libel imputed that the Cocoa Tree in St. James's Street "was opened by a party

of play-table sharpers, under the recognised leadership of a woman of notorious character." The 2d count stated another libel, in the *Satirist* of the 29th of March. This libel contained imputations that the house was a gaming-house, at which persons were defrauded of their money. The 3d count stated a third libel, contained in the *Satirist* of the 5th of April, which, after making similar imputations, stated that a sporting earl, who had been plundered of some money there, went with some friends, and took away a case of fraudulent dice; and it then went on to state, that "the keeper of the den, a notorious woman, who formerly kept a house of ill-fame at Pimlico, and subsequently lived in Panton Square, and recently in Bolton Row, being discovered by the party, they removed the brick-dust from her cheeks, substituting layers of black lead, in order, as they said, that she might, in colour at least, be a correct representation of her foster-father, his satanic majesty." The declaration also stated special damage, but of this no evidence was given. Pleas—

1st, not guilty; 2d, as to so much of the declaration as related to the plaintiff's opening the house as a club-house, and carrying on the business as a tavern and coffee-house keeper—a plea, denying that the plaintiff did so; 3d, as to the allegation that persons paid annual sums for the privilege of using the house as a club-house—a plea, denying that they had done so; 4th, to a part of the first count—a plea, stating in substance that the plaintiff and a person named Smart, and a woman of notorious character, named Harrison, kept the house called the Cocoa Tree as a common gaming-house; 5th, as to part of the libel in the second count, that the plaintiff had knowingly suffered loaded dice to be used in the house, whereby persons were defrauded by the plaintiff; 6th, to the whole of the first count, that the plaintiff kept a common gaming-house; 7th and 8th, the like as to the whole of the second and third counts. These three latter pleas were in the usual form of an indictment for keeping a common gaming-house. Replication as to those pleas which concluded to the country, a similitur, and as to the other pleas, *de injuria*.

It was opened by *Thesiger* for the plaintiff, that the plaintiff had taken the house known as the Cocoa Tree club-house, in St. James's Street, intending to open it as a club-house, and that several gentlemen had become subscribers to it; and that soon after the publication of these libels the plaintiff's wife had become ill, and died.

The publication of the libels by the defendant was proved; and to prove the introductory allegations of the declaration, two of the plaintiff's servants were called, who proved that the house had been fitted up as a club-house; and one of them proved that a book was kept for subscribers to insert their names, in which book he had seen Count d'Orsay and Colonel Bentinck put their signatures; but there was no evidence of any subscription having been actually paid.

*Thesiger*, for the plaintiff, proposed to ask one of the witnesses as to the state of health of the plaintiff's wife just after these libels were published.

*Chadwicke Jones*, for the defendant.—I submit that any thing that has occurred to Mrs. Guy cannot be evidence in this cause.

*COLERIDGE, J.*—How is it relevant to any of these issues? The plaintiff could not in this action recover damages either for the sufferings of his wife, or for the loss occasioned by her death. It does not seem to me to be relevant to the inquiry.

*Thesiger*.—I submit that it is evidence, as showing the general nature and character of these libels. They refer in direct terms to the plaintiff's wife; and we may therefore be allowed to give general evidence of the effect the libels had on her.

COLERIDGE, J.—If you had stated her illness on the record, you could not have gone into evidence of it; and I think you cannot do so the more, as you have not stated it.

*Thesiger*.—As the libels assail the plaintiff's wife, may I show that she is a respectable person?

COLERIDGE, J.—I think that she must be taken to be so.

The evidence was rejected.

*Chadwicke Jones* objected that there was no evidence on the third issue, that any one had paid any subscription.

COLERIDGE, J.—I think there is evidence to go to the jury.

*Chadwicke Jones*, for the defendant, addressed the jury on that point, and also in mitigation of damages.

COLERIDGE, J., left it to the jury to say whether, on the evidence, they were satisfied that subscriptions had been paid, or whether they thought, by putting their names in the book, the gentlemen who had been mentioned merely meant to intimate that they were willing to become subscribers.

Verdict for the plaintiff on all but the third issue, with £100 damages; and on the third issue, for the defendant.

*Thesiger* and *Hoggins*, for the plaintiff.

*Chadwicke Jones*, and *Wingrove Cooke*, for the defendant.

### READ v. DUNSMORE.—p. 588.

The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach-fare of the man back to London, and also the back-carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom, without these exceptions; but the judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment.

If a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman the master dismissed the journeyman, the judge left it to the jury to say whether the master was not justified in such dismissal.

ASSUMPSIT.—The first count of the declaration stated "that before and at the time of the plaintiff entering into the service and employ of the defendant, and of the making of the promise of the defendant as hereinafter next mentioned, the defendant exercised and carried on the trade and business of a carpenter in London, and thereupon heretofore, to wit, on the first day of September, A. D., 1839, in consideration that the plaintiff at the defendant's request had entered into the service and employ of the defendant, in his said trade and business in a certain capacity, to wit, as a journeyman carpenter, upon and subject to certain terms and conditions, that is to say, that the defendant should pay the

plaintiff for his expenses by him incurred in travelling, and in carrying and conveying his tools of trade from London to any place in the country to which the defendant should order the plaintiff to go, and to which the plaintiff should accordingly go in the course of his said service, and employ to do and perform work for the defendant with those tools, and also pay the plaintiff for his expenses by him incurred in travelling and in carrying and conveying his said tools back again from that place to London aforesaid, he, the defendant, then promised the plaintiff that he would perform and fulfil those terms and conditions; and the plaintiff avers that he, confiding in the said promise of the defendant, did continue in the said service and employ on the terms and conditions aforesaid for a long time, to wit, until the 15th of June, 1839, and that, in the course of the said service and employ, and whilst the plaintiff was therein, to wit, on the 28th of May, 1839, the defendant ordered the plaintiff to go to a certain place in the country, to wit, to Staunton in Wiltshire, to do and perform work for the defendant with the plaintiff's tools of trade, and the plaintiff then accordingly did go and travel from London aforesaid to that place, and cause and procure his tools of trade to be carried and conveyed thereto, to do and perform the said work for the defendant; and did afterwards, to wit, on the day and year aforesaid, go and travel, and cause to be carried and conveyed his said tools back again from that place to London aforesaid; and the plaintiff avers that he, the plaintiff, did incur and pay divers expenses amounting, to wit, to £10, in and about this said travelling, and causing to be carried and conveyed his said tools back again from the said place in the country to London aforesaid, whereof the defendant afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the same; yet the defendant, not regarding his said promise, hath not yet paid the plaintiff the said sum of £10, or any part thereof; and the same remains wholly due and unpaid to the plaintiff."

There were also counts for work and labour, and upon an account stated. Pleas—1st, non-assumpsit; 2d, as to so much of the first count as related to the plaintiff's going from London to the place mentioned, and conveying his tools thither—a plea, that he did not incur or pay any money in respect of the causes of action in the introductory part of this plea mentioned, (concluding to the country); 3d, as to the causes of action in the introductory part of the 2d plea mentioned—a plea of payment; 4th, as to the expenses incurred by the plaintiff in returning to London and bringing back his tools—that the plaintiff, at the time of making the promise in the first count mentioned, and in consideration of the premises, promised to conduct himself honestly, justly, and with due propriety and decorum during the period of his service, and that he did not do so; wherefore the defendant dismissed and discharged him: and that these expenses were incurred after such dismissal and discharge. (a) Repli-

(a) As the form of the plea may be useful in practice, we have subjoined it:—"And for a further plea in this behalf, as to so much of the first count of the said declaration as relates to the expenses alleged to have been incurred and paid by the said plaintiff in the said plaintiff's going and travelling from and causing to be carried and conveyed, his said tools back again, from the said place in that count mentioned to London aforesaid, the said defendant says, that, heretofore and at the time of the making of the said promise by the said defendant, as in the said first count mentioned, the said plaintiff, in consideration of the premises therein mentioned in that behalf, promised the said defendant to conduct himself honestly, justly, and with due propriety and decorum, during the period of the said service and employ in the said first count mentioned,

cation to the 3d plea, a denial of the payment; and to the 4th plea, *de injuriâ*.

It was opened by *Cockburn*, for the plaintiff, that the plaintiff was a journeyman carpenter, and the defendant a master carpenter and builder, and that the present claim was founded on the custom of the trade, that, where a journeyman carpenter was sent into the country to work, the master was to be at the expense of conveying the journeyman and his tools to the place at which the work was to be done and back again to London. In the present case, the plaintiff had been sent by the defendant to work at Staunton House, near Highworth, in Wiltshire, and had paid the expenses of conveying him and his tools thither; but having, while there, dismissed the plaintiff from his service, the defendant refused to pay the expenses of the plaintiff's returning to town, and also the expenses of the carriage of his tools from Staunton House to London, amounting to 1*l.* 7*s.*

Evidence was given, that, in the month of March, 1839, the plaintiff was sent down to work at Staunton House by the defendant, and that while there he was dismissed; and that his coach-fare back to London was £1, and the carriage of his tools 7*s.*; and several witnesses stated the custom of the trade to be, that when a man is to be sent to do work in the country, time is allowed for the man to pack his tools, and he does so, and carries them to his master's office, and then goes to the place in the country, the master paying the man's coach-fare, and sending and paying the carriage of the tools; and when the man's work is done there, the master is at the expense of the man's coach-fare back to London, and also the carriage of the tools; and the men are allowed for their time in travelling at the same rate as when at work: but the witnesses, who were called to prove the custom, stated, that if the man, while in the country, was dismissed for gross misconduct, or dismissed

and to use due care, well, diligently, and faithfully to serve the said defendant in such service and employ as aforesaid, and he the said defendant then retained and employed the said plaintiff as in the said first count mentioned, upon the faith and in consideration of the said promise so made by the said plaintiff as aforesaid, and the said defendant further saith, that he was always ready and willing to continue, retain, and employ the said plaintiff in the said capacity and upon the terms in the said first count mentioned, until he dismissed the said plaintiff as hereinafter mentioned; and the said defendant further saith that the said plaintiff did not, nor would, whilst he continued in the said service and employ of the said defendant, as in the first count mentioned, conduct himself honestly, justly, and with due propriety and decorum during the period of the said service and employ in the said first count mentioned; nor did nor would he the said plaintiff, use due care, well, diligently, and faithfully to serve the said defendant in such service and employ as aforesaid; but, on the contrary thereof, he the said plaintiff, from time to time after he entered such service and employ, and before and until he was discharged as hereinafter mentioned, wrongfully, carelessly, obstinately, and improperly neglected and refused to conduct himself honestly, justly, and with due propriety and decorum, during the period of the said service and employ in the said first count mentioned; and he the said plaintiff greatly misconducted himself in such service and employ as aforesaid, and thereby he the said defendant was greatly injured, in respect of divers matters and business, in which he employed the said plaintiff in his said service and employ as aforesaid; and by reason of the said several premises it became and was necessary and expedient for the due conduct and management of the said defendant's business, that the said defendant should discharge and dismiss the said plaintiff from his said service and employ; wherefore the said defendant afterwards, to wit, on the 15th day of the said month of June, did refuse to suffer or permit the said plaintiff to continue or abide any longer in his the said defendant's service and employ as such servant in the first count mentioned, and did discharge and dismiss him therefrom as he the said defendant lawfully might for the cause aforesaid; and the said defendant, in fact, further saith that the said several expenses, in the introductory part of this plea mentioned, were incurred by the said plaintiff after such dismissal and discharge by the said defendant as in the said first count mentioned, and this he the said defendant is ready to verify, &c."

himself, the custom was for the master not to pay either the man's coach-fare back to London, or the back carriage of his tools.

*Thesiger*, for the defendant.—The plaintiff sues on a custom of the trade, grafted on his contract with the defendant. The custom is stated generally in the declaration, and the evidence is of a custom, with restrictions as to dismissal for cause, and where the person dismisses himself. The authorities show, that, if a qualified custom be proved, that does not support an allegation of a general custom.

*Cockburn*.—I hope that your lordship will allow us to amend, by adding the exceptions of a dismissal for cause, or by the party himself.

*COLERIDGE, J.*—You wish to introduce those exceptions, and to allege that the plaintiff was not dismissed for cause?

*Cockburn*.—And also that the plaintiff did not dismiss himself.

*Thesiger*.—If it had been so alleged in the first instance, we might have traversed the allegation, and concluded to the country.

*Cockburn*.—That would be a matter entirely beside the merits, and would merely affect the right to reply.

*COLERIDGE, J.*—I think I ought to allow the amendments; but it must be on payment of such costs as are occasioned by them.

On the part of the defendant—it appeared, that the plaintiff and other workmen of the defendant were at work at Staunton House, the residence of the Rev. John Trenchard; and that, in the month of May, 1839, the defendant's foreman (in consequence of a complaint from Mr. Trenchard's gamekeeper) directed the plaintiff to keep off the preserves, and keep on the foot-paths; and it was proved by Mr. Trenchard, that, on the evening of the 15th of June, he found the plaintiff and two other of the workmen in one of his preserves, in which there was no path; and that he, believing they had been poaching, desired to see what they had got in a handkerchief which the plaintiff carried, and the plaintiff produced two young pigeons, which appeared to have been taken from a nest; and that on his desiring the plaintiff to replace them in the nest, the plaintiff did so. Mr. Trenchard also stated that, at that time of the year it was important that his preserves should not be disturbed, as the pheasants were sitting. It was further proved, that, on the same evening Mr. Trenchard complained of the conduct of the plaintiff to the defendant's foreman, and the plaintiff was, in consequence, dismissed.

*Cockburn*.—It is for your lordship to say whether this is a sufficient ground of dismissal. In the case of *Callo v. Brouncker*, ante, vol. 4, p. 518, (19 E. C. L. R. 504,) Mr. Justice J. PARKE lays it down that a master may dismiss his servant for moral misconduct, wilful disobedience, or habitual neglect. Here the plaintiff was not guilty of any misconduct in his service.

*COLERIDGE, J.*—I think it is a question for the jury. This is not at all like the case of a yearly servant, which the plaintiff was in the case you have cited. If these persons had been found poaching, that would not have been misconduct in their employment; but could any one say that the defendant would not have been justified in discharging them for it?

*Cockburn*.—That would be "moral misconduct."

*COLERIDGE, J.*—Not in the sense in which Mr. Justice J. PARKE uses the term.

*Cockburn*, in reply.—This was not misconduct by the plaintiff in his service, and is not such conduct as the master has any control over. If

these men had gone out for a walk, and had trespassed, is that any ground for the master dismissing them? It is not enough that Mr Trenchard desired that they should be dismissed. If Mr. Trenchard has had any right infringed, he has his remedy; but he cannot insist that the defendant shall dismiss his men. There is no ground for supposing that these men had been poaching. The allegation in the plea is, that the plaintiff was to conduct himself honestly, justly, and with propriety.—Of what dishonesty, injustice, or impropriety has he been guilty?

COLERIDGE, J., (in summing up.)—There is now no doubt as to the custom, as it is conceded that the master is to be at the expense of bringing the man and his tools back to London; but that that does not apply, if the service is terminated in the middle of the work, either by the misconduct of the man, or by his dismissing himself. The only question is, whether the defendant was justified in dismissing the plaintiff, under the particular circumstances of this case? This is not like the case of a yearly servant, where the contract is more permanent; for, as far as we know, this contract might not have extended beyond this particular work. It is proved that the plaintiff went to Staunton in March, and was dismissed in June, and that the game is preserved on this property. Now, Mr. Trenchard had as much right to preserve his game, as any other gentleman has to preserve his flower-garden; and it is proved, that a communication was made to the plaintiff from the gamekeeper in May, and that in June Mr. Trenchard found the plaintiff in the preserves, as he suspected for the purpose of poaching; but of that there is no evidence; and then Mr. Trenchard complains of the plaintiff, and he is dismissed. It has been said, that this afforded no just ground of dismissal, and that the plaintiff was merely taking a walk. However, in dealing with this question, I think that you ought to consider what Mr. Trenchard had a right to expect from the defendant and his men. If a gentleman engages a tradesman who has several workmen under him, he has a right to expect that the workmen will conduct themselves well; and Mr. Trenchard might very reasonably say, that he would not have all these men walking in his preserves, because they might do as much harm in July by walking there, as they might do in October by killing the game. It is said that they did no damage; but I do not think that it entirely depends on that, because it might have been, that Mr. Trenchard might have said, I will not allow the workmen to go into my garden; and if they had done so, they would have done no actual damage; but still, if the defendant employed persons who acted in that way, he would soon find that he was injured in his business, and would lose his custom, because gentlemen would not engage him. You will say, whether the plaintiff did not go down to Staunton on the understanding, and undertaking, that he was to conduct himself decorously and properly, and whether the defendant was not justified in dismissing him.

Verdict—for the plaintiff on the 1st and 4th issues, and for the defendant on the 2d and third.

*Cockburn*, and *E. James*, for the plaintiff.

*Thesiger*, and *Ogle*, for the defendant.

*Adjourned Sittings in London after Michaelmas Term, 1840.*

BEFORE LORD DENMAN, C. J.

**CARMAN v. EDWARDS and WORMALD, Gent. two, &c.—p. 596.**

A. accepted a bill for £15, drawn on him by B., which B. endorsed to C., and which was dishonoured. B. owed A. a balance of £102, and several months after, on B. and C. balancing their account, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B. After this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—*Held*, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W. in an action for money had and received; and that their having acted bona fide on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action.

**ASSUMPSIT** for money had and received, with a count upon an account stated. Plea, non-assumpsit.

It appeared, that, in the year 1839, a person named Strutt had drawn a bill of exchange on the plaintiff for £15, which the plaintiff had accepted, and this bill had been endorsed, by Strutt, to a person named Corner, in whose hands it was when it became due, in April, 1839. Previously to that time the plaintiff had stopped payment, and at that time Strutt owed the plaintiff a balance of 109*l.* 2*s.* 10*d.*, and Strutt therefore could not have successfully sued the plaintiff if the bill had been in his hands. On the 4th of November, 1839, there was a settlement of accounts between Corner and Strutt, and there then being a balance of a few shillings in favour of Strutt, it was paid to him by Corner, and the bill for £15 given back to Strutt. On the 6th of November, 1839, the plaintiff was served with a copy of writ of summonses at the suit of Corner, the writ being endorsed as follows:—

“This writ was issued by Messrs. Edwards & Wormald, No. 2, Great James Street, Bedford-row, in the county of Middlesex, attorneys for the said Henry Corner.

“The plaintiff claims £15, with interest thereon, from 29th January, 1839, until day of payment, for debt, and 1*l.* 15*s.* for costs; and if the amount thereof be paid to the plaintiff or his attorneys within four days from the service hereof, further proceedings will be stayed.”

It was proved by a witness named Eedes, that he, by the desire of the plaintiff, called on the defendants, and paid them 15*l.* 10*s.* as the amount of the bill of exchange and interest, and £3 for costs, and received back the bill. It was also proved by Mr. Corner that he had never authorized the defendants to bring any action against the plaintiff, and did not even know them; but this witness also stated, that a person named Musson had asked him to allow the defendants to bring the action, but that he always refused his consent; and in his cross-examination he also stated, that he gave Strutt a letter which had been written to him by the plaintiff, on the subject of the non-payment of this bill of exchange, at the same time when he gave him back the bill.

*Erle*, for the defendants.—I submit that this action is not maintain-



able, and that, at all events, no blame attaches to the defendants. I am in no situation to contend that they had the actual authority of Mr. Corner; but I am in a condition to show that the bill was brought to the defendants by Musson, together with the letter which the plaintiff had addressed to Mr. Corner, and that Strutt had desired Musson to give directions to the defendants to sue the plaintiff. After this a writ was sued out, and the plaintiff voluntarily paid the sum of 18*l.* 10*s.* to the defendants. It all arises from the misconduct of Strutt; but it is a question whether, as there is no privity of contract between the plaintiff and the defendants, this action can be maintained; and I submit also, that, to support any action in a case of this kind, there must be mala fides. However, in the present case, so far from that, there was a mutual mistake of fact by the plaintiff and also by the defendants; and that being so, I submit that the present action will not lie: and in addition to this, I am in a condition to prove that the sum of 15*l.* 10*s.* for the amount of the bill and interest has been paid over to Musson.

Lord DENMAN, C. J.—Giving you credit, Mr. *Erle*, for all the facts you have opened, I am of opinion that they afford no answer to the present action. Your clients should have ascertained whether they had the authority of the person in whose name they sued, before they brought the action. It was their own neglect if they did not do so, and I think that they were guilty of negligence in bringing an action for a man they never saw, without first ascertaining that they had his authority. The plaintiff is in no fault at all, and the defendants have received money that they had no right to, and that is money had and received to the plaintiff's use. I think, also, that the bona fides of the defendants, and the fact of their having paid over the money to Musson, are no grounds of defence. The defendants acted on the supposition that they had an authority which they had not. There must be a verdict for the plaintiff. (a)

Verdict for the plaintiff—Damages, 18*l.* 10*s.*

*Thesiger* and *Carrington*, for the plaintiff.

*Erle* and *Atherton*, for the defendants.

In the ensuing term *Atherton* applied to the court, to reduce the damages to the sum of £3, the amount of costs received by the defendants, but the court refused a rule.

(a) In the case of *Robson v. Eaton*, 1 T. R. 62, it was held, that, if A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is liable notwithstanding to pay B. again, and A.'s remedy is against the attorney, although the attorney conceived he was acting under the real authority of B. See also the case of *Dupres v. Keeling*, ante, vol. 4, p. 102, (19 E. C. L. R. 295.)

BEFORE MR. BARON GURNEY.

(*Who sat for the Lord Chief Justice.*)

LEES v. HOFFSTADT.—p. 599.

In assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that the drawer endorsed to the plaintiff. The defendant pleaded that the bill was drawn and

accepted for his accommodation, and handed to the drawer that he might get it discounted: that the drawer endorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which facts the plaintiff had notice;—*Held*, that on this state of the pleadings the defendant must begin.

**ASSUMPSIT** on a bill of exchange by the holder against the acceptor. The declaration stated, that Rogers, the drawer, endorsed to the plaintiff. The defendant pleaded especially, that the bill was drawn and accepted for the defendant's accommodation, and handed to the drawer, that he might get it discounted: that the drawer endorsed it in blank, and delivered it to one Atkinson to get it discounted, who, against good faith, delivered it to the plaintiff, for a purpose unknown to the defendant, and that the plaintiff had notice of these facts. The replication was *de injuriâ*.

*Humfrey*, for the plaintiff.—The defendant must begin, as the issue is on him.

*Bramwell*, for the defendant.—The plea is, in effect, a plea that Rogers, the drawer, did not endorse to the plaintiff. Atkinson, like any other holder, had a power to endorse, for any purpose, to any person not having notice of his limited rights. Here the plaintiff had that notice, and therefore he cannot rely on the general implied power of a holder to endorse. Nor can he rely on the express power given to Atkinson by Rogers, because this was not an endorsement in pursuance of that power. In other words, the delivery to the plaintiff was unauthorized, and he knew it. The facts stated would have maintained a traverse that Rogers did not endorse in answer to *prima facie* evidence that he did. This case is distinguishable from cases imputing fraud; as, in them, an endorsement in fact is admitted. Here, the defendant need not prove any fraud in the plaintiff's acquisition of the bill; because Atkinson may have delivered to him, and he may have taken it to discount *bonâ fide*, and then the wrong will be in now claiming to sue. This is an argumentative plea, amounting to this, "Rogers did not endorse." At all events, the plea is, that the plaintiff is not the true holder of the bill.

**GURNEY, B.**—The defendant must begin.

Verdict for the plaintiff.

*Humfrey* and *Swan*, for the plaintiff.

*Bramwell*, for the defendant.

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BEFORE MR. JUSTICE COLERIDGE.

(*Who sat for the Lord Chief Justice.*)

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SILLS v. BROWN.—p. 601.

The question in what is called a running down case, is, whether the plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; *not* to the *amount* of it, but to its occurrence. Therefore where a brig was carrying the anchor in a position contrary to the by-laws of the river Thames, at the time when she came in collision with a barge, it was *Held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the

brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by the collision, is receivable in evidence in the action for damages, if the witness be shown to be beyond the sea.

A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not.

Evidence of a practice in contravention of a by-law is not receivable.

The rule of the river is, that, if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away.

THE declaration stated that the plaintiff was possessed of a barge called the "Maria," with divers sails, tackle, &c., and of a boat fastened to it, and of a cargo of stone on board the barge, which said barge was lawfully sailing in the river Thames; and the defendant was possessed of a certain brig called the "Jarrow," sailing in the said river, under the management of his servants; and also of a certain anchor, which was suspended from and annexed to the said brig; yet the defendant, not regarding his duty, on the 17th October, 1838, by his said servants, took so little and such bad and improper care of his said brig, and of the said anchor, in the direction and management of the same, and conducted himself by his said servants in so negligent, careless, unskilful, and improper a manner, that the said brig, with the said anchor so suspended, &c. &c., ran foul of and struck against the barge, and the anchor pierced, broke, shattered, damaged, and injured the said barge, so that the same, with the cargo of stone, &c., sunk in the river, and became wholly lost to the plaintiff, &c., &c., &c.—Plea—Not Guilty.

The facts of the case were in substance as follow:—The plaintiff's barge, on the night of the 18th October, 1838, started from that part of the river Thames, which is called the North Fleet Hope, and was proceeding with the tide, but against the wind, up the river. The state of the tide was what is called young flood. The wind was W. N. W.; the night was clear, so that both shores were discoverable, and a vessel could see another at a distance of about a quarter of a mile off. The barge, which was loaded, was standing across to the south shore. The defendant's brig, which was light, was going down the river with the anchor hanging from the larboard bow, so as that a portion of it was under water. This was done, because the intention was to drop the anchor (which had not long been taken up) again, as soon as they could find a convenient berth. The men on board the barge, seeing the brig coming down, as they thought, in such a line that, if the barge had continued her course, the brig would have struck her amidships, ported their helm and got into stays, which caused the anchor of the brig to strike the barge, so as to sink it, and unfortunately to cause the death of the plaintiff's son, who was on board at the time. It was agreed on both sides, that the rule of the river is, that if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away.

On the part of the plaintiff it was contended, that the deviation from the general rule, on the part of the men who were on board the barge, was rendered necessary by the dangerous position in which the barge was placed, by the brig's neglecting, as they said, to bear away, but coming in such a direction, that, if they had not put their helm down, the brig would have struck the barge. It was also contended, on the part of the plaintiff, that the anchor of the brig was carried in a position

which was forbidden by the by-laws made for the regulation of the river, and that no injury would have been done to the barge at all, if the anchor had not been in such improper position. On the part of the defendant, it was contended, that the men on board the barge brought the injury on themselves, by improperly and unnecessarily departing from the rule of the river, and not keeping their course, as they were bound to do. This was the main question of fact in the case.

A witness had been examined before the coroner, on the inquiry concerning the death of the plaintiff's son, and since his examination had gone abroad. It was proposed on the part of the defendant, to read his deposition, taken on oath, before the coroner. This was objected to on the part of the plaintiff, but

COLERIDGE, J., was of opinion that, under the circumstances, the deposition ought to be admitted, and, being properly proved, it was read in evidence. (a)

Capt. Rowland, one of the harbour-masters of the port of London, produced a by-law against carrying the anchor in the position in which the anchor was on board the brig. He was asked, on the part of the defendant, whether, notwithstanding the by-law, it was not the practice so to carry it in some parts of the river?

*Thesiger*, for the plaintiff, objected to evidence of a practice contrary to the by-law.

*Cresswell*, for the defendant, contended that the value of the by-law did not decide the question of negligence, and therefore the practice, though contrary to it, was evidence in the case.

COLERIDGE, J., was of opinion that evidence of the practice in contravention of the by-law was not admissible. (b)

Capt. Rowland was then asked, whether, having heard the evidence in the cause, he thought the conduct of the captain of the brig was right or not?

*Thesiger*, for the plaintiff, objected.—This is putting Capt. Rowland in the place of the jury.

*Cresswell*, for the defendant.—It is a matter of skill. We cannot get a nautical jury. It is similar to cases in which a medical question arises, and then witnesses are asked, whether, in their opinion, the treatment was correct or not.

COLERIDGE, J.—I think you cannot ask the witness to draw a conclusion of fact, and then give his opinion upon it.

The question, in the form objected to, was not put; but the opinion

(a) In *Phillips's Law of Evidence*, Part II., ch. 4, s. 2, (vol. 1, p. 374, 5th edit.), it is said "A book of authority," [Boller's *Nisi Prius*,] "after stating the general rule, that depositions are not evidence where there cannot be a cross-examination, adds, by way of exception, 'yet if the witnesses, examined on a coroner's inquest, be dead, or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction.'" And Mr. Phillips further states, "It seems to be the prevailing opinion that they are admissible, though the prisoner may have been absent at the time of taking the inquisition."—For the mode of proof, see the page above-mentioned, viz. 374.

(b) In the case of *Marriott v. Stanley*, where the plaintiff sought to recover damages for a personal injury sustained by him in consequence of the defendants having wrongfully exposed to sale certain articles of ironmongery on a public highway at Northampton, in defiance of a local regulation, imposing a fine of £5 for so doing. In that case it was suggested, (but no evidence appears to have been offered of the fact,) that it was usual for the tradesmen of the town to place their goods at the road-side on market days. The learned judge who tried the cause, told the jury, *inter alia*, that the placing of the goods on the highway was an unlawful act, and that no local usage or custom could make it lawful.—See further, as to this case, in the note at the end of *Raisin v. Mitchell and others*, post.

of the witness was obtained by his being asked, what was the duty of a captain under certain specified circumstances.

COLERIDGE, J., in his summing up, told the jury, that, if it was a pure accident, or if the plaintiff's servants substantially contributed to the injury by their improper or negligent conduct, the defendant would be entitled to their verdict; but that, on the contrary, if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict. His lordship also told them, that if the mode of carrying the anchor contrary to the by-law was the cause of the injury, and the plaintiff's servants did not substantially contribute to produce it, the defendant would be liable, although the captain of the brig might, for his convenience, have reasonably carried the anchor in such a position.—[After reading over the evidence, and commenting upon it, his lordship said]—If you think the mischief was occasioned by any want of skill, or by any negligence or any improper conduct whatever on the part of the men on board the brig, without the men on board the barge having substantially contributed to produce it, then the plaintiff will be entitled to your verdict. On the other hand, if you think that the men on board the barge substantially contributed to the mischief—to its happening—to its taking place—then the defendant will be entitled to your verdict.

One of the jury afterwards asked his lordship, whether he had not told them, that the way in which the anchor was placed had nothing to do with the question.

COLERIDGE, J.—No. You must have misunderstood my observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to *the occurrence* of the injury, *not to its amount*, but to *the occurrence of it*. The plaintiff says, that if the anchor had not been in the position in which it was, no injury would have occurred at all; but that would not make the defendant liable, if the people on board the plaintiff's barge brought it by improper or careless navigation into the position in which it received the injury.

Verdict for the defendant.

*Thesiger*, and *Ogle*, for the plaintiff.

*C. Cresswell*, *R. V. Richards*, and *E. James*, for the defendant.

See the case of *Raisin v. Mitchell and others*, post, and the cases there referred to in the note at the end of it.

## COURT OF COMMON PLEAS.

*Adjourned Sittings in London after Hilary Term, 1839.*

BEFORE MR. JUSTICE ERSKINE.

*(Who sat for the Lord Chief Justice.)*

SLEATH v. WILSON.—p. 607.

If a servant without his master's knowledge take his master's carriage out of the coach-house, and with it commit an injury, the master is not liable; because he has not in such case intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by intrusting him with it. Therefore, where a servant, having set his master down in Stamford Street, was directed by him to put up in Castle Street, Leicester Square; but instead of so doing went to deliver a parcel of his own in the Old Street Road, and in returning along it drove against an old woman and injured her; it was *Held*, that the master was responsible for his servant's act.

CASE to recover damages for an injury occasioned to the plaintiff by the negligent driving of a servant of the defendant. Pleas—1st, that the horse and carriage were not the defendant's; 2d, that the person driving was not the defendant's servant; 3d, that at the time when the injury was sustained, the horse and carriage were not in the employ of the defendant, but were improperly used by the person driving them for purposes of his own.

*Wilde*, Serjeant, in stating the plaintiff's case, referred to the case of *Joel v. Morison*, ante, vol. 6, p. 501, (25 E. C. L. R. 511.) (a)

The witnesses on the part of the plaintiff stated, that the defendant's servant was driving a four-wheeled phaeton, drawn by one horse, along the Old Street Road, at a quick pace; some described it as very fast, others as not so fast; but they all agreed in the fact, that the plaintiff, who was an old woman nearly seventy years of age, and was crossing the road, was knocked down by one of the shafts of the carriage, and much bruised, and had some of her teeth knocked out.

*Slade*, for the defendant.—The plaintiff's counsel must make out two things to entitle him to a verdict:—1st, that the servant was acting within the due scope of his authority; and, 2dly, that he was driving carelessly. The case cited for the plaintiff is not all-fours with the present. I rely on the case of *M<sup>r</sup> Manus v. Crickett*, 1 East, 106. (b)

(a) That case decides, that, if a servant driving his master's cart on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purpose, the master will not be answerable for any injury he may do.

(b) That case decides that a master is not liable for the *wilful* act of his servant in driving his carriage against another, without his direction or assent; but only for damage arising from the *negligence* or *unskilfulness* of the servant, when acting in his employ.

I shall show that the servant, on the present occasion, was acting contrary to the directions of his master. He had no business in Old Street Road at all; it was four miles out of his way. My learned friend admits, that if a servant take his master's carriage without his knowledge, the master will not be liable for his acts. I do not see any difference between that state of facts and this, so far as the conduct of the servant is concerned. I see no difference between the servant in the present case driving out of his way, and the servant in the case admitted, taking the carriage out of the coach-house, and using it for his own purposes. As to the question of negligence, driving on the wrong side of the road is not proof of negligence; there is no obligation to keep on any particular side of the road, if there is room enough on the road, and no other carriages are in the way.

The servant who was driving the carriage was called as a witness, and said, "I drove my master to Great Stamford street; my orders were, to put up at the Red Lion in Castle Street, Leicester Square, and meet my master at the Olympic Theatre; I went into Old Street Road on business for myself; I took a parcel for my wife to her father and mother; I was driving at a slow pace in Old Street Road; at a pace not exceeding four miles an hour; I called to the woman three times distinctly, as loud as I could; she took no notice; I pulled up immediately when I found she took no notice; the horse was walking then; her back was turned, and I suppose the shaft of the vehicle struck her on the shoulder; somebody seized the horse by the bit, and he reared on his hind legs, and backed; I was sitting low at the time; I went to the old woman, and offered her a recompense of £5; she said she could do nothing with it, I must speak to the gentleman; I went to him, and he said he would speak to the party, and I heard nothing more of it; a friend gave me the money." On his cross-examination, he said, "I do not know that that money came from my master; it was a friend at Turnham Green; I did not go to the old woman by my master's desire; the only conversation I had with my master before I went was being scolded for going out of my way; the name of the person I got the money from was Barnett; he is a gentleman, a lawyer; as far as I know, he is my master's lawyer; when I came back, I gave the money back to Mr. Barnett; it was dusk when I was in the Old Street Road; I saw an object as I was driving; it had a cloak on; I was quite pretty nearly at a stand still, when she ran herself against the shaft; she came in contact with the shaft; I was pulling up at the time; her back was towards the horse; she was looking a contrary way, and then she fell down; I suppose she fell down from fright; I got to the Red Lion about half-past seven; I went there the direct road from Old Street Road; I had lived with the defendant about a year and a half at the time, and lived with him about nine months after." In answer to questions from the judge, he said: "My master did not know any thing about my having the parcel to deliver; I left the carriage in a yard at the corner of Old Street Road, by Shoreditch, while I went to Bateman's Row with the parcel; this was about 200 yards from the place where the accident happened."

The gentleman at whose house in Stamford street the defendant was set down, was also called as a witness for the defence, and stated, that the carriage arrived at his house about four in the afternoon, that he heard the defendant direct the servant to drive to some stables, the name

of which he did not remember, and to meet him afterwards with the carriage at the Olympic Theatre, and that the servant turned round and drove the carriage in a direction which would lead towards Leicester Square.

*Wilde, Serjt.*, in reply.—First, as to the law,—The rule of law I take to be this,—if you give your servant the care and control of your carriage and horses, and tell him to take the carriage to a given place, you place the carriage under his control as to the mode in which he is to arrive at that place, and for his conduct in the course of the execution of that order you will be responsible. We shall have next the case of a stage-coach, and it will be said that if the coach does not go by the usual and direct road, the proprietors will not be liable.—The case cited of *M<sup>r</sup> Manus v. Crickett*, is quite a different case—there the servant had a spite against the officer, and drove against him.

*ERSKINE, J.*—It is quite a different case.

*Wilde, Serjt.*—It is an improper mode; but it is a mode of conducting the employment—the man was out of his road—his object was the Red Lion stables, and he went out of his way for purposes of his own, but still it was an improper act while under his master's orders. It may be said next, that if the servant turns out of his road to get something to drink, the master will not be liable for any injury done by him. It is enough that it is in the course of his employ, though he acts improperly in carrying his master's orders into execution. The question is, was he when the act occurred in the course of the master's employ? if he was, the master will be liable.—After some observations by the learned serjeant on the question of negligence,

*ERSKINE, J.*, in summing up, said,—This is an action brought by the plaintiff to recover damages for an injury which she alleges she has sustained by the negligent conduct of the defendant's servant. The law has said that whenever an injury has been occasioned by the negligent conduct of a person in the service of another, the master is answerable for it; and this is for the purpose of inducing those who employ others to take care that they employ proper persons. The defendant pleads, first, that the horse and carriage were not his, and, secondly, that the servant was not his servant; but it has been clearly proved by the witnesses on the part of the defendant, that the carriage was the defendant's, and that the person driving it was his servant. But in addition to these he has pleaded, thirdly, that the horse and carriage at the time of the injury were not in the employ of the defendant, but were improperly used by the servant for purposes of his own; and evidence has been given that the master directed the servant to drive to the Red Lion, in Castle Street, Leicester Square, but that the servant improperly drove to the Old Street Road, to deliver a parcel of his own; and the point has been put to the court, that inasmuch as it is clear that the servant was not at that time engaged in his master's business, this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron PARKE, in the case which has been cited. It is quite clear that if a servant without his master's knowledge takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted



improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law: the master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it. And in this case, I am of opinion, that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle Street, in Leicester Square, the defendant was liable for any injury which might be committed through his negligence.—After reading the evidence and observing on the question of negligence, his lordship left the case to the jury, who found a

Verdict for the plaintiff, damages £25.

*Wilde*, Serjt., and *Channell*, for the plaintiff.

*Slade*, for the defendant.

See the case of *Lamb v. Lady Elizabeth Pall*, *post*, p. 629.

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BEFORE LORD CHIEF JUSTICE TINDAL.

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RAISIN *v.* MITCHELL and Others.—p. 613.

In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500—the jury gave a verdict for £250 only, and on being asked how they made up their verdict, replied that in their opinion there were faults on both sides:—*Held*, that notwithstanding this the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.

THE declaration stated that on the 20th November, 1837, the plaintiff was possessed of a sloop which was at anchor in that part of the river Thames which is called the Lower Hope, and that the defendants were possessed of a brig which they by their servants so unskilfully and negligently navigated, that it ran against the plaintiff's sloop, and caused it to sink. Plea, not guilty.

*Atcherley*, Serjt., stated the plaintiff's case.—The sloop was of thirty-nine tons burden, and on the day in question, being on a voyage from Cherburg, laden with eggs for the London market, came to an anchor about six in the evening in the Lower Hope; and the brig, which was called the *Arethusa*, and was of more than 300 tons burden, came towards the sloop, and having its anchor a-cockbill, ran it into the side of the sloop and sunk the sloop. The brig had not a proper pilot, but only a waterman on board. The question will be whether or no the brig was in fault. I contend that she was, for three reasons:—1st, the sloop was at anchor; 2d, the ground was ordinary anchoring-ground; and, 3dly, it is contrary to all seamanship for a vessel to sail with the anchor a-cockbill.

The captain of the sloop (a Frenchman) was called and examined through an interpreter—he said that he was forty-five years of age, was twenty-two years at sea before he was made a captain, and had been the voyage from Cherburg to London more than one hundred times,

and that on the occasion in question, his vessel had been at anchor for more than a quarter of an hour. He described the way in which it was injured, as follows:—"When I saw the brig, her course was from the N.E.; she was coming towards London; she was coming upon the sloop; we hailed all together to her to change her course; she did not, but came down on the sloop with her main-sail, fore-sail, fore-top-sail, jib, and fore-and-aft fore-sail set. The fore-sail and jib of the sloop were furled, and the peak of the main-sail was lowered so as to prevent the wind from operating upon it; it was half an hour before high water; the head of the sloop was N.N.W., with fifteen fathom of chain out; the distance between the Essex shore and the sloop was about a third of the width of the river; when we saw the brig, the anchor of the brig was hanging at the cat-head; we told them to slack the chain, or they would break the sloop; we told them in these words, 'let go down—break the ship;' they would not; the fluke of the anchor was about a foot below the water, and if they had let fall the anchor, no damage would have happened: my mate got a hatchet and was going to cut, when a man on board the brig came with a handspike and said, 'you d—d Frenchman!' they let go the anchor when the fluke of it was in the sloop; the sloop was dragged off by the brig into the middle of the river, though it was at anchor, for the anchor dragged: the brig got loose because she let go her anchor, and the weight of the chain dragged the anchor out: when the anchor came out of the sloop, we called to the brig for assistance; it carried off three feet of the plank, and the water ran in; the hole was above eight inches below the water, about one-third the length of the sloop, from the stern on the starboard side; we let the anchor slip into the river, and called to the brig for assistance, that we might leave the anchor behind and run ashore; we got two men from the brig to assist us in setting the sails; we sank in about four fathoms water, about 800 feet from the shore; when we hailed the brig at first, we said, 'keep away, you run us down;' the brig could have avoided us by putting the helm a-starboard; there were some vessels to the south of us, but none to hinder the brig from tacking to the south; it was not very dark, but there were no stars, and we saw the brig at 300 fathoms off; it was four or five minutes from the hailing to the striking; if they had kept a good look-out, they could have avoided us; nobody was on the look-out; the crew of the sloop escaped to shore in their own boat; we had 177 cases of eggs on board; the waterman was intoxicated, and when the captain left him he took a bottle of rum and drank out of it; the captain said to me, 'the waterman is drunk.'" On his cross-examination he said, "there were myself and three others on board the sloop; they could not speak English, except a few words; we had no pilot on board; we never had one, but always had a waterman before, as soon as we could find one; we could not find one on this occasion; the waterman on board the brig had been once on board our sloop to pilot it; the wind at W.S.W. would be contrary just in that part for coming up the river."

The mate and two seamen of the sloop confirmed the captain's statement, and it further appeared that the sloop was afterwards got up, and the damage (with the exception of the value of the eggs) was admitted at 143*l.* 13*s.* The eggs were valued at £880, and were sold by auction at something above £400.

*Theverger.* for the defendants.—1st, The captain of the French vessel,

not himself understanding English, and having a crew who did not understand English, was bound to have a pilot who did understand it, to navigate his vessel; 2d, the French vessel, according to my case, was not at anchor, but on the larboard tack, and that being so, and the brig being on the starboard tack, the French vessel ought to have given way and allowed the brig to keep her course; 3d, as to the question of whether the sloop was in fact at anchor, the witnesses say the wind was stronger than the tide, and if that be so, the head of the vessel would have been in a different position from that in which they say it was.

For the defendants the waterman was called as a witness, and gave a different account of the transaction as to the sloop being at anchor, and the state of the sails of both vessels; he also swore that the custom of the river was always for a vessel on the larboard tack to give way to one on the starboard tack; also, that if the sloop had been at anchor, as the wind was fresh and the tide ebbing strong, the brig would not have reached the sloop, and that in fact the sloop was called to three times to let go her anchor before she did so. He further said, "About twenty minutes after the two vessels separated, the captain and myself and a boy got on board the sloop; the crew were all in the boat, and the French captain would not come on board, saying he should lose his life; but the mate, after a good deal of persuasion, came on board and assisted in setting the sails to get on shore; if the Frenchmen had been active, the sloop might have got on shore before we reached her; in all square-rigged vessels you must cockbill the anchor before anchoring." The witness also denied that he was drunk, or that any one from the brig threatened a Frenchman with a handspike. The mate and others of the crew of the brig confirmed the leading facts of the waterman's statement, and all swore that the sloop was not at anchor and had not her sails furled.

*Atcherley*, Serjeant, replied.

TINDAL, C. J., in summing up, said, The question is, whether the plaintiff has made out a case to entitle him to damages. You must be satisfied that the injury was occasioned by the want of care or the improper conduct of the defendants, and was not imputable in any degree to any want of care or any improper conduct on the part of the plaintiff.

The jury found for the plaintiff, damages £250, the amount claimed by him being upwards of £500.

*Atcherley*, Serjeant, for the plaintiff.—There must be some mistake.

*R. V. Richards*, for the defendants.—There is not any mistake at all.

TINDAL, C. J., asked the jury how they made up their verdict.

The foreman answered that there were faults on both sides.

TINDAL, C. J.—Then you have considered the whole matter.

The foreman replied in the affirmative.

*R. V. Richards* submitted to his lordship that the fact which the foreman of the jury had stated entitled the defendant to the verdict.

TINDAL, C. J.—No. There may be faults to a certain extent.

*R. V. Richards* requested his lordship to take a note of his having made the objection.

TINDAL, C. J., assented, and the verdict was entered by the associate for £250. (a)

(a) The verdict in this case, as well as the opinion of the learned chief justice, seem to be quite correct, and sustainable in point of law, according to the most modern authorities.—In the case of *Bridge v. The Grand Junction Railway Company*, 3 Mee. & Wels. 244, which was

*Atcherley*, and *Bompas*, Serjts., and *Curwood*, for the plaintiff.  
*Thesiger*, and *R. V. Richards*, for the defendants.

an action on the case for the negligent management of a train of railway carriages, Mr. Baron Parke said—"There may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*. [11 East, 60.] and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule, as to the exercise of ordinary care, is applicable to questions of this kind." In the case of *Marriott v. Stanley*, 1 Scott, New Cases, p. 392, it was held, that in an action to recover compensation in damages, for an injury occasioned by an obstruction of the highway, it was not a misdirection on the part of the judge to leave it to the jury to say—"whether or not the plaintiff was himself in any degree the cause of the injury—whether he had acted with such a want of reasonable and ordinary care as to disentitle him to recover!" See also the cases there cited and referred to of *Smith v. Peleh*, 2 Stra. 1264, and *Bird v. Holbrook*, 1 Moo. & Payne, 607, and 4 Bing. 628, (15 E. C. L. R. 91.)

The result of the cases seems to be, that the fault of the plaintiff, in order to prevent his recovering, must be one directly tending to produce the injury; as, for instance, if a person be on the wrong side of the road, or in a state of drunkenness, though in such case they would neither of them be altogether free from blame, yet they might recover in an action for damages, unless the being on the wrong side of the road in the one case, or the being in a state of drunkenness in the other, directly contributed to the occurrence of the injury. On this point see particularly the concluding observations of Mr. Justice Coleridge, in the case of *Sills v. Brown*, ante, p. 245.

## COURT OF EXCHEQUER.

*Adjourned Sittings in London after Trinity Term, 1840.*

BEFORE LORD ABINGER, C. B.

LONG v. HITCHCOCK.—p. 619.

A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it of his having done so.

The plaintiff is to prove his case to the satisfaction of the jury; and, if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict.

CRIM. CON.—The only witness called on the part of the plaintiff to prove the adultery, was a man named Harris, who had been convicted of felony, and had also been several times in prison, charged with various offences.

On his cross-examination he was asked this question with reference to what he had described himself as having seen—"Will you swear that you did not tell your master only yesterday, that you were drunk when you made the statement; and will you swear that it was not false; and that you did not tell your master that it was false?"

The witness answered that he would not.

*C. Phillips*, for the defendant, asked his lordship if, under these circumstances, he thought there was any case to go to the jury.

**LORD ABINGER, C. B.**—I cannot say that there is not evidence for the consideration of the jury. It all rests upon the credit of the witness, Harris.

*C. Phillips* was addressing the jury for the defence when one of them said that they wished to hear the evidence of Harris's master.

**LORD ABINGER, C. B.**—The master cannot be called as a witness, because the man would not swear that he did not say that which was imputed to him. They cannot call one man to contradict another, unless that other swears positively on the subject. (a) The plaintiff is to prove his case to your satisfaction, and if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, then you cannot say that he has made it out.

Verdict for the defendant.

*Kelly, and Bramwell*, for the plaintiff.

*C. Phillips, and C. C. Jones*, for the defendant.

(a) In the case of *Pain v. Beeston*, 1 Moo. & Rob. p. 20, it was decided that where a witness merely says he does not recollect making the statement, evidence to prove that he did make it is inadmissible; there must be an express denial. But see the case of *Crowley v. Page*, ante, vol. 7, p. 789, (32 E. C. L. R. 737.)

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### BURNETT v. BOUCH and Others.—p. 620.

The usage is, that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charterparty be effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves.

If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charterparty be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other.

A., a broker, introduced a merchant and a ship-owner together to treat for a charterparty: they finally made the charterparty through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff for procuring a charter for a vessel called the *W.*, &c.;"—*Held*, sufficient.

**ASSUMPSIT** for work and labour, with a count upon an account stated.  
Plea—Non-assumpsit.

It was opened by *Erle*, for the plaintiff, That the plaintiff was a broker, and the defendants the owners of the ship *Wilton*; and that the question in this case was, whether the plaintiff was entitled to commission for having found a freight for the ship *Wilton*, on the ground that the plaintiff, as the broker had introduced the merchant to the ship owner, although the charter had been afterwards made through another broker. He stated the custom as applicable in these cases to be, that the broker who first introduces the parties to each other on the subject of the charterparty, is the person entitled to the commission if a charter be made between the parties so introduced; and that the circumstance of the charterparty being made at the office of another broker, would not deprive the broker who first introduced the parties to his right of commission.

It was proved, that, previously to the 2d of April, 1840, Captain Wil-

son, who was captain and part owner of the Wilton, had applied to the plaintiff, and requested to be apprized of a West India voyage for the Wilton; and that the plaintiff had accordingly entered the Wilton in his book. It was further proved, that, on the 2d of April, Mr. Ballard, a merchant, had applied to the plaintiff, stating that he wanted a vessel for a voyage to St. Domingo, and that the plaintiff mentioned the Wilton, and Mr. Ballard then asked to see the captain; and it also appeared that Captain Wilson and Mr. Ballard were introduced to each other at the plaintiff's counting-house on the morning of the same day, when Captain Wilson asked 4*l.* 10*s.* per ton for the freight, and Mr. Ballard offered 4*l.* 5*s.*; and on the plaintiff's managing clerk suggesting that 4*l.* 7*s.* 6*d.* should be the sum, Captain Wilson said he would consider of it, and give an answer on 'Change that afternoon; but it appeared that he did not go on 'Change, and that on the next day, when asked what he thought of the St. Domingo voyage, he said he had closed it himself with Mr. Ballard.

*Kelly*, for the defendants.—I submit that the plaintiff cannot recover on the particulars of demand delivered in this action: they are—"In this Exchequer of Pleas, *Burnett v. Bouch and Others*.—This action is brought to recover the sum of 37*l.* 7*s.* 6*d.* for *commission due to the plaintiff for procuring a charter for a vessel called the Wilton, whereof the defendants were owners, for a voyage from London to Hayti in the month of April last.*" The plaintiff did not procure the charter, which was concluded without him.

LORD ABINGER, C. B.—This particular could not have deceived you at all. The plaintiff says that he introduced the parties, and that, as there was a charter, he is entitled to commission. I have heard the usage proved as Mr. *Erle* has opened it.

With respect to the usage, Mr. Griffith was called. He said: "If a shipbroker introduces the party who ultimately charters the ship, he is the broker who receives the commission; and that is so whether he makes the charterparty or not. If the charterparty is made upon the same voyage, the broker would be entitled to commission, though the shipowner himself made the charterparty. In his cross-examination he said, "If a broker has introduced the parties, and the negotiation has gone off upon the terms, and another broker arranges them, the first broker has the commission; I never heard of the second broker getting any thing."

Mr. Wilkinson said, "The broker who first introduces the parties, having an authority to tender the ship, is entitled, if the bargain is finally made, though not in his office, provided the charterparty is made between the same merchant and the same owner, and for the same voyage." Mr. Woollet and Mr. Walter confirmed this evidence.

It was opened by *Kelly*, for the defendants, that, early in the month of March, the owners of the Wilton had (through Mr. Harnett) applied to Messrs. Urquhart and Scruden to provide a charter for the Wilton, and that Mr. Ballard applying to them for a ship, the bargain was concluded through them on the 2d of April; and each party found that the other was the same that he had met at the plaintiff's on that morning.

On the part of the defendant Mr. Scruden was called. He said:—"In the middle of March, Mr. Harnett applied to us to get a charter for this ship; and, about the 16th of that month, Captain Wilson asked me

if we could get him a charter: I made no entry of the ship in our books; it is not our practice; I obtained from him all the information as to the name, tonnage, and draft of the ship. About the same time Mr. Ballard said he wanted a ship for St. Domingo at 4*l.* 7*s.* 6*d.* I mentioned these terms to Captain Wilson, and he wanted 4*l.* 10*s.*: he called on me again on the 2*d* of April at about ten o'clock, A. M., and said he would take 4*l.* 7*s.* 6*d.* I said the merchant would be at my office at about twelve; but it being inconvenient to him to come at that hour, he said he would come at three: at about twelve Mr. Ballard called, and I told him I had got a vessel on his terms. I had not mentioned Mr. Ballard's name to Captain Wilson, neither had I mentioned Captain Wilson's name to Mr. Ballard, nor had I named the ship: at three o'clock the parties met at our office, and they recognised each other as having met at Mr. Burnett's. I told each that I had agreed with the other, and the charterparty was drawn and signed."

The witnesses for the plaintiff, who had deposed to the usage, were recalled by Lord ABINGER, C. B., and stated, that to entitle a broker to commission, as having introduced the parties, he should mention the names of the parties or the name of the ship, and that the mention of the tonnage and voyage was not sufficient; but Mr. Harnett, who was called as a witness for the defendant, stated that in his judgment the mentioning the names was not material; and Mr. Forsyth, who was also called for the defendant, said, "I am the partner of Alderman Pirie, as a ship-broker; if a broker is employed by both parties, and communicates between them, and effects the charterparty, but before it is effected, another broker interposes, and introduces the parties personally, I should say that the person who effects the charterparty is the person to be paid, although the parties had been personally introduced by another."

*Erle*, in reply.—The broker who first introduces the parties, or who first mentions the name of each to the other, or names the ship, is the person to be paid, though he does not effect the charterparty. If the parties had been named by Mr. Scruden, they would have known at the plaintiff's that they were the same persons who had been negotiating at Messrs. Urquhart and Scruden's; and if it were not necessary to name the parties or the ship, or to say something which would completely identify the transaction, a broker might change the ship, and put in another ship pending the negotiation. The parties were never introduced at Messrs. Urquhart and Scruden's till the afternoon of the 2*d* of April, and then it was found that they had been introduced before by the plaintiff.

Lord ABINGER, C. B. (in summing up).—It is perfectly usual for parties to go to several brokers, and state on each side, what the one offers, and what the other is willing to take; and if there was no usage as to commission, great confusion might arise, particularly if it was not necessary to name either the vessel or the parties. The rule as stated by the plaintiff's witnesses is this: when a broker has introduced the captain and merchant together, and they by his means enter into some negotiation as to the voyage, he is entitled to commission if a charterparty be effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves. The usage goes further, that if a broker authorized by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and also communi-

cates to the ship-owner what the merchant will give, and he name the ship and the parties, so as to identify the transaction, and a charter-party be ultimately effected for that voyage, this broker is entitled to commission: but if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other; and it has been observed with some force, that if the ship and parties were not named, the broker might change the ship and put in another pending the negotiation. You will say whether it is not a reasonable qualification of the usage, that if the first broker has not named the parties or the ship, he is not entitled to commission to the exclusion of another broker who afterwards introduces the parties to each other. If Mr. Scruden had named either the parties or the vessel, either party might have said, "we are negotiating already;" and I think that this case fully illustrates the necessity of mentioning the names. If Mr. Scruden had mentioned the names, he would clearly have been entitled to the commission; but as he did not do so, you will say whether the plaintiff is not entitled to it. (a)

Verdict for the plaintiff,—damages 37*l.* 7*s.* 6*d.*

*Erle and Montagu Smith*, for the plaintiff.

*Kelly and Hughes*, for the defendants.

(a) See the case of *Brown v. Nairne*, ante, p. 204.

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BLAKE *v.* BARNARD.—p. 626.

In an action for an assault the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty, and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that if the plaintiff was not quiet he would blow his brains out:—

*Held*, that if the defendant, at the time he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would be no assault:—

*Held*, also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that unless the jury were satisfied that the pistol was loaded they ought to find for the defendant.

**ASSAULT and false imprisonment.**—The first count of the declaration stated, that the defendant assaulted and beat the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot at the plaintiff, and threatened and offered therewith to shoot the plaintiff and blow out his brains." 2d count for false imprisonment.

Pleas—First, to the whole declaration, not guilty.—Second, as to the first count, "except as to the presenting of the said pistol, and threatening and offering therewith to shoot the plaintiff as therein mentioned," that the plaintiff and William Lock were fighting together, whereupon the defendant, being present, in order to separate them, gently laid his hands on the plaintiff, whereupon the plaintiff made an assault on the defendant, and would have beaten, wounded, and ill-treated the defendant, if the defendant had not defended himself; whereupon the defendant did defend himself, and in so doing, did necessarily and to a little degree, commit the trespasses in the introductory part of this plea mentioned, doing no unnecessary damage to the plaintiff.—Third, as to



the first count, with a similar exception, that the defendant was commander of the ship or vessel *Eleanor*, and the plaintiff a mariner on board the same and belonging thereto; and that the plaintiff and William Lock were fighting together on board the said ship, and the plaintiff was conducting himself in a riotous, mutinous, and disorderly manner; whereupon the defendant, so being such commander, and, as such commander, for the preservation of discipline and order in the said ship, and that the plaintiff and W. Lock might do no hurt to each other, and in order to separate them, gently laid his hands on the plaintiff, whereupon the plaintiff made an assault on the defendant, &c. (as in the last plea.) Fourth, to the first count—son assault demesne. Fifth, to the second count—that the defendant was commander of the *Eleanor*, and the plaintiff a mariner in and belonging to her, and that the plaintiff had deserted the ship for five hours, and was fighting with W. Lock, and behaving in a mutinous, disorderly, and improper manner on board the ship, and it was necessary that for this assault and conduct the plaintiff should be kept apart from the other mariners on board the ship: whereupon the defendant, so being such commander, and as such commander, for the preservation of discipline and order on board the ship, and for imprisoning and punishing the plaintiff for the cause aforesaid, gently laid his hands on the plaintiff, and imprisoned him.

Replication to the second and third pleas, that the defendant committed the trespasses in the introductory parts of those pleas mentioned, with more force and violence than was necessary for the purposes in those pleas mentioned.

To the fourth plea, *de injuriâ*, and to the fifth plea, that the defendant imprisoned the plaintiff for a longer time and with more severity than was reasonable, necessary, or lawful, in respect of the offences and misconduct of the plaintiff in the said last plea mentioned.—Rejoinder, denying the excesses charged by replication to the second, third, and fifth pleas.

It was proved by Mr. Coates, the surgeon of the ship *Eleanor*, that she was a South Sea Whaler, and that on the 13th of December, 1839, the ship being at anchor in the Bay of Conception, which is on the coast of Chili, the plaintiff and others had gone ashore and did not return on board till the next morning: and that on that morning William Lock challenged the plaintiff to fight, when some blows passed between them, and the defendant, who was the commander of the ship, came up and struck the plaintiff, and the plaintiff struck him; whereupon the defendant ordered the plaintiff below, and went below himself. This witness also proved that the plaintiff was not allowed to leave his berth for about four months, at the end of which time the ship arrived in the docks. It was also proved by a cabin-boy named Coleman, that on the 14th of December, 1839, he saw the plaintiff and defendant go below, as stated by the last witness, and he also said as follows—"The captain went into his cabin, brought out a pistol and cocked it, and presented it at Blake's head, and said if Blake was not quiet he would blow his brains out."

Lord ABINGER, C. B. (in summing up).—With respect to the assault which is alleged to have been committed with the pistol, if the defendant, at the time he presented it, added words showing that it was not his intention to shoot the plaintiff, that would be no assault; and besides, there is no evidence that the pistol was loaded. It is stated in the

declaration, that the pistol was loaded with gunpowder, ball, and shot, and it is for the plaintiff to make that out, and he has not done so. If the pistol was not loaded, it would be no assault; and unless you are satisfied that the pistol was loaded, you ought to find for the defendant as to that part of the case, and return a verdict that the defendant was guilty of assaulting the plaintiff, but not with a pistol. (a)

His lordship left the case to the jury on the questions of excess raised on the second, third, and fifth pleas.

Verdict for the plaintiff on the fourth issue, and on the first issue, except as to the assault with the pistol; and for the defendant as to the residue.

*Shee*, Serjeant, and *Miller*, for the plaintiff.

*Thesiger* and *Chandless*, for the defendant.

(a) See the cases of *Reg. v. St. George*, ante, p. 483, and *Reg. v. Oxford*, ante, p. 525.

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*Adjourned Sittings at Westminster after Michaelmas Term, 1840.*

BEFORE MR. BARON GURNEY.

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LAMB v. LADY ELIZABETH PALK.—p. 629.

A van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head: this caused the van to move, and thereby a packing-case fell out of the van upon the shafts of the gig and broke them:—*Held*, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred.

CASE.—The declaration stated that the plaintiff "heretofore, to wit, on the second day of June, 1840, was lawfully possessed as well of a certain carriage, to wit, a gig of value, to wit, of the value of £80, as of a certain case and divers, to wit, one hundred bottles of foreign mineral water contained therein, and which said case of foreign water was then in a certain other carriage, to wit, a van, and the said van, together with a horse then attached to the same, were then lawfully standing and being in a certain public and common highway, near to certain premises of the plaintiff, to wit, in order that the said foreign water might be unloaded and taken from the said van, and placed in the premises of the plaintiff: and the said gig of the plaintiff was then also lawfully standing and being in the said highway near to the said premises of the plaintiff, and likewise near to the said van and horse. And the defendant was also then possessed of a certain other carriage, and of divers, to wit, two horses drawing the same, and which said carriage and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, who was then driving the same, to wit, unto and into the said highway, and who for that purpose was desirous of passing the said van and horse attached to the same, with the said carriage and horses of the defendant: nevertheless, the defendant then by her said servant, so carelessly, injudiciously, unskilfully, and improperly drove, governed, and directed her said carriage and horses, and so carelessly, injudiciously, and unskilfully and

improperly backed and removed, and endeavoured to back and remove the said van and the said horse so attached to the same, and otherwise so carelessly and improperly conducted herself in the premises, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant by her said servant in that behalf, the said van then ran and was forced back towards, upon, and against the said gig of the plaintiff, and thereby the said case of foreign water, the contents whereof he, the plaintiff, was then causing to be unloaded from the said van as aforesaid, then fell, and was then cast and thrown with great force and violence from the said van down to and upon the shafts of the said gig of the plaintiff, whereby the said shafts were then crashed and broken to pieces, damaged and destroyed, and divers, to wit, nineteen of the said bottles of foreign water, being of value, to wit, of the value of £2, were then broken and destroyed, and the said last-mentioned water spilled and wholly lost to the plaintiff: and also by means of the premises, the plaintiff was forced and obliged to incur, pay, lay out, and expend, and hath necessarily incurred, paid, laid out, and expended, and become liable to pay divers moneys, amounting in the whole to a large sum of money, to wit, the sum of 5*l.* 14*s.*, in and about the repairing of his said gig so damaged as aforesaid." Plea—Not guilty.

It was opened by *Wightman*, for the plaintiff, that on the 2d of June, 1840, a van which had brought mineral water to the back entrance of the plaintiff in Little Bruton Street, was unloading, and the plaintiff's gig standing behind it, when the defendant's coachman, with a carriage and a pair of horses, came up from Bruton mews into Little Bruton Street, and the carriage being unable to pass the van for want of room, the defendant's coachman got off his box and took hold of the head of the horse which was in the van, in order to remove the van, when a case of mineral water, that a person was taking from the van, fell down on the shafts of the plaintiff's gig, and broke them.

On the part of the plaintiff Thomas Carter was called: he said, "I am a carman and van-owner: on the 2d of June I was employed by the plaintiff to fetch mineral water, and also to fetch his gig. I did so, and the van and the gig were standing in Little Bruton Street. The gig was a little behind the van, and detached from it. While I was unloading the van, the defendant's carriage came up from Bruton mews. For five minutes the carriage was obstructed, and the coachman desired the van to be moved. I said I would move the van as soon as I got the case into the premises. The coachman said he was not going to wait there, and jumped down from his coach-box and took the horse of the van by the head; this caused the van to move, and the case fell down on the shafts of the gig and broke them."

GURNEY, B.—Can you carry this any further? I think this is not enough to charge the defendant.

*Wightman*, for the plaintiff.—The coachman was driving, and left his box merely to remove the van. It was done in the course of his employment. His being off his box makes no difference. Suppose he had been a carter, his employer would be equally liable, and yet carters are almost always on foot.

GURNEY, B., (having conferred with the other learned barons who were sitting in the Exchequer Chamber,)—I am of opinion that the coachman was not acting in the employ of his mistress at the time that

this matter occurred, and that the defendant is therefore not liable in this action. The plaintiff must be nonsuited.

Nonsuit. (a)

*Wightman and Tuprell*, for the plaintiff.

*R. V. Richards*, for the defendant.

(a) See the case of *Seath v. Wilson*, ante, p. 607.

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MACKENZIE v. COX.—p. 632.

If A. place a dog with B., and the dog be received by B., to be kept by him, for reward to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the onus lies on B. to acquit himself by showing that he was not in fault with respect to the loss.

CASE.—The declaration stated, that the plaintiff, at the request of the defendant, delivered to the defendant divers, to wit, three dogs of the plaintiff, “to be by the defendant kept, fed, and taken care of, for reward to the defendant in that behalf; and the defendant then had and received the said dogs for the purpose aforesaid; yet the defendant, not regarding his duty on that behalf whilst he had the dogs for the purpose aforesaid, to wit, on, &c., took so little and such bad and improper care of the said dogs, that by and through the negligence, carelessness, and improper conduct of the defendant in that behalf, one of the said dogs became and was wholly lost to the plaintiff.” Pleas—first, not guilty, and, second, that the defendant did not receive the dogs, or either of them, to be taken care of for reward. (a)

On the part of the plaintiff, it appeared that three dogs of the plaintiff were put into the stables of the defendant, who was a livery stable keeper, and that his ostler was paid money to buy them food, and that one of the dogs was afterwards lost; but no evidence was given on the part of the plaintiff as to how the loss of this dog had occurred.

On the part of the defendant it was proved, that before the dogs were placed in the defendant’s stable, the plaintiff said to the defendant that he had a horse and three dogs which he wished to place with him, and that the defendant replied, that he did not take in dogs, but he should have no objection to the dogs being with the horse; and that on the plaintiff asking whether the dogs would be safe, the defendant replied that he had never lost any thing, and referred the plaintiff to the ostler. With respect to the loss, it was proved by the defendant’s ostler, that on the evening of the night on which the dog was lost, he locked it up in the stable, and that he missed it between twelve and one o’clock on that night, the stable-door having been opened by a false key; and this witness further stated, that he gave immediate information of the loss.

*Shee*, Serjt., in reply.—If a person has goods left with him without reward, he is only bound to take such care of them as he would take of his own; but if they are placed with him for hire, he must prove to

(a) As the form of this plea may be useful in practice, we have subjoined it. “And for a further plea on this behalf, the defendant says, that the plaintiff did not cause to be delivered to him, the defendant, nor did the defendant have or receive the said dogs in the declaration mentioned, or any, or either of them to be by him, the defendant, fed, kept, or taken care of for reward to the defendant in that behalf, in manner and form as the plaintiff hath in the declaration above alleged; and of this the defendant puts himself upon the country, &c.”

your satisfaction that he took every care of them which a person reasonably could take.

GURNEY, B. (in summing up.)—In this case, the plaintiff must make out to your satisfaction that this dog was received by the defendant for reward to be paid by the plaintiff to the defendant; and if that be made out to your satisfaction, the next question is, whether the defendant has been negligent. With respect to the first question, evidence was given on the part of the plaintiff, that the dogs were placed at the defendant's stable; but no evidence was given on the part of the plaintiff, as to the manner in which the dog was lost, the onus being on the defendant to acquit himself, by showing that he was not in fault with respect to the loss of it. The defendant has adduced evidence on both questions, and has called witnesses to show that the dog was not received for reward, and that the stable was entered by a false key; and even if a person does take goods into his possession for reward, he is not answerable for their loss if he takes reasonable care of them; and it is for you to say, whether locking these dogs into a stable was not taking reasonable care of them; and if you think that it was, and that a dog-stealer came in the night and stole this dog, then the defendant is not answerable for the loss. You will consider on the whole of the evidence that has been given, first, whether the defendant received the dogs for reward to be paid him; and secondly, whether this dog was lost by the negligence of the defendant.

Verdict for the defendant on both issues.

*Shee*, Serjt., and *R. Gurney*, for the plaintiff.

*Platt*, and *F. V. Lee*, for the defendant.

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### GIBBONS v. POWELL.—p. 634.

In a town cause, a notice to produce a paper that would be in the hands of the opposite attorney, was served at 8 p. m. on the evening before the trial, at his office, on one of his clerks who had the management of the cause:—*Held*, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents.

DEBT for goods sold. Plea, *nunquam indebitatus*.

On the part of the plaintiff it was proposed to call for the copy of the writ of summons served on the defendant in this action, with a view of proving an admission made at the time of the service of it.

It was proved that the notice to produce it was served at the office of the defendant's attorney, at eight o'clock on the evening before the trial, and was served on a clerk of the defendant's attorney who had attended several summonses in the cause; and it was also proved that the defendant's attorney lived in Chancery Lane, and the defendant himself in Carpenter Street.

*Butt*, for the defendant.—I submit that the service of the notice was too late.

*Bull*, for the plaintiff.—It is to produce a paper that the attorney must have.

*Butt*.—In the case of *Byrne v. Harvey*, 2 M. & Rob. 89, the notice to produce was served at half-past seven, on the evening before the trial, at the house at which one of the defendant's attorneys lived, and

where both had their offices, and Lord DENMAN, C. J., held that it was served too late. (a)

GURNEY, B.—What was that, a notice to produce?

Butt.—It was a letter.

GURNEY, B.—That would very probably be with the client. This the attorney would certainly have.

Butt.—The party is personally served with the writ.

GURNEY, B.—But he always gives it to his attorney. As I think it is a thing that the attorney must have, I shall receive the evidence.

The evidence was received, but evidence was also given of the actual delivery of the goods.

Verdict for the plaintiff.

Ball, for the plaintiff.

Butt, for the defendant.

(a) In that case, Lord Denman, C. J., said, "he thought the notice was not served in sufficient time to allow the attorney to *communicate with his client* for the purpose of *procuring* the letter; and his lordship refused to receive the secondary evidence." See the cases of *Holt v. Miers*, ante, p. 191; *Firkin v. Edwards*, ante, p. 478; and *Foster v. Pointer*, post.

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BEFORE LORD ABINGER, C. B.

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PEGG v. STEAD.—p. 636.

A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount, and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evidence to show that the lead was of inferior quality.

On a count for a quantum valebant the plaintiff may give evidence of an agreed price for the goods, and the defendant on a plea of non assumpsit may also go into evidence to induce the jury not to give that price, by showing that the articles delivered were inferior to those that the price was agreed to be paid for.

ASSUMPSIT.—The first count of the declaration stated, "whereas, heretofore, to wit, on, &c., in consideration that the plaintiff, under the name and style of Robert Pegg & Co., at the request of the defendant, had sold to the defendant twenty tons of best Dutch lead, at the price and sum of five guineas per ton, five per cent. discount, to be delivered free in the stream; the amount to be taken out in prussiate potash at 15*d.* per pound, delivered free on board; he, the defendant, then promised the plaintiff, under the name and style aforesaid, to deliver to the plaintiff free on board, prussiate potash at 15*d.* per pound, 2½ per cent. discount, to the amount of the price of the said twenty tons of the best Dutch lead, at five guineas per ton, 5 per cent. discount: And the plaintiff further saith, that, although he, the plaintiff, did deliver to the defendant free in the stream twenty tons of the best Dutch lead at five guineas per ton, 5 per cent. discount; and although he, the plaintiff, hath been from the time of the making of the contract and promise by the defendant, until the commencement of this suit, ready and willing to take out the amount of the aforesaid price of the said twenty tons of best Dutch

lead in prussiate potash at 15*d.* per pound, 2½ per cent. discount, and to receive the same, when delivered free, on board; and, although the price of the said twenty tons of the best Dutch lead, at five guineas per ton, 5 per cent. discount, amounted to a large sum of money, to wit, to the sum of £100; and although the quantity of prussiate potash at 15*d.* per pound, 2½ per cent. discount, which would amount to the aforesaid price of the said twenty tons of the best Dutch lead, would amount to a large quantity, to wit, 1700 lbs. of prussiate potash: Nevertheless, the plaintiff saith, that, although a reasonable time for the delivery of the aforesaid quantity of prussiate potash had elapsed long before the commencement of this suit, yet the defendant did not, nor would deliver to the plaintiff free on board, nor in any other way whatever, the said 1700 lbs. of prussiate potash; but, on the contrary thereof, delivered a smaller and much less quantity, to wit, 157 lbs. of prussiate potash, only amounting to 9*l.* 16*s.* 3*d.* of the said price of said twenty tons of best Dutch lead, so sold and delivered by the plaintiff to the defendant as aforesaid, contrary to the contract and promise of the defendant, so made by him in that behalf, as aforesaid." There were also counts for goods sold, and upon an account stated. Plea—Non-assumpsit.

On the part of the plaintiff, a freight note, signed by the defendant, of which the following is a copy, was put in and read:—

"Bought of Robert Pegg and Co. twenty tons of best Dutch lead at 5*l.* 5*s.*—5 disc., delivered free in the stream, the amount to be taken out in prussiate potash at 15*d.*—2½ dis. deld. free on board.

"13 Feb., 1840.

"JNO. STEAD."

*Erle*, for the defendant.—I am prepared to show, that the lead, though very good at the top of the casks was inferior in the middle.

Lord ABINGER, C. B.—If that be so, you must bring a cross action.

*Erle*.—In the case of *Street v. Blay*, 2 B. & Ad. 456, (22 E. C. L. R. 122, (a) and also in the case of *Chanter v. Hopkins*, 4 M. & W. 399, (b) a single specific article had been sold; and if in this case the article to be delivered by the plaintiff had been a single article, perhaps the defendant might be driven to a cross action; but I submit that that is not so, where it is an article in bulk which the defendant could not see when the contract was made.

Lord ABINGER, C. B.—It would be as you say in an action for goods sold: but this is an action on a specific contract; and you, by your plea, only deny the making of the contract. If you had meant to insist that the contract was void by reason of the non-delivery of the lead, you should have pleaded it.

*Erle*.—*Chanter v. Hopkins* was an action for goods sold.

LORD ABINGER, C. B.—On a count for goods sold you could go into

(a) From that case it seems that the purchaser of a *specific chattel* under warranty, having once accepted it, cannot return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud or express agreement authorizing the return, or consent of the vendor.

(b) In that case the defendant had, by a written order, ordered of the plaintiff a smoke-consuming furnace for his brewery. The furnace was sent and put up in the brewery, and in an action of assumpsit for the price which had been agreed upon, (in which the defendant pleaded non assumpsit,) it was found by the jury that the smoke-consuming furnace was useless to the defendant for his brewery; but the court held, that plaintiff was entitled to recover the full price, no fraud being imputed to him, inasmuch as the order was for a specific defined article which was furnished, and that no warranty that it should answer the required purpose could be imported into the contract.

the value of the goods; but in this declaration, which is on the special contract, they aver a delivery of goods, and you only plead non-assumpsit. You should have pleaded, that the lead was not delivered to the value averred, and that you therefore were not bound by the contract. The plaintiff has a right to say, that, on these pleadings, he was not prepared to meet this point, more especially if you never returned the lead.

*Erle*.—The lead has not been returned.

Lord ABINGER, C. B.—On a quantum valebant the plaintiff might have given evidence of an agreed price for the goods; and you would have been let in to say, that the jury should not give that price, because the article was inferior to the one that the price was agreed to be paid for: but as this declaration is framed on the contract, I could not allow you to give that evidence unless you had pleaded that the contract was avoided by the non-delivery of the lead according to its terms.

Verdict for the plaintiff on the first issue, and for the defendant on the other issues.

*Kelly and Selfe*, for the plaintiff.

*Erle*, for the defendant.

RICHES and Another v. EVANS, Esq., and WHEELTON, Esq.,  
Sheriff of Middlesex.—p. 640.

If a person, expecting a *fiery facias* will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the *fiery facias*, and an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was bona fide meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor, and this is a question of fact, and not a question of law.

The fact that a deed of this kind was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud.

TROVER for horses and carts. Pleas,—first, not guilty,—Second, a denial of the property of the plaintiffs.

It appeared that the goods in question, which consisted of seventeen horses and several carts, had belonged to a person named Stansby, and had been taken by the defendants under a writ of *fiery facias*, which had been sued out against Stansby by a person named Hart. It further appeared that Mr. Hart obtained a judgment for £30 and costs, against Mr. Stansby (who was a wharfinger) on the 6th of September, 1840, on which execution was stayed for ten days, on an application by Mr. Turner, his attorney, to set it aside; the judgment being ordered to be set aside if the costs were paid in ten days; and that on the 14th of that month Stansby executed a deed of assignment between himself of the first part, the plaintiffs of the second part, and the plaintiff Riches and the other creditors of Stansby, who should execute this deed of the third part; and by this deed Stansby assigned all his goods and effects to the plaintiffs as trustees for the benefit of his creditors, and they were to take possession, and by writing under their hands to allow Stansby till breach of the covenants, to continue in possession of the horses, carts, and household furniture; and this deed also contained a covenant by Stansby to pay all his creditors who executed this deed 10s. in the



pound, at three, six, nine, and twelve months; and there was a proviso, that if he did so, then the deed should be void. And there was also a covenant by the creditors, that they would not sue Stansby, unless he made default; and it was further provided, that, if Stansby did not pay the instalments, the trustees should take possession of all the goods, &c., and do so.

It was proved that Stansby remained in possession of the horses and carts till they were taken by the sheriff on the 17th of September, 1840.

*Thesiger*, for the plaintiffs, cited the case of *Martindale v. Booth*, 3 B. and Ad. 493, (23 E. C. L. R. 130.) (a)

*Humfrey* addressed the jury for the defendants.—The case of *Martindale v. Booth* only decides that the jury having found that a deed was not fraudulent, the court would not hold the deed to be absolutely void, as matter of law. The possession here was not consistent with the deed. The plaintiffs' right, by writing under their hands, allow Stansby to remain in possession, but there was no such writing; and if this execution had not come in, no one would ever have heard of the deed. I admit that if you are satisfied that this deed was honestly and *bonâ fide* meant to pass this property to the trustees, the plaintiffs are entitled to recover in this action; but I submit to you that the property was all along intended to continue Stansby's, and that this was a mere device to defeat Mr. Hart's execution; and in addition to that, even supposing the terms of the deed to be acted up to, Mr. Stansby protects his goods from executions, pays all his creditors off with 10s. in the pound, and then has all his goods back clear of every thing.

Lord ABINGER, C. B. (in summing up.)—The plaintiffs in this case contend that the goods were not the goods of Stansby, as he had conveyed them to the plaintiffs. It appears that a person named Hart had a judgment against Stansby for £30 and costs, making together above £50; which sum Stansby was capable of paying, as he had seventeen horses. I think also that it cannot be doubted that this deed was executed because Hart was coming in with an execution: as Mr. Turner gets ten days' time, which expired on the 15th of September, the sheriff would come in on the 16th, and this deed was executed on the 14th; and the object no doubt was to get the deed executed before the execution was sued out. But still the law does not prevent a man from conveying his goods away to avoid a judgment; and a man may very honestly do so in many cases, as he may wish his property to be given equally among all his creditors, and not for one to take every thing; and the intent to avoid an execution does not in point of law make a deed of this kind void. The party remains in possession: that in some cases is provided for by the deed; but where the possession is according to the deed, that will not set up the deed, if the jury should think that the deed was a fraud. Here the original defendant, Stansby, is carrying on his business as usual, and had contracted to pay 10s. in the pound to his creditors, at three, six, nine, and twelve months; and by the deed he is

(a) In that case Mr. Justice J. Parke said, "It is evident that the bill of sale in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury whether, under the circumstances, a bill of sale of goods be fraudulent or not;" and Mr. Justice Patteson said, "There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in *Martin v. Podger*, [2 Sir W. B. 701.] that want of possession was a badge of fraud which ought to be left to the jury. Then if it be a badge of fraud only, in order to ascertain whether it be fraudulent or not, all the circumstances must be taken into consideration."

to keep his goods, and if he pays the instalments, the property is to be restored to him. You will say whether this was a *bonâ fide* deed, intended to part with the property, and to convey it to the trustees for the benefit of the general body of creditors; for if it was, the plaintiffs are entitled to your verdict; but if you think, from the circumstances, that Stansby was to keep possession and to have his goods back again, that this was all a pretext to keep off this execution, and that Stansby was really to have the goods all along, you ought to find for the defendants. There is no question of law in it; and it is a question for you under all the circumstances to determine whether this deed was meant *bonâ fide* to convey the property to the trustees.(a)

Verdict for the plaintiffs.

*Thesiger* and *Ogle*, for the plaintiffs.

*Humfrey* and *Rawlison*, for the defendant

In the ensuing term, *Humfrey* moved for a new trial, but the court refused a rule.

(a) See the case of *Burling v. Paterson*, ante, p. 570.

### FREESTONE v. BUTCHER.—p. 643.

The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency.

If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife, and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband.

DEBT for goods sold and delivered, with counts for money paid, money had and received, and upon an account stated. Plea—*Nunquam indebtedatus*.

It appeared from the evidence given on the part of the plaintiff, that the plaintiff, Mrs. Freestone, was a dealer in foreign birds, carrying on business in St. Martin's Lane, London; and that the defendant, the Rev Dr. Butcher, was curate of Milton, near Northampton, and residing at the rectory house at that place. The present action was brought to recover a balance amounting to 757*l.* 0*s.* 6*d.* for live foreign birds supplied to the defendant's wife, from the 20th of February, 1839, to the 23d of December in the same year. The original amount of the plaintiff's demand had been 959*l.* 16*s.* 6*d.*, of which a sum of 202*l.* 16*s.* had been paid at different times by the defendant's wife.

It was proved that the defendant and his wife were living together at the rectory house at Milton, and that the defendant had caused the room to be fitted up as an aviary; and it was also proved, that the birds which

had been sent by the plaintiff by coach, and had been delivered at the defendant's house, were between six and seven hundred in number, mostly foreign, consisting of lories, avadavats, love birds, bishop birds, cardinals, quakers, cut-throats, manakins, &c., many being of the same species.

It was also proved, that, in the month of March, 1840, Mr. Read, a dealer in birds, (in consequence of an application from Mr. Ball, of Northampton,) went to the defendant's house and saw the birds, when the defendant offered to sell them to him for £200, and that after some negotiation, Mr. Reed bought a portion of them from the defendant, consisting of fifty love birds, twelve cut-throats, three blackheaded manakins, twelve cardinals, twelve mountain lories, and other birds, to the number of about 200, for the sum of £110, of which sum he paid £64 to the defendant, and left the remaining £46 in the hands of Mr. Ball; but there was no evidence to show that Mr. Ball had paid the £46 to the defendant. A letter, sent by the defendant to Mr. Read, was also put in; it was in the following terms:—

“Milton, Friday Evening.

“Sir,—Finding that you have left without paying the remainder of the money due for the birds, I write to say, that unless it is paid in full to my credit, at the bank of Messrs. Drummond, Charing-cross, London, before twelve o'clock to-morrow morning, my solicitors are directed to issue a writ against you immediately for the amount. The sums paid were £50 yesterday and £14 to-day, leaving a balance of £46 due.

Your obedient,

E. R. BUTCHER.”

It was opened by Sir *F. Pollock*, for the defendant, that Mrs. Butcher had a separate income of her own, over which her husband had no control, and that she kept a separate banking account of her own with Messrs. Drummond, as her bankers; and that the plaintiff had dealt with Mrs. Butcher on her own separate account, and not on the credit of the defendant, as all the accounts and invoices were headed “Mrs. Dr. Butcher;” and the plaintiff had drawn bills of exchange on Mrs. Butcher, which were accepted by her in her own name, and paid at her bankers, Messrs. Drummond, from her money in their hands.

*Kelly*, for the plaintiff.—I submit that the bills of exchange, accepted by Mrs. Butcher, can hardly be evidence. The plaintiff was no doubt glad to get paid by any one.

Lord ABINGER, C. B.—The husband is sought to be charged, because the wife was the husband's agent. That may be proved by circumstances. Other circumstances may show that she was not so. Mr. Kelly has shown facts from which a jury may infer that the husband was credited, and, to repel this inference, evidence may be given of a separate income, and of the wife accepting bills in her own name. I shall tell the jury, that if this lady had a separate income, and the plaintiff was taking bills with her acceptance, they as men of sense must see that the plaintiff was dealing with the wife and not with the husband.

On the part of the defendant, the general account of the plaintiff was put in, it was headed “Mrs. Dr. Butcher;” and twenty-four invoices headed in the same way were also put in, and also several bills of exchange, drawn by the plaintiff on Mrs. Butcher and accepted by her, payable at Messrs. Drummond's, and there paid from Mrs. Butcher's separate funds.

The marriage settlement of Dr. and Mrs. Butcher, dated the 21st of October, 1823, was put in, and by it the interest of £2500 was secured to Mrs. Butcher's separate use; and another deed of settlement, dated the 23d of February, 1837, was also put in.

*Kelly*.—Mrs. Butcher had altogether about £380 a year, without the control of her husband.

Sir *F. Pollock*.—Dr. Butcher has an income of £490 a year, under an order of the Court of Chancery, for the maintenance of his children, and he has £400 a year of his own.

It was proved that Mrs. Butcher had a separate banking account at Messrs. Drummond's, and a separate pass-book, and that she drew checks on that firm, which were paid from her separate funds in their hands.

*Kelly*, in reply, cited the case of *Waithman v. Wakefield*, 1 Camp. 120. (a)

Lord ABINGER, C. B.—In that case Lord Ellenborough thought the husband not liable, but the jury found against his opinion.

*Kelly*.—There is no case which decides that a husband is not liable where his wife is living with him.

Lord ABINGER, C. B. (in summing up).—The general rule is, that the wife cannot bind her husband by her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments of her husband's household which she has under her control, the jury may infer that the wife was the agent of her husband, till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appear to the contrary, the jury do right by inferring the agency; but if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which the jury would infer that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one

(a) In that case Lord Ellenborough said, "Where a husband is living in the same house with his wife, he is liable to any extent for goods which he *permits* her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general only liable for such necessities as, from his situation in life, it is his duty to supply her. But even where they are parted, if the husband has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts her act, and renders himself answerable. Nor is it any excuse in law that the wife is unmanageable or disobedient, as he must be supposed to exercise his marital rights and to regulate her conduct." "Again, however low a man's circumstances may be, if he allows his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, the loss must fall on him who connived at the deception." "However, it is the duty of tradesmen to make inquiries before trusting a married woman who is a stranger to them, and the plaintiffs do not seem to have taken the pains they were bound to do to ascertain the defendant's responsibility. Therefore, as they have trusted his wife for want of information, which might easily have been obtained, if they receive a verdict at all, their demand should be reduced to the charge for necessities suitable to the circumstances of the defendant." "The jury, notwithstanding, gave the plaintiff a verdict for the full sum." See the cases of *Montague v. Espinasse*, ante, vol. 1, pp. 358, 502, (11 E. C. L. R. 416, 454; *Houlston v. Smyth*, ante, vol. 2, p. 22, (12 E. C. L. R. 9; *Mainwaring v. Leslie*, ib. p. 507, (12 E. C. L. R. 238; *Clifford v. Laton*, ante, vol. 3, p. 15, (14 E. C. L. R. 188; *Red v. Moore*, ante, vol. 5, p. 200, (24 E. C. L. R. 277; *Dennys v. Sergeant*, ante, vol. 6, p. 419, (25 E. C. L. R. 465; *Atkins v. Curwood*, ante, vol. 7, p. 756, (32 E. C. L. R. 721; *Sproudbury v. Chapman*, ante, vol. 8, p. 371, (34 E. C. L. R. 434; *Mizen v. Pick*, ib. p. 373, n. (34 E. C. L. R. 434, n.); *Emmett v. Norton*, ib. p. 506, (34 E. C. L. R. 503; *Hardie v. Grant*, ib. p. 512; *Dixon v. Hurrell*, ib. p. 717, (34 E. C. L. R. 599.)

of an extravagant nature, such as the husband would never have authorized, that would alone be sufficient to repel the inference of agency. In a late case tried before me, (a) it appeared that the defendant, a gentleman of the legal profession, had a very limited income, and that his wife incurred debts for millinery to an extravagant amount, and there the jury found that there was no authority on the part of the husband to contract the debt; and I think that they were quite right in so finding. The plaintiff in each of these cases has the onus cast upon him, and he is bound to prove that the goods were supplied on the credit and by the authority of the husband. The cases which I have put, as those in which the jury would infer the authority, are those where, in the ordinary course of things, the wife would give the orders; but if the wife ordered five puncheons of rum and five hogsheads of sugar, you would not infer agency, even if she had accepted a bill of exchange for the amount. Here you have a married woman ordering, in about ten months, £900 worth of fancy birds. If the thing is out of the ordinary course, juries ought to insist on strict proof. It is proved that the birds were delivered at the defendant's house, and, in addition to that, the only evidence is, that the defendant sold some of the birds, and wrote a letter respecting the payment of the price of them. That is evidence which is certainly for your consideration, yet it is in its nature ambiguous; for if Mrs. Butcher had ordered these goods and paid ready money for them, the defendant would have been entitled to sell them, and take the price for them. You will say whether that satisfies you that he gave authority to his wife to buy them. It is proved that his income is £400 a year, and that he prayed an allowance from the Court of Chancery for the maintenance of his children, upon which an allowance was granted, which is never done unless it be shown that the husband has not a sufficient income to maintain his children without such an allowance, and this alone would be enough to show that avadavats and mocking birds were not necessities for his wife. It is proved that Mrs. Butcher has a separate income of about £380 a year. Now, if it be shown that the wife has a separate income, that by itself goes to repel the inference of agency. It has been said that the defendant allowed his wife to buy these birds; however, if the defendant had objected, Mrs. Butcher had a right to say, 'I have the money in my own power, and it is not to be under your control;' and that being so, if Dr. Butcher, knowing that his wife liked birds, had fitted up an aviary for her, it would not show that he meant also to pay for all the fancy birds that were to be put into it. It might go a great way to show agency, if the wife had no separate income; but she having a separate income, it proves nothing as to the agency with respect to the buying of the birds. It is said, 'Why did not Dr. Butcher stop his wife from buying them?' Why should he, as she had separate means? If he knew that she was running in debt, no doubt he ought to have remonstrated with her, but what evidence is there that he made her his agent to buy all these birds? To whom did the plaintiff address the invoices? To "*Mrs. Dr. Butcher.*" The term "*Mrs. Dr.*" shows that the plaintiff knew that Mrs. Butcher was married. The plaintiff draws bills of exchange on this married woman, and the married woman accepts them in her own name, payable at a banker's where she keeps a separate banking account, and where they are paid out of her separate funds.

(a) The case of *Atkins v. Curwood*, ante, vol. 7, p. 756, (32 E. C. L. R. 721.)

Is there any thing to show that the plaintiff was not dealing with a married woman on the credit of that married woman herself? It is the bounden duty of tradesmen, when they find a wife giving extravagant orders, to give notice to the husband immediately, if they mean to hold him liable. The case then comes to this, did the plaintiff deal with Mrs. Butcher on the credit of her husband, the defendant? The plaintiff makes out the invoices and accounts to Mrs. Butcher, and draws bills of exchange for Mrs. Butcher to accept; and can any man living doubt that the dealing was on the credit of Mrs. Butcher? But it is not enough that the credit was given by the plaintiff to Dr. Butcher, the defendant, unless you find also that Dr. Butcher authorized it; and so far from that being proved, there is evidence of a separate provision for the wife, and almost every circumstance which is calculated to repel that inference.

A special juror.—We wish to know whether the husband made himself liable by selling the birds and taking the money for them.

Lord ABINGER, C. B.—If you ask me as matter of law, I think that he did not; it is only a circumstance for your consideration in determining the question, whether, in buying these birds, Mrs. Butcher was acting by the authority of her husband or not. As soon as she had bought these birds they became the property of her husband. There was a late case in which a wife's clothes, bought with her separate income, were seized under an execution against her husband. (a)

Verdict for the defendant.

*Kelly* and *Hayes*, for the plaintiff.

Sir *F. Pollock*, *R. V. Richards*, and *Busby*, for the defendant.

(a) The case of *Carr v. Brice*, Law Jour. Exch., vol. 10, p. 28.

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*Sittings in London after Michaelmas Term, 1840.*

BEFORE LORD ABINGER, C. B.

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BROOKER *v.* FIELD and WIFE.—p. 651.

A private person, who gives another into custody on a charge of having committed an offence against the stat. 7 & 8 Geo. 4, c. 29 (the Larceny Consolidation Act), is not entitled to notice of action under the 75th section of that act, as that section only applies to constables and other officers and persons of that kind.

FALSE imprisonment.—The declaration stated that Olivia, then being the wife of the other defendant, William Field, assaulted the plaintiff and imprisoned him. Plea, "by statute," by both the defendants; that the defendant Olivia was not guilty.

It was opened by Sir *F. Pollock* for the plaintiff, that Mrs. Field had directed a police constable to take the plaintiff into custody for stealing

her cat, she being present at the time the police constable had done so; and that the intended defence was, that the defendants were protected by the 75th section of the statute 7 & 8 Geo. 4, c. 29, the Law of Larceny Consolidation Act, which protected persons acting in the execution of that act. That section, however, did not (as he submitted) apply to this case, as it applied only to magistrates, constables, and officers, and not to persons who acted voluntarily. The clause of the Bankrupt Act, 6 Geo. 4, c. 16, was quite as general and as strong as the 75th section of the statute 7 & 8 Geo. 4, c. 29, and yet it was held not to apply to any but commissioners and officers. He cited the case of *Cooke v. Leonard*, 6 B. & C. 351.

It was proved by a police constable named Kershaw, that on the 2d of September, 1840, he went with Mrs. Field to the house of the plaintiff in Willow-walk, Shoreditch, in the county of Middlesex, when Mrs. Field charged the plaintiff with stealing her cat, and directed him to take the plaintiff into custody, which he did.

*Whateley*, for the defendant.—I submit that the plaintiff cannot recover in this action. If it be shown that Mrs. Field had reasonable ground to believe that the plaintiff had stolen her cat, by the 75th section of the statute 7 & 8 Geo. 4, c. 29, she would be entitled to notice of action, and to have the venue laid in the proper county.

Lord ABINGER, C. B.—Bonâ fide belief has nothing at all to do with this case. I think that this provision only applies to constables and persons of that kind. If this section of the statute were held to apply to these defendants, it would go to the extent of saying, that every person might give a party into custody for any offence under the statute 7 & 8 Geo. 4, c. 29, and then be entitled to notice of action, to tender amends, and to have the case tried in the particular county in which it arose.

Evidence was given that the plaintiff, before he was taken into custody, had written letters to Mrs. Field, offering to restore her cat for a sum of money, and that the cat had been seen upon his premises.

Verdict for the plaintiff—damages, one farthing.

Sir F. Pollock, C. Phillips, and S. Martin, for the plaintiff.

*Whateley* and *Montague Chambers*, for the defendants.

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*Second Sittings at Westminster in Hilary Term, 1841.*

BEFORE BARON ROLFE.

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STOCKEN v. COLLINS.—p. 653.

A party being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated that he put a letter containing the notice of dishonour into the post at one o'clock, p. m., on the 28th. The post-mark on the letter was the 29th:—*Held*, that if the jury were satisfied that the letter was put into the post sufficiently

early for the party in the ordinary course of the post to have received it on the 28th, it was sufficient, and that its having been delayed in the post-office would make no difference.

A notice of dishonour, which states that a bill of exchange "has been dishonoured," is sufficient, although it does not state that the bill has been presented.

ASSUMPSIT by the plaintiff, as endorsee of a bill of exchange for 28*l.* 8*s.* 3*d.*, dated the 24th of October, 1838, drawn by the defendant on a person named Davis, payable eighteen months after date to the order of the drawer. Plea, denying the notice of dishonour. The bill became due on the 27th of April, 1840.

John Turner said:—"I am clerk to Mr. Sydney Smith, who is an attorney in Barnard's Inn; I produce Mr. Smith's letter-book. [The defendant's counsel handed the witness a letter.] This is the letter I put into the post; I put it into the post before one o'clock on the 28th of April."

Mr. Murphy, a clerk to the plaintiff, proved that the defendant lived at 9, Euston Place; and that when he asked for payment of this and another bill, the defendant referred him to his attorney.

The letter (a notice of dishonour) was read; it was postmarked

10 FN. 10. AP. 29 1840.
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The letter commenced—"9, Barnard's Inn, 28th April, 1840.

Sir, I am instructed by Mr. Molineux to give you notice that a bill [describing it] has been dishonoured," &c. It was signed, "For Sydney Smith, W. Hayward."

*Wordsworth*, for the defendant.—I submit that the plaintiff must be nonsuited. The bill became due on the 27th of April, and the notice of dishonour ought to have been given to the defendant on the 28th. The post-office mark on the letter is ten in the forenoon of the 29th of April, and it is, therefore, too late. The question is, not when the notice was put into the post, but when the defendant received it; and, being within the bills of mortality, the defendant was entitled to receive the notice of dishonour on the day after the dishonour of the bill. There is also another objection. According to the opinion of the Lord Chief Justice in the case of *Boulton v. Welch*, 4 Scott, 425, (32 E. C. L. R. 283,) the notice of dishonour should state the presentment of the bill, as well as the dishonour.

*F. V. Lee*, for the plaintiff.—The case cited has been overruled several times: and, with respect to the other point, it should be observed, that the notice purports to have been given on the behalf of Mr. Molineux, and there is no evidence that Mr. Molineux lives in town; but even if there were, it is proved that the letter was put into the post on the 28th of April; and if the defendant means to insist that he did not receive the notice till the 29th, he is bound to show affirmatively that he, in fact, did not receive it till that day.

*Wordsworth*.—If the plaintiff seeks to excuse his delay, because Mr. Molineux does not live in town, it lies on the plaintiff to prove that. The notice is dated from Barnard's Inn, which is in town.

ROLFE, B.—I do not think there is any thing in the objection as to the form of the notice; and with respect to the other point, the case must go to the jury. You can address the jury if you wish it; but it is hardly necessary.

*Wordsworth* declined addressing the jury.



ROLFE, B. (in summing up.)—If a party residing in London is bound to give notice of dishonour to another person also residing in London, it is enough if he puts the notice of dishonour into the post so early, that, in the usual course of post, the person to whom it is addressed will receive it at some time on the day following that on which the bill is dishonoured. If this letter was put into the post at the time at which the witness says it was, it may have been overlooked in the post-office, and delayed there, as the post-office is not infallible. On the other hand, the witness may be mistaken as to the time at which the letter was put into the post. If you think that the letter was put into the post before one o'clock on the 28th of April, as the witness says it was, I think that it is good, and that the plaintiff will be entitled to your verdict; but if the letter was put in at the time which the post-mark denotes, it was too late, and you ought to find for the defendant.

Verdict for the plaintiff.

ROLFE, B.—You think that it was put into the post before one on the 28th?

A juror.—Yes, my lord.

ROLFE, B.—Mr. *Wordsworth*, I shall give you leave to move to enter a nonsuit, if the court should think the notice put into the post-office before one on the 28th was not sufficient.

*F. V. Lee*, for the plaintiff.

*Wordsworth*, for the defendant.

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On a subsequent day, *Wordsworth* applied to the court, in pursuance of the leave given; but the court, after citing the case of *Dobree v. Eastwood*, ante, vol. 3, p. 250, (14 E. C. L. R. 289;) held, that the learned baron had left the proper questions to the jury, and refused a rule.

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### MARSHALL v. PARSONS.—p. 656.

A. acted under a written agreement as the commission agent of B. in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—*Held*, that if in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately.

*Held*, also, that this was a question for the jury.

ASSUMPSIT for “work, journeys, and attendances by the plaintiff, as agent for the defendant, and for commission payable to the plaintiff in respect thereof,” with counts for money paid, and upon an account stated. Pleas—Non assumpsit, and a set-off.

It appeared that the defendant was a manufacturer of edge tools at Wolverhampton, and that the plaintiff had acted as his commission agent in London, and that the only real question between the parties was, whether the plaintiff was entitled to recover any thing under the following item in his particulars of demand:—

"1839, August 4th.—Attendance at Somerset House, from October 2d, 1838, to August 4th, 1839, superintending the unpacking, delivery, and examination of patterns, and at return of those rejected; eighty-seven days, at 21s. per day, £91 7 0

It further appeared, that when the plaintiff became the agent of the defendant, the parties entered into a written agreement, dated the 1st day of December, 1837, by which the plaintiff agreed to act as the agent of the defendant for one year, and thenceforth from year to year, until either party should give the other twelve calendar months' notice; and by this agreement the plaintiff was to "use his best endeavours and exertions to vend, sell, and dispose of the several goods manufactured" by the plaintiff, within the city and seven miles thereof, and "use his best endeavours to obtain information as to the particulars as to any supply of goods in the said trade [of an edge-tool manufacturer] which may be required by any government, public or private body or firm," and communicate the same to the defendant, so as to enable him to tender for the same, "which shall be done through the agency of the said William Marshall; and that he will forward to the best of his ability and power the interest of the said John Parsons, his executors, administrators, or assigns, within the limits aforesaid, in selling the articles manufactured by the said John Parsons as aforesaid, and in obtaining payment for the same upon the terms usual in the trade, as to credit or otherwise;" and it was further agreed that the defendant should pay to the plaintiff for all goods sold by him 2½ per cent. on heavy goods, [which were specified,] and 5 per cent. on all such goods as were not specified, which commissions of 2½ per cent. and 5 per cent. respectively were to be "clear of all charges, expenses, and deductions whatsoever."

It appeared that the defendant was a contractor with the Admiralty for a great variety of articles, and that when any article of a given description was wanted, the defendant had to send seven patterns of the article to Somerset House, which were all to be precisely of the description required, and precisely similar to each other; and such of the seven patterns as were not so, were rejected, and others had to be sent by the defendant in their stead; and it further appeared, that if all the seven patterns of any article were approved, one of them was kept at Somerset House, and one of the other six went to each of the royal dockyards, to be compared with the bulk when delivered by the defendant; and it was proved by Mr. Gossage, the inspector of stores, in the store-keeper general's office, that it was necessary for some person to attend at Somerset House on the behalf of the defendant, whenever the patterns were to be inspected; and it was also proved by Mr. Gossage, that the plaintiff attended at Somerset House about sixty times on this business; and it was also proved, that the usual charge made by a competent person for taking stock was from 10s. to 1*l.* 1s. per day. It was admitted, that the plaintiff had been paid commission on the goods supplied to the Admiralty by the defendant under his contract, to which the patterns in question referred.

*R. V. Richards*, for the defendant.—The plaintiff has no right to charge for attendances. An agent who is paid a commission, is not entitled to charge any thing for attendance. The commission is his compensation for his trouble; and if it were not paid him as a reward for his trouble, for what is any commission paid at all?

ROLFE, B., (in summing up.)—This is an action brought to recover a compensation for the attendances of the plaintiff, made when he was agent for the defendant; and the question for you (and I think it is a question for you) is, whether what the plaintiff did was or was not done in the ordinary course of his business as an agent? The plaintiff had agreed to act as the defendant's agent for certain commission, and you will say whether or not these attendances were in the course of the plaintiff's business as an agent. The witness from Somerset House has told us, that it is necessary for some one to attend when the patterns are inspected; but it appears to me, that these attendances to ascertain whether the patterns are correct, are within the ordinary duty of the agent. If the plaintiff, in giving these attendances, was only acting in the discharge of his business as an agent, he is paid by his commission; but if these attendances were a matter beyond his duty as an agent, he is entitled to be paid for them separately. However, it seems to me, that this is just what an agent does, and is paid for by his commission.

Verdict for the defendant.

*Jervis*, and *E. V. Williams*, for the plaintiff.

*R. V. Richards*, and *Whateley*, for the defendant.

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*Sittings in London after Hilary Term, 1841.*

BEFORE MR. BARON GURNEY.

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BOSANQUET and Others v. FORSTER.—p. 659.

A. having been in partnership with B., on the dissolution undertook to collect and pay the partnership debts: A. and B. during the partnership had kept a joint account with a certain branch bank; but after the dissolution there was only a single account of A. kept there. A. having greatly overdrawn that account, obtained a promissory note for £500 from B., his former partner, which he endorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch; the clerk who managed the branch promising that it should not be presented. He however kept it, and it was found among the securities of the branch, in his portfolio, when he was discharged from his situation:—*Held*, that the directors of the bank might recover the amount from B.

ASSUMPSIT.—The first count of the declaration was on a promissory note, dated June 8th, 1840, by which the defendant undertook, two months after the date, to pay to one Chipperfield the sum of £400, and which note was stated in the declaration to have been endorsed by Chipperfield to the plaintiffs.

The second count was on a promissory note between the same parties for £500, and was dated January 1st, 1840, and made payable at three months after the date.

The defendant pleaded to the first count, that the £400 note was given by the defendant for the accommodation of Chipperfield and that no consideration for it passed between Chipperfield and him, and also that Chipperfield endorsed it to the plaintiffs without any value or consideration whatever.

There was a similar plea as to the £500 note; and also a further plea that the £400 declared on in the first count, and dated in June, 1840, was substituted for and accepted by the plaintiffs in lieu of that set

out in the second count, and which was dated the 1<sup>st</sup> of January 1840.

The affirmative of the issues being on the defendant, *Erle* began by stating his case. It appeared that the plaintiffs were the directors and trustees having the management of the affairs of the London and Westminster Bank, which bank had a branch established at Whitechapel, which was under the superintendence of a person named Rees. Chipperfield kept an account there, which was overdrawn to a very large amount; and it being the practice of the bank for inspectors to examine the accounts of the branch quarterly, Chipperfield handed over to Rees, who was his friend, various promissory notes and checks, to be produced as securities before the inspectors, and afterwards given back to Chipperfield. The promissory notes sued on in this action were found among the bank papers, in the possession of Rees, when he was discharged.

Chipperfield was called as a witness for the defendant, and gave the following account of the transaction:—"I was once in partnership with the defendant, and applied to him to give me the note (the £500 note,) on the 28th of January, 1840; no value was given for it. It was to be deposited at the bank; it was to be given to Rees in consideration of my account being overdrawn. I did not tell the defendant he should not be called upon to pay it. I gave him my check for the amount as a counter-security. Rees applied to me to get security. I had six times previously given Rees checks, which he afterwards returned to me, but this was the first promissory note. I afterwards applied to Rees for it, and he told me it would not be used—it was safe. When the £500 note had been due about two months, the £400 note was given to Rees, on an agreement that the £500 note should be given up, and I told the defendant this when I got the £400 note from him. I did not at the time ask Rees to give it up, but did shortly afterwards. I saw the £400 in Rees's possession after he quitted the bank; it was not then due; he had only had it a few days. He was dismissed a few days after the 8th of June; I then applied to him for it, but he would not give it up." On his cross-examination the witness said—"The £500 note was given to be placed to my account in January and March. I judged it was for the purpose of being exhibited to the directors when they came round, to cover the account. Both notes were not allowed to remain in Rees's hands, to be exhibited as assets in my favour, but only one. After the dissolution of the partnership between the defendant and me, an account was opened with the bank in my name only; the partnership account was closed at the dissolution, which was in June, 1838. The partnership funds received by me were included in my private account. I received and paid the partnership moneys. The defendant had a private account there. The balance against me in my account was for debts due from the old firm, and the first note was paid in against that balance." On his re-examination he said, "I was to receive the partnership accounts, and pay the partnership debts, but the defendant had nothing to do with my separate account at the bank; but I used the money only for the liquidation of the partnership accounts of Chipperfield and Forster."

Rees was also called as a witness for the defendant, and said, "There was no general agreement when Chipperfield handed the note for £500 to me that I would return it, but I afterwards promised to return it. I expected another £500 note for the first £500 note, but, instead, a £400 note only was sent. I was to retain the £400 note for a sum I had pri-

vately borrowed for Chipperfield. I was dismissed on the 15th of June; and between the 8th and the 15th it was agreed that I should retain it. The £500 note was given as a security for a transfer from the loan account of the bank to Chipperfield's account. Chipperfield brought the note, endorsed by himself." On his cross-examination he said, "In January, 1840, Chipperfield owed the bank nearly £4,000, and that balance increased as the year went on. I certainly understood, when the £400 note was sent, that it was sent in substitution of the £500 note; but I never accounted to the bank for it, nor put it to the credit of Chipperfield at the bank; I retained it myself. I had no authority from the directors to give up the £500 note, or to substitute the £400 note for it." On his re-examination he said, "I had authority to get what securities I could."

*Erle*, for the defendant.—Great injustice will be done if the plaintiffs are only bound to adopt the act of their agent in part, and not throughout. The question is, which of two comparatively innocent parties is to suffer from the misconduct of a third. I say, the party who put Rees into the situation to commit the misconduct, which, if the verdict is for the plaintiffs, will be prejudicial to Mr. Forster, the defendant. But there is this further point here, which arises on the third plea. Can it be said that Rees, having accepted one note in substitution for the other, the bank can sue upon both notes? If there was an express promise made by the agent, by whose hands and through whose means the principals obtained the instrument, surely they cannot sue upon it afterwards. The principal must stand in the same situation as the agent, and cannot be in a better. As to a counter-check creating value, if it is known that the check itself is not to be presented, that counter-check is mere waste paper. Suppose Mr. Bosanquet himself, or any other of the trustees, had done what Rees did, could he and the others have sued? Surely not. The plaintiffs adopt the acts of Rees, and they must adopt them in toto.

*Platt*, for the plaintiffs.—The value for the £500 note was the loan from the Bank Loan Fund to Chipperfield. The principal is only responsible for the acts of his agent within the scope of his authority. A groom would not have authority to sell his master's horse, or let his master's stables; and, in this case, Rees has no authority to cheat his employers. There is no defence as to the £500 note; and, as to the £400, I contend that it was never substituted for the £500 note, and the possession of it is *prima facie* evidence of consideration; and the only plea here as to that note, is, that it was given without value. How is the presumption of value broken in upon in this case? Only by the evidence of Chipperfield, who is an interested witness. As to the argument about two innocent parties, Forster, the defendant, must have known the state of the account when he gave the notes, and therefore he cannot be considered as an innocent party. I also submit, that Chipperfield and Rees are not persons whose testimony is to be relied on; and the finding of the £400 note among the bank securities, is sufficient to entitle the plaintiffs to sue upon it. Besides this, the statement of the witnesses with respect to that note is not in itself at all a probable statement.

GURNEY, B., after stating the pleadings, in summing up said,—As to the £500 note, it appears that it was obtained from Forster by Chipperfield, who had been in partnership with him, and had undertaken to collect and pay the partnership debts. I think, therefore, that it was

not given without value, because it was given to reduce the balance, which balance was brought about by the payment of the partnership debts. And with respect to the bank, there was clearly, from the state of the account, a consideration by them for the note. Then, as to the £400 note, that stands upon a very different ground from the other. It appears that it was not, in fact, substituted for the £500 note, as it does not appear that it was ever carried to the account of Chipperfield. Rees says that it never was, and if he speaks untruly, the plaintiffs could prove it, as they are in possession of the accounts. And if it was given on the terms stated by the witnesses, then there was no consideration for the endorsement of it to the bank, and the plaintiffs will not be entitled to your verdict so far as that note is concerned. As to the £500 note, it is quite clear in point of law, as well as in point of honesty, that the plaintiffs are entitled to recover.

Verdict for the plaintiff on the £500 note, and on all the issues except as to the want of consideration for the £400 note.

*Platt and Butt*, for the plaintiffs.

*Erle and Humfrey*, for the defendants.

#### BOSANQUET and Others v. CORSER.—p. 664.

A customer of a branch belonging to the London and Westminster Bank, having overdrawn his account, previous to a quarterly inspection of the affairs of the branch, handed over to the clerk who superintended the business of the branch, and who was his friend, a check for £500, which was entered to the credit of the customer; the clerk promising that it should not be presented, but should be returned after the inspection was over. This check the customer had obtained from an acquaintance, giving him his own check for the same amount in exchange. It was not returned by the clerk to the customer, according to his promise, but was found by the directors of the bank among the papers of the branch in the clerk's portfolio, after he had been discharged from his situation:—*Held*, that the directors might recover the amount of the check from the defendant.

ASSUMPSIT upon a check for £500, by the plaintiffs as holders, against the defendant as maker.

*Plca*, that the check was an accommodation check, given by the defendant to Chipperfield, without consideration; and also that there was no consideration between Chipperfield and the plaintiffs to entitle him to sue upon the check.

The facts of the case were similar to those detailed in the preceding case of *Bosunquet v. Forster*, so far as relates to the mode by which the plaintiffs obtained possession of the check. It was dated in March, 1840, and it appeared from the evidence of Chipperfield and Rees, that at six different quarterly periods, when the inspectors of the bank were expected to come and examine the accounts, Chipperfield, whose account was greatly overdrawn, obtained from different persons, and handed over to Rees as the manager of the branch, various checks, which were entered to the credit of Chipperfield's account, Rees promising him that they should not be presented. The check in question was with other securities put by Rees into his portfolio, and was found there by the directors, when they discharged him from their employ in the month of June, 1840. It appeared, also, that Chipperfield gave his own check to the defendant for £500, at the time when the defendant gave his check to him.

*Erle*, for the defendant, argued, as in the other case, that, Rees being the agent of the plaintiffs, they were bound by his agreement with Chipperfield, and could not, therefore, sue upon the note; and also, that, as between Chipperfield and the defendant, there was clearly no consideration whatever for the check.

*Platt*, for the plaintiffs, contended that Rees had authority from the directors to receive checks from a customer of the bank, and enter them to the credit of his account, but he had not any authority from them to agree not to present such check for payment.

GURNEY, B., told the jury that, in his opinion, in point of law, the plaintiffs were entitled to the verdict; that, as between the bank and Chipperfield, it was a payment; and that the defendants taking a counter-check in exchange from Chipperfield was very like value as between Chipperfield and him. His lordship added that Mr. *Erle* should be at liberty to move the Court of Exchequer, who, if his opinion was wrong, might set it right.

The jury immediately found a verdict for the plaintiffs.

*Platt* and *Butt*, for the plaintiffs.

*Erle* and *Humfrey*, for the defendant.

In the ensuing Easter Term, *Erle* moved the court pursuant to the leave given at the trial, but their lordships

Refused a rule.

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## CENTRAL CRIMINAL COURT.

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NOVEMBER SESSION, 1840.

BEFORE MR. JUSTICE BOSANQUET.

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REGINA v. A. L. PEARCE.—p. 667.

A man was indicted for shooting at his wife with intent to murder her, &c. Previous to the commencement of his trial he applied to the judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests: the counsel for the prosecution stated that he should not call her; and the judge told the prisoner that, although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution, to negative the supposition that he was insane; and his lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence was an incorrect one, and, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity.

THE prisoner was indicted under the 3d section of the stat. 7 Will. 4, & 1 Vict. c. 85. The 1st count of the indictment stated, that he, on the 1st of October, at St. Mary Abbots, Kensington, in and upon Elizabeth Pearce, (his wife,) in the peace, &c., feloniously did make an assault; and that he with a certain loaded pistol then and there feloniously did shoot at the said Elizabeth Pearce, with intent in so doing, and by

means thereof, feloniously and wilfully, &c., to kill and murder her. There were other counts charging an intent to maim and disable, and to do grievous bodily harm.

*Clarkson*, and *C. C. Jones*, appeared as counsel for the defence ; but before the jury were charged the prisoner himself applied to the learned judge, to know whether his wife was to be produced against him or not, as her presence he considered necessary for his interest. He stated that she had not been produced at either of the examinations before the magistrate, and he wished her to be examined on the trial.

*Clarkson* said that he, as counsel for the prisoner when before the magistrate, made a similar observation as to the absence of the wife ; but that circumstances had since come to his knowledge which induced him to consider that her attendance was not of importance—circumstances which would render it, at least, very doubtful whether the unfortunate prisoner was in a state of mind to be answerable for the act which undoubtedly he committed.

*C. Phillips*, for the prosecution, said that he certainly should not produce the prisoner's wife as a witness.

BOSANQUET, J.—The charge is one of personal violence to the wife, she is, therefore, a competent witness. But it is not indispensable that she should be called.

The prisoner said, that he wished to put questions to her which were essential to his defence, and as she was quite well in health he thought that she ought to be called.

*Clarkson* said, that the solicitor who instructed him had not made in the brief any suggestions as to the examination of the prisoner's wife.

The prisoner then asked his lordship if he was to understand that his appeal was overruled ?

BOSANQUET, J.—Yes. The case will proceed, and such witnesses as are here will be produced ; and we shall see at the close of the case whether the evidence is or is not sufficient to prove the charge against you.

The case then proceeded, and *C. Phillips*, in his opening speech, expressed it as his opinion, that the prisoner must have been insane at the time when he committed the act.

The facts having been proved by the witnesses for the prosecution—

*Clarkson* addressed the jury for the defence, and relied on the prisoner's insanity as an answer to the charge.

At the conclusion of his address the prisoner stated, that he did not agree with the observations which Mr. *Clarkson* had made ; that he (the prisoner) had never seen the brief, nor had been consulted on the subject of his defence ; and he denied that he was at any time suffering under any aberration of mind.

*Clarkson* stated, that he relied on the prisoner's denial of his insanity, under the circumstances which had been proved against him, as one proof of the fact of his being insane.

Several medical men and others were called as witnesses to prove the prisoner's insanity. One of them, Dr. Marshall Hall, on being put into the box, refused to take the oath, saying, that he was a simple Christian, and did not think it right to swear. He was not examined.

The prisoner was allowed to put questions in cross-examination to the witnesses for the prosecution, and also additional questions to the witnesses called for the defence. All the questions were considered, in



point of form, as put through the learned judge, though, in point of fact, most of them were put to the witnesses by the prisoner himself. (a)

After *Clarkson* had finished his case, the prisoner said that he wished some witnesses to be called for the purpose of proving that he was not insane.

*BOSANQUET, J.*, said—If the prisoner wishes to have any witnesses called, I will call them, and put such questions to them as the prisoner wishes, if they are proper questions. But this case cannot be conducted in two ways—first by the prisoner's counsel, and then by the prisoner himself. But at his suggestion I can call a witness, and examine him.

Several witnesses were then called, but so far from their testimony proving that the prisoner was not insane, it went directly to establish the contrary position.

Verdict—Not Guilty, on the ground of insanity.

*C. Phillips*, and *Ballantine*, for the prosecution.

*Clarkson*, and *C. C. Jones*, for the prisoner.

(a) In the case of *Earl Ferrers*, who was tried for murder before the House of Lords, it appears from the address of the Lord High Steward, that counsel were assigned to the prisoner, but they do not appear to have interfered at all during the trial; and although the defence set up was insanity, yet the earl himself cross-examined the witnesses for the prosecution minutely to the facts of the transaction, and addressed the court; and afterwards called and examined all the witnesses for the defence. It is, however, to be observed, that the earl afterwards spoke of his defence as one which he set up rather at the desire of his relatives than from any wish of his own.

BEFORE MR. BARON PARKE AND MR. JUSTICE BOSANQUET.

REGINA v. LITTLETON.—p. 671.

Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the court, to a gentleman at the bar, he should consider himself as counsel for the crown, and act in all respects as he would if he had been instructed by the prosecutor; and should not consider himself merely as acting in assistance of the judge, by examining the witnesses.

THE prisoner was indicted for the wilful murder of *Mary Nicholls*.

The learned judges having ascertained that counsel had not been instructed on the part of the prosecution, directed that the depositions should be put into the hands of some gentleman at the bar, and postponed the trial for a short time, to enable him to read them.

The depositions were handed by the officer of the court to *Mr. Adolphus*, the senior barrister.

*Adolphus*, in addressing the jury, observed, that, under the circumstances, he should consider himself only as acting in assistance of the judge, and not as in the ordinary situation of counsel engaged to conduct the prosecution.

*PARKE, B.*, said, that when the depositions were delivered to counsel by direction of the court, he ought to consider himself as counsel for the crown, and should act in all respects as if he had been instructed by the prosecutor instead of the court.

Verdict—Guilty of Manslaughter. Sentence—transportation for life.

*Adolphus*, for the prosecution.

*Montagu Chambers*, for the prisoner.

BEFORE MR. BARON PARKE.

## REGINA v. TAYLOR and WEST.—p. 672.

Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct.

In a case of manslaughter, it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him.

However, if the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the bill, and examined before the grand jury.

THE defendants were charged on the coroner's inquisition only, (the grand jury having ignored the bill of indictment,) for the manslaughter of Michael Shea. The inquisition stated, that the defendants, on the 6th of October, &c., with force and arms, at the parish of Woolwich, in the county of Kent, and within the jurisdiction of the Central Criminal Court, upon the river Thames there, in and upon the said Michael Shea, in the peace of God and of our said lady the queen, and in a certain small boat called a skiff upon the said river Thames then and there being, feloniously did make an assault; and that the said defendants, being in a certain large vessel called the London, upon the said river, did then and there feloniously propel and force the said large vessel called the London, unto and against the said boat called a skiff, wherein the said Michael Shea was as aforesaid; and did thereby then and there feloniously cast and force the said Michael Shea from and out of the said boat called a skiff, into the said river, by means of which said propelling and forcing the said vessel called the London unto and against the said boat called a skiff, and casting and forcing the said Michael Shea from and out of the said boat called a skiff into the said river, the said Michael Shea, in, by, and with the waters of the said river was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning, the said Michael Shea did then and there die.

*Clarkson*, in stating the case on the part of the prosecution, said:— This prosecution is instituted by the corporation of the Trinity House, and their object is only that justice should be brought home to the defendants, if they have committed any offence; but there is undoubtedly a feeling on the part of the corporation against the mode of navigating large steam vessels on the river Thames. With respect to the law on the subject, I apprehend that the rule as to the mode of traversing the river Thames is to be the same as that applicable to the mode of passing along any of the queen's common highways. Therefore I submit, that if it shall turn out that the speed at which, or the manner in which, the defendants were navigating the vessel and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they will be responsible for the offence of manslaughter if his death happened in consequence. Before the coroner, the witnesses called for the defence were bound over, as well as those called for the purpose of making out the charge of manslaughter. Now, though the Coroner's Court is an open court, and he is bound to hear those who can give material infor-

mation touching the death of a person, yet, where the verdict of the jury points to a particular party as to blame, it is not the proper course for the coroner to bind over the witnesses who were called to exonerate such party. The absurdity of such a course is manifest. The officer of the court here required that all the witnesses bound over by the coroner should be examined before the grand jury; and that, in my opinion, accounts for their ignoring the bill. On the question of whether it was an accident, I contend that if, on a misty night, the defendants were proceeding at such a rate that they could not stop in time, their so proceeding was illegal; and, as death ensued, they are responsible. Before the coroner, the defendant West made a statement with reference to the other defendant, Taylor.

PARKE, B.—The statement of West will not be evidence against Taylor, under such circumstances. What one man says in the presence of another, is only evidence against that other, on the ground that, by his silence, he acquiesces; but that comes to nothing in this case. The coroner cannot have his proceedings interrupted by one man contradicting what another says.

*Clarkson* was further observing on the responsibility of the defendants, when

PARKE, B., said—The allegation in the inquisition is, that the defendants forced and propelled the steam vessel against the skiff. Evidence against those who gave the immediate orders will be necessary to sustain this allegation.

*Clarkson* made some observation on the course pursued before the grand jury on the examination of some of the witnesses for the defence.

PARKE, B.—You must pursue the same course here. You must call some of these witnesses who were examined before the grand jury, one or more of them; and, under such circumstances, do you think that you could succeed in obtaining a verdict? You have stated the law most correctly. There is no doubt that those who navigate the river Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on the public highway, either by furious driving or by negligent conduct. With respect to the binding over of the witnesses, I apprehend it is the coroner's duty to bind over those witnesses only who make out the case against the party charged, and not those who are called to rebut it.

*Clarkson* said, that, after such an intimation from his lordship of his opinion, under the circumstances, and considering the difficulties which beset the case, he should take upon himself to withdraw from the prosecution.

PARKE, B., to the jury.—I believe the case would, at the end, be one of considerable doubt; and I think the learned counsel has incurred no blame in not offering any evidence against the defendants.

Verdict—Not Guilty.

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After the verdict had been given, *Clarkson* informed his lordship that Mr. Roper, the clerk of the indictments, was apprehensive that some of his observations might be considered as referring to him.

PARKE, B.—No, not at all: he was not in fault. He only acted according to the usual practice.

The coroner, being present, then addressed the judge, and said, that, in his opinion, without the testimony of the witnesses called from the

steam vessel, and whom the counsel for the prosecution styled witnesses for the defence, no verdict of manslaughter could have been returned at all.

*Clarkson* observed, that he was sure the coroner did not mean to represent, that all the witnesses examined before him were material witnesses on the part of the prosecution.

The coroner replied, that, in his judgment, those witnesses were material witnesses to be bound over.

*PARKE, B.*—All that I need say, is this: it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him.

*Clarkson* and *Wilmore*, for the prosecution.

*C. Phillips, Bodkin, and Montagu Chambers*, for the defendants.

## DECEMBER SESSION, 1840.

BEFORE MR. JUSTICE PATTESON.

### REGINA *v.* MAZEAU, RAMUZ, and RAULT.—p. 676.

Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4, and 1 W. 4, c. 66, s. 19. The plates were engraved by an Englishman, who was an innocent agent in the transaction. It appears that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction. The questions left to the jury were, 1st, whether the two who gave the order for the engraving knew the nature of the instrument; and, 2dly, whether all three concurred in the order given. The judge told the jury that in order to find all three guilty, they must be satisfied that they jointly employed the engraver; but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and that all three concurred in the employment of the engraver. His lordship also said, that he was inclined to think that if the prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not, but intimated that, if it became necessary, that matter might be made the subject of further consideration. The jury found the two guilty who gave the order, and added that they considered they knew the nature of the instrument. The third prisoner was acquitted.

THE prisoners were indicted for feloniously engraving and making upon two plates, two parts of a promissory note for 25 rubles, of Nicholas, Emperor of Russia. The charge was stated in various ways in different counts of the indictment.

From the evidence for the prosecution it appeared that the prisoners Ramuz and Mazeau had been for some time acquainted with an engraver named Salt, and that on the 9th of August Mazeau went to Salt and showed him two Russian notes, and had some conversation with him about engraving some plates, and some days after Mazeau came again accompanied by Ramuz, and both told Salt that he was to go on with the engraving, and both gave him some money, and it was

proved that they both came together to him frequently during the progress of the work. The evidence against the third prisoner was as follows: Mr. Salt said, "When I took the print, Mazeau told me the man they were executing the order for was present in their house, in their parlour; in consequence of what he said, I watched outside the door after I left, and saw the prisoner Rault come out of the house." Being asked whether he had ever seen Rault at any other time than that, he said, "I have seen him several times during the progress of the engraving; I have seen him in conversation with Mazeau and Ramuz." Mr. Salt's wife said, "I know the three prisoners. I have seen two of them a great many times; but one not so often as the other two; I only saw the three prisoners together once, that was on the Thursday that they were taken into custody; I saw them at the corner of Princes Street and King Street, about two o'clock, I think. I think they were all three together; they were standing together for a short time, and then they dispersed; Rault went one way, and Ramuz and Mazeau went together another way. I did not notice what they were doing when they stood together, no more than they were talking together; they were close to our window; I was in the shop at the time. I had no reason for watching them. I did not look at them with any particularity; I merely said to Mr. Salt that they were standing there three together; I had seen Mazeau and Ramuz a great many times coming to our house on business; I had seen Rault once before, alone, at the door in King Street." On his apprehension, some proofs from the plates and a Russian passport were found upon Rault.

*Montagu Chambers*, for the prisoner Rault, at the close of the case for the prosecution, submitted that there was not any act proved to have been done by Rault, jointly with Mazeau and Ramuz, so as to make him guilty of the charge laid in the indictment. He contended that there must be a joint employment of Salt by all the three prisoners; and that in order to make out such joint employment, it was necessary to show that all three were present at the time the order was given.

PATTESON, J.—I quite agree that there must be a joint employment, and that all these three persons cannot be convicted on this indictment, unless the jury think that they jointly employed Mr. Salt. But I do not go along with Mr. *Chambers* in saying that they must all three be present at the time when the order was given to Mr. Salt. I am of opinion that if it be shown that two of them gave the order on behalf of themselves and another person, that other person being the other prisoner, he may be connected by some evidence with the employment. Whether there is such evidence in the case is a question for the jury; I cannot withdraw the case from their consideration.

C. *Phillips* then addressed the jury for the prisoner Mazeau, and *Montagu Chambers*, for the prisoner Rault.

The prisoner Ramuz defended himself.

PATTESON, J., in summing up, said, The words of the act of Parliament (11 Geo. 4, & 1 Will. 4, c. 66. s. 19) bearing upon this case are, "If any person shall engrave or in any wise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be, or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note

undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of his majesty, without the authority of such foreign prince or state, minister or officer, body corporate or body of the like nature, person, or company of persons, the proof of which authority shall be on the party accused, every such offender shall be guilty of felony." Now, I take it in the first place to be clear, that whatever was done by the parties here charged, was done without the authority of the Emperor of Russia; but these parties do not, upon the evidence adduced, all stand in the same position. You cannot find all guilty unless you are of opinion that they jointly employed Salt to make the engraving. If you are satisfied that Rault first communicated with the other two, and then that they all concurred in employing Salt, the three prisoners may be found guilty; but you cannot find Rault guilty if you think he employed the other two to get the plate engraved by any person, and they afterwards, of their own accord, employed Salt. You may acquit all or any one of the prisoners, if you are satisfied that they did not employ Salt. It is clear, under the words of the act of Parliament, and taking the evidence to be true, that Ramuz and Mazeau knew the nature of the instrument, that the case is brought home to them; and I am inclined to think, that if by Salt they engraved the plate, although they did not know the nature of the instrument, they are within the act; but I am not confident of that, and shall ask you to say, whether you think they knew the nature of the instrument which they employed Salt to engrave. With respect to the guilt of Rault upon this indictment, the evidence is certainly not so cogent. He is not brought forward until a very late period, long after the order had been given by the other two prisoners, when he is seen coming out of their house, and he is subsequently seen in their company. When he is apprehended, he gives his address in Portland Street, and at that address, in the room he occupied, the first proof of the plate is found, and other proofs are also found upon him. These circumstances, however, do not clearly lead to the inference that you must arrive at, before you can pronounce him guilty on this indictment; for, to make him answerable for the offence now charged, you must be satisfied that he was a party concerned in giving the order originally to Salt. For that purpose, it seems to me, the evidence is but slight; but should you think that he did originally instruct the other prisoners, and that by his authority they went and employed Salt, they may all be convicted. If you do not think that, Rault must be acquitted. You will, therefore, say, whether Ramuz and Mazeau knew what the contents of the plate were, and what the nature of the instrument was; and you will also say, whether Rault was a party concerned in giving the original instructions to Salt.

The jury found Ramuz and Mazeau guilty, stating, that they believed they did know the nature of the instrument; and they found Rault not guilty, stating, that, as against him, the evidence was not conclusive.

*Platt, Bodkin, and Doane*, for the prosecution.

*C. Phillips and Clarkson*, for the prisoner Mazeau.

*Montagu Chambers*, for the prisoner Rault. (*a*)

(*a*) The prisoner afterwards pleaded guilty to an indictment, which charged him with having

in his possession, without lawful license, a piece of paper, on which was printed part of a promissory note of the Emperor of Russia.

See the cases of *Rez v. Harris and Others*, ante, vol. 7, p. 416, (32 E. C. L. R. 564,) et seq.

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REGINA v. CULLEN.—p. 681.

*Seem*, that the true construction of the 22d section of the 9 Geo. 4, c. 31, in relation to the offence of bigamy, is this: not that the party, charged to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive.

THE prisoner was indicted for bigamy.

From the evidence on the part of the prosecution, it appeared that the prisoner was married to his first wife, Mary Ann Mitchell, on the 23d of February, 1824, and that after their marriage they lived together till the month of September, 1825.—The witness who proved these facts was named Mary Bridge, and she said in addition—"I saw Mary Ann Mitchell here to-day, she is the same person to whom the prisoner was married in 1824. I do not know where she has been living within the last six years, or nearly six years. *I saw her in 1834.* I am not sure whether it was the latter end of July, or the beginning of August, but I am sure it was in 1834. She then lived at the corner of Cannon-Place.—I saw her in Whitechapel—the prisoner was with her—he went to her there; *I saw them walking together.*"—This witness admitted that they separated in 1827, or the beginning of 1828, and that she did not see the wife again till the time she had mentioned in 1834.

The second marriage was proved to have taken place on the 16th of November, 1840.

The second wife was examined as a witness for the prosecution, and said that the prisoner occupied lodgings in her house, which he took on the 15th of June, 1840: that on the 2d of August he met with a violent accident, and kept his bed about three weeks, after which he paid his addresses to her, and proposed to marry her.—She added, "I ascertained a little, and I told him, I did hear, he certainly had been a married man: he said he had, but it was about seventeen years ago: that he had not seen his wife for nearly eight years, and he believed she was dead, as he had not seen her. I believed so too, as he had not seen her. I believed what he told me, and married him." The witness was cross-examined, with a view to show that, after the accident, the prisoner was not in his right senses; but she said that he was very bad from his head for some time after, but always spoke very rationally to her, and did not seem to her to have any thing the matter with him, except that he was rather outrageous at times in his temper.

*Montagu Chambers*, for the prisoner, in addressing the jury, stated that he should be able to bring the prisoner within the proviso of sect. 22 of 9 Geo. 4, c. 31, (a) by showing in addition to the fact of the separation in 1827, proved on the part of the prosecution, that the prisoner

(a) That proviso, so far as relates to this question, is as follows—"Provided always, that nothing herein contained shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

had been continually absent from his wife for more than seven years previous to the second marriage. He denied that the testimony of Mrs. Bridge, as to the meeting in 1834, could be depended upon; but he also said that, conceding that it was correct, he should prove that the prisoner, shortly before his second marriage, received a serious injury from a blow on the head, which for some time rendered him insensible and delirious, and had impaired his memory; and he submitted that if at the time of the second marriage the jury from this circumstance could infer that he did not know that his first wife had been alive during the seven years, he would be within the protection of the proviso.

Witnesses were accordingly called, two of whom were actors at the Surrey Theatre, at which place the prisoner also was engaged as an actor. One of them said—"I knew him before the attack which was made upon him, when he was struck on the head: before that time he was a very excellent, dependable, good actor: you might always rely upon him with safety for memory and regularity: since that I have observed a very visible alteration; his memory has been very indifferent, and he has been flighty, and it has been remarked by us that there has been a great alteration in him since that." The other said—"I have frequently observed an alteration in him since he received the injury in his head." Several witnesses were also called, the substance of whose testimony was, that they had known the prisoner since the year 1833, and never saw any female with him who passed as or appeared to be his wife.

PATTESON, J., (in summing up,) said—The case is proved to this extent, that Cullen the prisoner was married in the year 1824 to M. A. Mitchell, who is now alive, and to Jane Bristow in the month of November of the present year. But the prisoner seeks to bring himself within the proviso of the act of Parliament, and the point turns upon the construction of that proviso. It appears that the prisoner and his first wife were separated in the year 1827, and I think it must now be taken that they have not lived together since. If the case had so rested, the question would have arisen whether a party who, having been so separated or so continually absent from his wife for the space of seven years, is bound, upon an indictment for bigamy, to prove that he used due diligence to ascertain whether his wife was living before he contracted a second marriage; but should you believe the evidence of Mrs. Bridge, and that she is accurate as to the time when she states she saw the prisoner and his first wife in company together, that question is not raised. If she is accurate, he was aware in 1834 that his first wife was living, and it seems to me that the true construction of the proviso is, not that the party must know at the time when he contracts a second marriage, that the first wife has been alive during the seven years, but that he must have been ignorant during the whole of those seven years that she was alive. If it had been meant that he should not, "at the time of such second marriage," know that the first wife was alive, it would have been easy to make use of these words, and they would have been used instead of the words that are employed. If also the question under this proviso had been as to the prisoner's knowledge, at the time when he contracted the second marriage, the circumstance of the accident he met with and the injury so produced might have been considered, but it cannot now have any effect. If, then, you think Mrs. Bridge is accurate in her statements as to the time, the prisoner is not



within the proviso; but if you think she is not accurate, then the question will arise, whether, in point of law, he was bound to make inquiries as to the fact of his first wife being alive at the time when he was married a second time. You will therefore give me your opinion whether you believe Mrs. Bridge's account to be accurate, and, if you are satisfied that it is, will pronounce the prisoner guilty; but if you think it is not, then I shall feel bound to direct you further upon the point of law I have mentioned.

The jury, after consulting together for some time, said, that they thought the evidence of Mrs. Bridge was correct, and accordingly pronounced a

Verdict of Guilty.—The prisoner was sentenced to six months' imprisonment without hard labour.

*Clarkson*, for the prosecution.

*Montagu Chambers*, for the prisoner.

## COURT OF COMMON PLEAS.

*Adjourned Sittings in London after Michaelmas Term, 1839.*

BEFORE MR. JUSTICE COLTMAN.

*(Who sat for the Lord Chief Justice.)*

DEACON & Others, Executors, &c., of Deacon, deceased, *v.* STODHART & Others.—p. 685.

To assumpsit on a bill of exchange for £150 by the executors of the endorsee against the acceptors, the defendants pleaded, that, on the day when the bill became due, they duly paid and honoured it when presented, according to the tenor and effect of it and of their promise, and then paid the said sum, to wit, £150, the amount made payable by the said bill. It appeared, that, before the bill became due, the endorsee, not having any banker of his own, handed the bill to a friend, in order that he might present it at the bank of Messrs. W. & Co., where it was made payable. This friend endorsed the bill, and got it discounted at the Bank of England; but afterwards receiving an intimation from the party from whom he received it, that it was not to be noted, sent the amount of the bill to the banking-house at which it was payable, on the understanding that he was to have the bill delivered up to him. The acceptors kept cash at that banking-house, and when the bill had been paid, the transaction was entered in their account as if the money to meet the bill had been paid by them; but the bill was delivered up to the party who, in fact, paid in that money. The jury having on this issue found a verdict for the defendants, the Court of Common Pleas set it aside, on the ground that this payment could not, under the circumstances, be considered as a payment by or on the behalf of the acceptors, but must be taken to have been a payment for the honour of the endorser.

The defendant also pleaded that the acceptance was an accommodation acceptance for the drawer, with the knowledge of the endorsee; and that the drawer became insolvent, and the endorsees, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several back debts and liabilities. The plea averred that the defendants and the two other creditors *did discharge and release their several debts, &c.*; and then went on to state that the endorsee, in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was then

an averment that the other creditors had released their debts. The replication to this plea stated that the endorsee did not agree in manner and form as in the plea mentioned. The evidence was, that the endorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said, on one occasion, that he knew the bill was an accommodation bill, and he should not call on the defendant to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement, signed by the creditors, contained these words: "We, the undersigned, do hereby agree to accept of a release from the said E. A. [the drawer] of the equity of redemption, &c.; and we agree upon the execution of such deed, to execute releases," &c. The endorsee died, and the action on the bill was brought by his executors:—*Held*, that the allegations in the plea were not sustained by the evidence.

**ASSUMPSIT** on a bill of exchange, dated the 30th of November, 1836, for £150, at three months from the date, drawn by one Edward Andrews on, and accepted by the defendants, made payable to the drawer's order, and endorsed by him to Deacon, the deceased.

There were counts for money paid, &c.

The defendants pleaded—1st, to the money counts, that they did not promise in manner and form, &c.

To the count upon the bill of exchange, the defendants pleaded—1st, that they, before the commencement of the suit, to wit, on the 3d day of March, 1837, when the said bill became and was due and payable according to the tenor and effect thereof, duly paid and honoured the same when presented for payment, to wit, on the said day and year aforesaid, according to the tenor and effect thereof, and their said promise, and then paid the said sum, to wit, £150, the amount made payable by the said bill, &c. (a)

The defendants pleaded also to the count upon the bill, that they accepted the said bill of exchange for the accommodation of the drawer thereof, the said E. A., with the knowledge and privity of the said Francis Deacon, (the deceased,) and that "afterwards the said E. A. became insolvent, and was indebted to divers persons in large sums of money, and thereupon afterwards, to wit, on the 1st day of February, 1837, the said Francis Deacon, one Samuel Wilson, one Thomas Alder, and the defendants, all then being creditors of the said Edward Andrews, or to whom the said E. A. was then under pecuniary liabilities, agreed amongst themselves, as the mutual friends of the said E. A., and for his relief and ease and benefit, to release their several debts and liabilities to the said E. A., and never afterwards to enforce payment thereof; and the said defendants and the said S. W. and T. A. then discharged and released to the said E. A. their several debts and liabilities respectively, and then agreed with and promised the said E. A. that they respectively would never enforce, demand, ask, or sue for payment of their respective debts or liabilities. And the said F. D. then, *in consideration of the premises*, and that certain other creditors of the said E. A. would release, abandon, and never enforce payment of their debts against the said E. A., agreed to and with the said defendants, and then faithfully promised them, the defendants, that he, the said F. D., would never ask, sue for, demand, or enforce payment of the said bill of exchange, in the said first count mentioned; and the defendants say, that, by reason and in consideration of the said promise by the said F. D.,

(a) There was another plea on this part of the case, which the Court of Common Pleas held bad on special demurrer for uncertainty and duplicity.—See 7 Scott, 763; 5 Bing. New Cases 304, (35 E. C. L. R. 239.)

and of the said defendants and the said S. W. and T. A., never to enforce payment, or ask, sue for, or demand payment of their respective debts or liabilities as aforesaid, the said other creditors of the said E. A., to wit, one Mr. P., one Mrs. F., and one Mr. V., agreed with and promised the said E. A. to release their several debts and liabilities, and never to enforce, ask for, sue for, or demand payment of their debts and liabilities respectively, amounting together to a large sum, to wit, the sum of £1000; and the defendants say, that they, the defendants, and the said S. W., T. A., Mr. T., Mrs. F. and Mr. V., creditors of the said E. A. as aforesaid, in consideration of the premises and the said promises by the said F. D., never have enforced, sued for, asked, or demanded payment of their debts respectively, or any part thereof, and *have released the same* to the said E. A., for and upon the considerations aforesaid.

The plaintiffs, in their replication, joined issue upon the pleas of the general issue and payment; and to the other plea, replied that Deacon did not agree in manner and form as in that plea alleged.

*Atcherley*, Serjeant, for the plaintiffs, stated that the only question in the cause was as to the bill of exchange, and therefore

*Thesiger*, for the defendants, began by stating their case, the affirmative of the issues as to the bill being upon them. "Dr. Andrews, who was a dissenting minister, became embarrassed in his affairs, and Deacon, the deceased, who was a member of his congregation, agreed to advance him money, but required a bill from the doctor, with the name of some other person in addition to his. The defendants, who were also members of the doctor's congregation, agreed to join him in a bill, and one was accordingly drawn by Deacon, and accepted by Dr. Andrews, and the names of the defendants were put upon the bill as security. Arrangements were afterwards made to let Dr. A. have £12,000 on his chapel, which was freehold, &c. &c.; and another bill, drawn by Dr. A. and accepted by the defendants, was substituted for the former. Shortly before this latter bill became due, it was found impossible to settle Dr. A.'s affairs without some arrangement among the creditors to take less than 20s. in the pound. A mortgage, to take effect after two other mortgages, was accordingly prepared, and Deacon was requested to consent to the arrangement, and sign an agreement which had been prepared. He at first assented, and sent for pen and ink to sign, but afterwards said he should like to see a few other signatures before he signed. The agreement was therefore taken to other creditors, who signed it on the faith of the understanding that Deacon would sign afterwards. Deacon, however, declined: but said he should not expect any dividend, and would take care that Messrs. Stodhart, the defendants, should not be called upon to pay the bill. On this state of facts I contend that it will be a fraud if the 4th plea does not prevail. The bill became due on the 3d of March, 1837; it came to the banking-house of Weston & Co. in due course, and the account of the defendants there was debited with it. How, then, can the executors of Deacon recover on the bill, when it has been already once paid? It cannot be negotiated again without a fresh stamp."

Mr. Wilson, one of the creditors mentioned, was called as a witness for the defendants, and said, "I called on Mr. Deacon on the 17th of February, 1837; I was then a creditor of Dr. A.'s for 73*l.* 10*s.* I went with Mr. Stodhart, junior, and Mr. Alder; we talked with Mr. Deacon about a bill of exchange for £150. Mr. Deacon acknowledged that the

bill accepted by Messrs. Stodhart was an accommodation bill, and said he should not call upon them to pay it: we asked him to sign the agreement; he read it to himself; he consented to sign it, and got up for a pen and ink for the purpose, but after a little consideration, he said, 'I should like to see a few more signatures,' and we were to call again when we had obtained them, and he said he would then sign it; there were the three signatures of Stodhart, Alder, and myself. I in consequence assisted in getting other signatures, and procured Mr. Turner's and Mr. Valentine's; in a few days I and Stodhart went to Deacon again, and he declined to sign the agreement, but gave us his word that the bill should not come against any of the parties, but he himself would come in as the rest of the creditors, and take what there was, and return the same to Dr. A.; he was a friend of Dr. A.'s, and so we were all; he saw on the second interview three additional signatures; he did not assign any reason why he would not sign; it was a third mortgage on the chapel which belongs to Dr. A." On his cross-examination, the witness said, "Dr. A. now keeps on the chapel; Stodhart collected the pew-rents, which constitute the funds of the chapel; Alder was only a member of the congregation, not a deacon; I believe the property was always considered valuable." On his re-examination, he said, "I have not been paid any portion of my debt."

Mr. Alder confirmed Mr. Wilson's account, and said in addition, on cross-examination, "I claim to be a creditor now for £200 as before." On re-examination he said, "The £200 is against my name in the instrument I signed."

The instrument was then read. The material part was as follows: We [&c. &c.] "do hereby agree to accept of a release from the said Edward Andrews of the equity of redemption," &c. &c.; and *we agree, upon the execution of such deed, to execute releases, &c.*

Mr. Turner, whose signature was to the agreement, was called as a witness, and said, "I was a creditor of Dr. A. for £250; I remember some gentlemen calling upon me, and requesting me to sign this paper, which at first I was not willing to do, and they said my signing would facilitate the arrangement with other parties. I do not remember Mr. Deacon's name being mentioned: it was in February, 1837; to the best of my belief no name was mentioned."

Mr. Valentine, another creditor, said, "I signed in consequence of a meeting at the office of Mr. S., the attorney, where several other creditors were present; it was to relieve Dr. A. from his unpleasant state of mind; Mr. Wilson, with Mr. Stodhart and Mr. Alder, brought this paper to my office to sign; this was after the meeting."

It was also proved that a Mrs. Fenner, a creditor to the amount of £495, had signed the agreement.

To make out the plea of payment, a clerk to Messrs. Weston & Co., bankers, in Southwark, was called: he said, "Messrs. Stodhart, in 1837, kept an account at our house, and do still. This bill, which became due on the 3d of March, was paid at our banking-house on that day, and cancelled in the usual way on the same day." On cross-examination he said, "I paid the bill out of the till. The money was paid in for the bill by another party, for the express purpose of meeting this bill; I do not know by whom. The money was not paid in by Stodhart's people; there is the endorsement of Messrs. Jones upon it; I cannot say who called, but I took the money upon the condition that I was to give up

the bill. Some gentlemen called about a bill of Dr. Andrews's, but I cannot say it was this bill; we had another bill of Dr. Andrews's due that day. Stodhart's account was debited, but the bill was not paid with their money, but with the £150 paid in. I cannot swear that the gentleman who paid in the money did not say it was taken up for the honour of the endorsers; we gave Stodhart's account credit for the money paid in to meet the bill; we entered the receipt and payment in Stodhart's account as the most correct mode of preserving a record of the transaction."

*Atcherley*, Serjt., for the plaintiffs.—I submit that the evidence which has been given is no answer to the action. First, as to the plea of payment, it says, that the defendants duly paid the bill, which I apprehend is clearly negatived. This has been decided on the argument on the demurrer to the 3d plea. [*Petersdorf*, s.—That plea was held bad, because it did not state that the defendants themselves paid the bill.] The plea means you have improperly called on me; because I, the acceptor, have paid. If the endorser had paid, the acceptor would be still liable to him. The evidence is, that the bill was not paid by the acceptor.

COLTMAN, J.—We must take the opinion of the jury as to the matter of fact, whether this bill was paid by the acceptor or some other person, and whether that will be an answer to the action or not, may be seen by-and-by. I am inclined to think that it may.

*Atcherley*, Serjt.—Then, as to the other special plea, every important allegation in it is negatived. The words are that it was an accommodation bill, with the knowledge and privity of the said Francis Deacon. Now, it was a substitute for another bill, in which the parties were reversed.

COLTMAN, J.—Still he was not the party bound to pay, being the drawer.

*Atcherley*, Serjt.—The second point is, that the Stodharts received the pew-rents for the doctor. These two facts raise the question, whether it was in reality an accommodation bill for the doctor. Then again the plea says, that Deacon, Wilson, Alder, and the defendants agreed amongst themselves as the mutual friends of the said Edward Andrews, and for his ease and benefit, to release their debts to the said E. Andrews, and never afterwards to enforce payment thereof. Now, there is no evidence of this whatever, but, on the contrary, they consider themselves creditors of Dr. Andrews still.

COLTMAN, J.—The question is, whether that means under the agreement. There does not appear to be any other. The words are, "do hereby agree to accept of a release from the said Edward Andrews of the equity of redemption, &c., and we agree upon the execution of such deed to execute releases," &c.

*Atcherley*, Serjt.—The plea states an absolute agreement, and the instrument itself shows a conditional agreement. There is a third allegation, that Alder and Wilson did actually release and discharge their debts to Dr. Andrews.

COLTMAN, J.—That is not proved, certainly.

*Thesiger*.—We must look at the replication, which only denies Deacon's releasing, but admits that the others did.

*Atcherley*, Serjt.—Then, again, Turner does not recollect Mr. Deacon's name being mentioned, nor are Turner or Valentine shown to

have at all acted on any statement as to Deacon, and this disproves another part of the plea.

COLTMAN, J.—The part that is in issue is the agreement and the consideration.

*Atcherley*, Serjt.—I submit that the words, “by reason whereof” form a substantial part of the plea, and this is disproved; but if it is not so, yet there was no agreement by Wilson, Alder, and Deacon, to release Andrews—no absolute agreement.

*Petersdorff*, on the same side.—Let us look at it as if a creditor had brought an action against Dr. Andrews, and, if so, Dr. Andrews must have shown that he had done what he had agreed to do, viz., assigned the equity of redemption: and this is not done here; and there is no absolute release, but only one conditional on the assignment, which has not been made.

*Thesiger*.—The only point raised by the replication is, whether Francis Deacon did agree in manner and form as in the plea alleged. The agreement stated in the plea as to him is, that he agreed that he would not ask for, sue for, demand or enforce payment of the said bill of exchange.

COLTMAN, J.—That is the point—how much is denied? The question is, and it is one of some nicety, whether, by putting in issue the agreement, you put in issue the consideration also.

*Thesiger*.—Your lordship can give leave to amend under the 3 & 4 Will. 4, c. 42, s. 23, but we need not do it now.

*Atcherley*, Serjt.—The power of amendment cannot be reserved.

*Hoggins*.—In *Story v. Richardson*, TINDAL, C. J., said, that the court above might amend if necessary.

COLTMAN, J.—That is under the twenty-fourth section of the statute.

*Atcherley*, Serjt.—There is no power to amend under the act of Parliament.

COLTMAN, J.—If I reserve it, the court may decide that question.

*Atcherley*, Serjt.—This is substance, and not a mere variance, and it is not amendable under the statute.

COLTMAN, J.—What I must do is, I must take the opinion of the jury whether the agreement was entered into as specified here, and the rest will be a question for the court above. I think, and I shall tell the jury so, that the consideration is admitted, and the promise only put in issue by the replication. This is in accordance with the decision of the Court of Common Pleas last term. There will also be the question for the jury as to the fact of the payment of the bill by the defendants. Being a payment on the day, I shall be inclined to think, that in point of law it was a payment by the defendants, and that the plea is made out.

After some further discussion, COLTMAN, J., said, that there were difficulties in the way of reserving the power to amend, and he, therefore, could not do it.

*Atcherley*, Serjt., then addressed the jury for the plaintiffs, and called witnesses, whose evidence was to the effect, that, some time before this bill became due, Deacon, who had no banker, left the bill with a Mr. Jones, an oil-merchant, in Gracechurch Street, that he might get it presented when it became due. Jones endorsed the bill, and got it discounted at the Bank of England. But he afterwards received an intimation from Deacon that the bill was not to be noted, and he, therefore, sent to the banking-house of Messrs. Weston, at which the bill was

made payable, and inquired whether, if he paid the bill for the honour of his endorsement it would be given up to him, and he was answered in the affirmative. Accordingly, on the morning of the day when it became due he paid in the money to meet it, and afterwards, though not without some delay and difficulty, got possession of the bill.

COLTMAN, J., in summing up, said, that if the bill was paid either by the defendants themselves or by some other person for them, in consequence of some supposed arrangement by which they were to be protected from the payment, it would be, in point of law, a payment for them—generally speaking (said his lordship), a payment for honour is not made till after default by the acceptor. It is a singular circumstance that, in the present case, the bill should have been paid for the honour of the endorser before payment had been refused by the acceptor. It will be for you to say, whether the allegation is made out, that the bill was paid by the defendants when it became due, according to the custom of merchants; and it will be so paid if it be paid either by the defendants themselves or by any other person on their behalf. With respect to the other plea, what the defendants undertake to prove is, that Valentine, Fenner, and Turner agreed not to enforce their demand, in consideration that Deacon agreed not to enforce his claim. The words of the agreement are—"We, the undersigned creditors of Edward Andrews, do hereby agree to accept of a release from the said Edward Andrews of the equity of redemption, &c., and we agree upon the execution of such deed to execute releases," &c. It seems to me, that the creditors named have not agreed absolutely to release, but only conditionally, and on this ground I am of opinion that the issue on this plea must be found for the plaintiffs.

Verdict for the plaintiffs on the issue as to the agreement, and for the defendants on the issue as to payment. The jury said "We think the bill was paid by the defendants under some arrangement."

*Atcherley*, Serjt., and *Petersdorff*, for the plaintiffs.

*Thesiger* and *Hoggins* for the defendants

In the ensuing Term, *Atcherley*, Serjt., obtained a rule nisi for entering a verdict for the plaintiff on the issue on the plea of payment, on the ground that the finding of the jury on that issue was against the evidence in the cause.

This rule came on to be argued in the course of Hilary Term, 1841, when the court being clearly of opinion that according to the evidence the bill had not been paid by the defendants, the acceptors, but by Jones, who had improperly parted with it, in order to get it back, made the

Rule absolute.

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*Adjourned Sittings at Westminster after Trinity Term, 1840.*

BEFORE MR. JUSTICE MAULE,

(*Who sat for the Lord Chief Justice.*)

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SMITH and Others v. ROLT.—p. 696.

In assumpsit for goods sold and delivered where the price is above £10, and nothing was paid as earnest to bind the bargain, nor was there any memorandum in writing, signed by the defendant or his agent: two things must be proved to entitle the plaintiff to recover; first, that the defendant in fact ordered the goods; and secondly, that he accepted them with an intent to take to them as owner.

**ASSUMPSIT.**—The 1st count was for 57*l.* 12*s.* for goods sold and delivered; the 2d count, for work done and materials found; and the 3d count, for 57*l.* 12*s.* on an account stated. The defendant pleaded, first, that he did not promise, &c.; secondly, that the cause of action in the first count was in respect of an entire contract for the sale of goods for a price exceeding £10, and that the defendant did not accept or receive the goods or any part of them, or pay any thing as earnest, to bind the bargain, nor was there any note or memorandum in writing of the bargain signed by the defendant or his agent lawfully authorized. The plea to the 2d count commenced by stating, that the work and materials mentioned in it were for preparing certain goods above the price of £10, and not actually made at the time of the contract, and then proceeded in a similar form to the plea to the 1st count. The plaintiffs joined issue on the 1st plea, and to the 2d and 3d replied that the defendant actually accepted the goods.

It appeared that the defendant, being about to paper his house, called at the plaintiff's premises, and was shown some paper, and the party who showed it him, wrote on the back of the pattern piece the following words as a memorandum of the terms agreed upon:—"The paper 2*s.* 8*d.*, at 1*s.* 4*d.* per piece to put up." The plaintiffs only claimed the 2*s.* 8*d.* for the paper itself, which had been delivered at the defendant's premises, but not put up.

*Talfourd*, Serjt., for the defendant, submitted that the plaintiffs must be nonsuited, as according to the writing the whole was one entire contract.

*Platt* and *Hoggins*, for the plaintiffs, contended that the charge of 1*s.* 4*d.* a piece was only to be made if the defendant should eventually require the plaintiffs to put up the paper, and was a separate matter from the charge of 2*s.* 8*d.* for the paper itself.

**MAULE, J.**, was of opinion, that it was a proper case to go to the jury upon the evidence.

*Talfourd*, Serjt., to the jury.—There is no acceptance to satisfy the statute. In the case of *Phillips v. Bistolli*, 2 B. & C. 513, it is said by the court, "In order to satisfy the statute there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter with an intention of taking to the possession as owner."

On the part of the defendant it was proved that the paper was brought to his house at a time when it was in the care of a charwoman, and that upon its coming to the defendant's knowledge, he wrote to the plaintiffs, desiring them to fetch it away.

*Platt*, in reply.—The order was clearly given, and as the charwoman had a general authority to receive goods at the house, her receipt of the paper is an acceptance which will bind the defendant.

**MAULE, J.**, told the jury that there were two questions for their consideration:—first, was there in fact an order given by the defendant for the goods in question? Secondly, if such order was given, then was there an acceptance by him of the goods with an intent to take to them as owner?

Verdict for the defendant.

*Platt* and *Hoggins*, for the plaintiffs.

*Talfourd*, Serjt., and *Wightman*, for the defendant.



BEFORE MR. JUSTICE ERSKINE,

(Who sat for the Lord Chief Justice.)

## WACKERBATH and Others v. RICH.—p. 699.

The object of the legislature in passing the stat. 3 & 4 Will. 4, c. 58, was to insure that double-refined sugar should be *pure sugar*; and, though it says that the single-refined sugar from which it is made must be of a uniform whiteness throughout, that must be taken to mean of a uniform whiteness according to the subject-matter; and does not mean that every loaf or lump must be free from all discoloration. By that statute, standard samples must be provided for the purpose of comparing double-refined sugar with them; and these standard samples must be made from single-refined sugar of a uniform whiteness throughout, and double-refined sugar entered for the bounty if it be not of a quality equal to the standard sample may be seized:—But there is not, in point of law, any right to seize such sugar on account of a discoloration which prevents it from being of a uniform whiteness, if it be in fact equal in quality to the standard sample, and the discoloration does not arise from impurities.

THE declaration stated that the defendant on the 4th of October, 1838, seized, took, and carried away certain goods, to wit, 250 cwt. of sugar of the plaintiffs, of the value of £1000, and kept and detained the said goods for a long space of time, &c. There were similar complaints of seizures on the 6th, 8th, and 10th days of October, and the declaration then stated that by reason of the said several seizures and detentions of their said goods by the defendant, the plaintiffs had lost and been deprived of the use and benefit of the said goods during the respective times aforesaid, and had necessarily become liable to pay divers large sums of money for the warehousing of the goods, and were prevented from selling or disposing of them, or delivering them to the purchasers, and became and were liable to pay £100 to one John Chapman, who had purchased a large quantity because it was not delivered within a reasonable time.—Plea, not guilty.(a)

*F. Kelly*, for the plaintiffs.—By the 2d section of the 3 & 4 Will. 4, c. 58, it is enacted that there shall be allowed on the exportation of refined sugar made in the United Kingdom, the several sums set forth in the table thereafter contained, which table, after mentioning several kinds of sugar has the following statement:—"Other refined sugar in loaf complete and whole, or lumps duly refined, having been perfectly clarified and thoroughly dried in the stove, and being of a uniform whiteness throughout, or such sugar pounded, crushed, or broken, and sugar candy exported in a British ship, for every cwt. 1*l.* 16*s.* 10*d.*,—exported in a ship not British for every cwt. 1*l.* 15*s.* 8*d.* Double-refined sugar, and sugar equal in quality to double-refined sugar, additional bounty for every cwt., 6*s.* 4*d.*"—By section 7 it is enacted, that there

(a) This plea was not marked in the margin by statute, as required by the rule of 1 Vict. Trinity Term, which is as follows:—"It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of Parliament, he shall insert in the margin of the plea the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue and of the *Nisi Prius* Record." Under these circumstances it seems that the plea would not have let in evidence of the special matter, had not admissions with the defendant, in which they agreed to waive the words. See the case of *Mason v. Newland*, ant

shall be provided by and at the expense of the Committee of Sugar Refiners, London, as many loaves of double-refined sugar, prepared in manner thereafter directed, as the Commissioners of Customs shall think necessary, which loaves, when approved of by the Commissioners, shall be deemed and taken to be *standard samples*, &c., for the purpose of comparing therewith double-refined sugar, or sugar equal in quality to double-refined sugar entered for exportation for the bounty—"Provided always that no loaf sugar shall be deemed to be a proper sample loaf of double-refined sugar as aforesaid, if it be of greater weight than 14lb., nor unless it be a loaf complete and whole, nor unless the same shall have been made by a distinct second process of refinement from a quantity of single-refined sugar, every part of which had first been perfectly clarified and duly refined, and had been made into loaves or lumps which were of a *uniform whiteness throughout*, and had been thoroughly dried in the stove." By section 8 it is enacted, "That in case any sugar which shall be entered, in order to obtain the bounty on double-refined sugar, or sugar equal in quality to double-refined sugar, shall on examination by the proper officer, be found to be of a *quality not equal to such standard sample*, all sugar so entered shall be forfeited and may be seized." In September, 1838, the plaintiffs, who are Sugar Refiners, contracted to supply a Mr. Chapman with a certain quantity of sugar equal to double-refined sugar. It was submitted, among other persons, to the defendant, who held the situation of searcher under the Commissioners of Customs. The defendant, under the pretence that the sugar in question was not of the quality entitling the plaintiff to the bounty, seized and detained it. He thought that as it was not of a uniform whiteness throughout, he was entitled to seize it, and did so; but the act of Parliament only required that it should be equal in quality to the standard sample, and it was not necessary that it should be of a uniform whiteness throughout. Two courses are open to a party under such circumstances,—he may commence a suit in the Exchequer, and he may apply to the Lords of the Treasury, who may allow the sugar to be exported with the bounty. On the report of Dr. Ure and Professor Dadd, the Treasury ordered the sugars to be restored, and they were ultimately exported and the bounty was paid. I am surprised that a public board should support their officer under such circumstances. By the 2d section of the statute, bounties are to be allowed on the export of several kinds of sugar, among others "For double-refined sugar and sugar equal in quality to double-refined sugar," an additional bounty is given. The words used in the 8th section are, "Of a quality not equal to such standard sample;" while in the second the words are, "being of a uniform whiteness throughout."

ERSKINE, J.—What is the standard sample?

Kelly.—There is nothing in the act which requires the sugar to be of a uniform whiteness throughout; but in point of fact it was: there was only a slight discoloration at the base from the presence of molasses, and that is not what was intended to be guarded against by the words "Of a uniform whiteness throughout." The only question in this case is, whether the sugars were of a quality equal to the standard sample. The argument on the other side is, I suppose, founded on the 7th section, which directs that the standard sample must be of a uniform whiteness throughout.

ERSKINE, J.—It is rather the standard sample must be made from sugar of a uniform whiteness; that is, the sugar must have been of a

uniform whiteness throughout, before it underwent the process of double refining.

*Kelly*.—By an order of a learned judge it is admitted, on the part of the plaintiffs, that the defence shall be given in evidence under the general issue, (a) and also that the sugar was entered for the bounty; and on the part of the defendant, the property of the plaintiffs in the sugar and the seizure by the defendant are both admitted.

A clerk of the plaintiffs' produced half a lump of sugar, and said it was equal to double-refined and to the standard sample. On his cross-examination by *Spankie*, Serjt., for the defendant, he said—"This is not part of the sugar delivered, but it is part of one of the same day's work; the usual way of examining is, to cut sometimes across and sometimes down the middle; there was a gray mark which prevented its being of a uniform whiteness throughout; stoving is to dry up the moisture; when it goes down towards the base, and the discoloration appears, we call it water on the face; it is very seldom seen without it; I was present at the examination, and there was a standard loaf there; the loaf cut down had a rim of grayish colour similar to this; there were several different examinations of the sugar on different days; there was only one custom house officer; I was present at an examination by Mr. Holthouse, Mr. Plaxton, &c., and almost all the leading gentlemen in the trade; I should say the standard loaf had a discoloration, but I did not see the face of it, and I cannot speak positively; the standard loaf was not split down, and so I could not see the base. [By *ERSKINE*, J.—If the narrow part was cut off it would give the best test whether the sugar was pure or not.] By stoving the moisture is driven towards the centre from the heat; the discoloration does not arise from a slovenly mode of drying; I should say the grayish mark cannot be avoided in this quality of sugar; I have seen large quantities." On his re-examination the witness said—"There are a great many standard loaves in different places; I have seen some cut down, and some had the grayish discoloration to some extent; most of them had the discoloration to a greater or less extent; I have only examined three, and they had the discoloration. [A loaf which was admitted to be a standard sample was here produced, and the witness continued]—"It is in this, but less, because this is of a smaller bulk; it is by act of Parliament only 14lb., and the loaf of the plaintiffs is from 38lb. to 40lb.; this loaf of the plaintiffs is superior in quality to the standard sample without a doubt; some of those sent were still better. The defendant admitted at the time that they were of a better quality than the standard sample."

*ERSKINE*, J.—Is it intended to be said, to-day, that the sugar was not of the quality of the standard sample?

*Spankie*, Serjt.—I do not mean to contend that it is not even of better quality; but I say that will not do. I do not mean to show that the sugar was inferior, as sugar, to the standard quality: it may or may not have been; we go by visible tests.

Mr. Plaxton, a Colonial agent and merchant, who had been a sugar-refiner for thirty years, and was for several years on the Committee of Sugar Refiners, was called as a witness and said, "I took samples of the plaintiffs' sugars which were seized by the defendant, and examined them thoroughly; we split about fifty lumps; Mr. Holthouse, Mr. Manning, the defendant, and the landing waiter were there; I had an order from the board of trade to inspect the sugar; the quality of the whole

was very good; it was much superior to the standard sample in quality and value; if the sugar had not been properly refined the defect would have appeared at the small end; if any molasses or other impurity were left in it, it would appear at that part of the cone; there was a slight discoloration near the base of what I examined at the Custom House, it was caused by the moisture settling down, which will leave a mark, particularly in strong sugar; the discoloration near the base has nothing whatever to do with the quality of the sugar; I have seen a great many standard samples, and they have shown that discoloration at the base; the quality of the plaintiffs' lump is superior to the standard sample."

ERSKINE, J.—Brother *Spankie*, can you after this say that this is within the act of Parliament?

*Spankie*, Serjt.—Yes, my Lord, I can. The word quality is used with reference to those tests which the act of Parliament requires.

The witness continued—"The discoloration is perceptible in the smaller or standard sample; taking into account the difference in size, it is as perceptible in the smaller as the larger; the same filling would be necessarily of the same quality; there was not one defective of the number I examined."—In answer to questions from *Spankie*, Serjt., he said "The moisture in stoving goes downwards in a slight degree; I never saw a lump of refined sugar of one uniform whiteness."

ERSKINE, J.—That may be, construing the act of Parliament as I do. It cannot mean discoloration not arising from impurities. The object of the legislature was, that double-refined sugar should be pure sugar; and though it says, that the refined sugar from which it is made must be of a uniform whiteness, that must be taken to be of one uniform whiteness, according to the subject-matter, and does not mean that every loaf or lump must be free from all discoloration.

Several other witnesses were called on the part of the plaintiffs, and the case eventually went to the jury, who found a

Verdict for the plaintiffs—Damages £60.

*F. Kelly*, and *Cleasby*, for the plaintiffs.

*Spankie*, Serjt., and *Barlow*, for the defendant.

## COURT OF QUEEN'S BENCH.

*Sittings at Westminster after Hilary Term, 1841.*

BEFORE LORD DENMAN, C. J.

DOE on the Demise of PITTMAN v. SUTTON and Others.—p. 706.

A covenant, "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it.

A lessee covenanted to insure, and the premises were uninsured for a week:—

*Held*, in an ejectment for a forfeiture for a breach of this covenant, that the lessor could not

recover if he, by his conduct, had led the lessee to believe that the premises were properly insured by himself.

A lease (among other covenants) contained a covenant by the lessee to insure, with a proviso that if he did not do so the lessor might insure and distrain on the lessee for the premiums. The lease contained the usual proviso as to forfeiture. Whether the lessee's omitting to insure would incur a forfeiture—*Quære*.

**EJECTMENT** to recover premises in the parish of St. Martin's-in-the-Fields.

It was opened by *F. Robinson* for the plaintiff, that this ejectment was brought by the lessor of the plaintiff as landlord of the house, No. 69, Strand, and a house in Theobald's Court, against the defendant Sutton, by reason of the forfeiture of the lease by breaches of covenant in not putting the premises into "complete and substantial repair," and in not keeping the premises insured; and that the defendant Sutton had been in possession of the premises since the year 1838, although the lease was not granted till the year 1840.

The lease of the premises, dated the 18th of March, 1840, was put in; it was between the lessor of the plaintiff of the one part, the defendant Sutton of the other part, and by it the property was demised by the former to the latter for twenty-one years from the 24th of June, 1838. This lease contained a covenant that the lessee would "forthwith" put the premises "into complete and substantial repair," and keep them "in good and substantial repair;" and also a covenant that the lessee would insure them and keep them insured in the Westminster Fire-office, or in some other office to be approved by the lessor, for £2500, in the joint names of the lessor and lessee; and that if the lessee made default in insuring, the lessor might do so, and charge the lessee with the premiums, and recover them by distress. The lease also contained the usual proviso of re-entry for breach of any covenants contained in the lease.

With respect to the insurance, it was proved, that, in the years 1838 and 1839, the premises had been insured for £2500 in the Westminster Fire-office, in the name of the lessor of the plaintiff only, and that the policy was allowed to expire on the 7th of October, 1839, and that the premises remained uninsured till the 13th of October following, when they were insured by the lessor of the plaintiff in the joint names of himself and Sutton. But it was also proved, that, in the years 1838 and 1839, the premiums of the insurance were paid after the policy had been allowed to expire, and that the lessor of the plaintiff had paid 10s. 4d. additional for the new policy in 1840, which had been repaid him by the defendant Sutton; and it was also proved, that the notices of the premiums becoming due had been always sent to the solicitors of the lessor of the plaintiff, and there was no evidence that they had ever been transmitted to the defendant.

With respect to the repairs, it was proved by Mr. Mayhew, the surveyor of the Westminster Fire-office, that the premises were not in repair, as one of the chimneys had bulged; a drain was stopped; some iron stays were wanting to support a chimney-shaft; the roof of a room at the back of No. 69, Strand, was out of repair; a dormer-door was defective; the floor of one of the rooms in No. 69, Strand, was shored up; two ridge-tiles were broken, and some weather-boarding required repair; and a window was broken. But this witness could not state what amount of repairs was needed.

*Thesiger*, for the defendant.—I submit that the non-insurance cannot

work a forfeiture of this lease ; because it is expressly provided, that, if the lessee makes default in insuring, the lessor is to do it, and distrain for the premium.

LORD DENMAN, C. J.—I shall reserve that point if it shall become necessary.

On the part of the defendant, a letter from the solicitors of the lessor of the plaintiff to the defendant Sutton was put in, dated in the year 1839, in which they stated, that the lease could not be granted till the defendant Sutton had shown by receipts that he had expended £500 in repair on the premises ; and a surveyor was called, who stated that as much as £500 had been expended by the defendant Sutton on repairs, and that the bulging of the chimney was caused by an under-tenant keeping granite to the extent of several tons' weight on the floor, which was shored up, and that this did not arise from want of repair. And this witness also stated, that the roof of the room was sufficient to go through the winter, and that he had advised the defendant Sutton to delay its repair till the spring ; and that he saw no fault in the drainage, and believed that the iron stays were not deficient.

LORD DENMAN, C. J., (in summing up.)—Upon this covenant to repair having a reasonable construction put upon it, you will have to say whether or not the defendant has or has not performed it. It is absurd to attempt to construe this covenant according to the strictest view of it, because it is impossible. The word is "forthwith," which cannot here mean either a day or a week ; and you must say, on such reasonable construction of the terms of the covenant, whether the defendant Sutton has really done what he reasonably ought in the performance of it. With respect to these premises being uninsured for a week, it appears that the insurance had previously been in the name of the lessor of the plaintiff, and the notices always sent to his solicitors, and, as far as we know, never transmitted to the defendant, the policy always remaining in the name of the lessor of the plaintiff only ; you will therefore consider, whether the lessor of the plaintiff by his conduct led the defendant Sutton to believe that the premises were insured by him ; for, if the lessor by his conduct led the lessee to believe that the premises were properly insured, he cannot come on the tenant for a forfeiture by reason of their not being insured. (a) Verdict for the defendant.

*C. Cresswell* and *F. Robinson*, for the plaintiff.

*Thesiger, N. Clarke, and Fry*, for the defendant.

(a) See the case of *Doe d. Knight v. Rowe*, ante, vol. 2, p. 246.

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*Adjourned Sittings in London, after Hilary Term, 1841.*

BEFORE MR. BARON PARKE.

(*Who sat for the Lord Chief Justice.*)

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HORN v. BENSUSAN.—p. 709.

If there be no contract as to demurrage, a ship-owner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially.

**ASSUMPSIT.**—The declaration contained a common count for demurrage, but no special count. Plea as to all but the sum of 39*l.* 7*s.* 6*d.*, non assumpsit, and as to that sum a tender and payment of it into court.

It appeared that Mr. Walker, the plaintiff's ship-broker, had sent a charterparty to the defendant's ship-broker, in which thirty days were allowed for discharging the cargo, and no express provision made as to loading; and that a few days afterwards a copy of this charterparty was returned by the defendant's ship-broker with the alteration of thirty days for loading and thirty for discharging, instead of thirty days for discharging only. The plaintiff's broker altered it to one term of thirty days, and the plaintiff signed it as owner of the vessel; but the defendant refused to sign it unless the time were thirty-five days, and the defendant's broker altered it to thirty-five days and returned it to the plaintiff's broker, at the same time calling his attention to the alteration. It was proved that the ship was thirty-seven days in loading and unloading, and it was admitted that the amount claimed for two days' demurrage was paid into court.

*Thesiger*, and *R. Gurney*, for the defendant, submitted that the written contract was put aside and made entirely void by the different alterations made in it.

*Campbell*, A. G., and *Hoggins*, for the plaintiff, contended, first, that the plaintiff was entitled to recover for demurrage for every day beyond thirty, as that was the number specified in the contract under which the plaintiff undertook the voyage; and, secondly, that if the contract was entirely avoided by the alterations made in it, the plaintiff was entitled to be paid for all demurrage beyond a reasonable time for loading and unloading, which would be shown to be thirty days.

*Thesiger*.—If there be no contract, the plaintiff cannot go into evidence of a detaining of the ship beyond a reasonable time on the common counts. To entitle the plaintiff to go into that, there should have been a special count in the declaration for not loading and unloading in a reasonable time.

*Campbell*, A. G.—It will be a question for the jury what the implied contract between these parties was. If the jury find that it was as we put it, the plaintiff will be entitled to recover in this action.

**PARKE, B.**—I entertain no doubt on this point. To entitle the plaintiff in this case to recover for delaying the ship beyond a reasonable time, a special count was necessary.

Verdict for the defendant on the first issue, and for the plaintiff on the second.

*Campbell*, A. G., and *Hoggins*, for the plaintiff.

*Thesiger*, and *R. Gurney*, for the defendant.

*First Sittings at Westminster in Easter Term, 1841.*

BEFORE MR. JUSTICE COLERIDGE.

CHAPMAN v. EMDEN.—p. 712.

In assumpsit by the marshal of the Queen's Bench prison, the declaration stated that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules,

the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned, and other expenses.

Plea, that A., the execution creditor and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W., and to cause him (if he should go beyond the rules) to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that in pursuance of that conspiracy a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action.

Replication, admitting the writ and warrant, with *de injuriâ* as to the residue:—*Held*, that on these pleadings the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea.

The rule of the judges as to the right to begin does not extend to actions of covenant; and sem-  
ble, that it does not extend to any cases of contract.

Sem-  
ble, that the court above would grant a new trial, if the judge allowed a party to begin who had not a right to do so.

ASSUMPSIT.—The declaration stated, that the plaintiff before the making of the promise of the defendant hereinafter mentioned was marshal of the marshalsea of the court of our late lord the king, before the king himself, and still is marshal of the marshalsea of the court of our lady the queen, before the queen herself; and that in Michaelmas Term, 7 Will. 4, in the said court, Henry Merry and Theophilus Merry obtained a judgment against James Wright for £400, for damages, and 12*l.* 12*s.* for costs, and that James Wright was taken on a *ca. sa.*; and being brought before Mr. Justice PATTESON, on *habeas corpus*, was committed to the custody of the plaintiff as marshal in execution on the said judgment, and was in his custody, of all which the defendant had notice; and that in consideration that the plaintiff would permit and suffer J. Wright to reside and be within the rules of the said prison during his imprisonment, the defendant promised the plaintiff, then being such marshal, to indemnify the plaintiff, then being such marshal, from any escape or escapes of the said James Wright, and to reimburse the plaintiff all loss, costs, charges, damages, and expenses which the plaintiff might bear, pay, or expend, or be put unto by reason of any action, suit, or motion which might be brought, commenced, or made against the plaintiff for any escape or escapes of the said James Wright, or any misconduct of the said J. W., while residing in the said rules as aforesaid. The declaration then went on to aver, that the plaintiff did permit James Wright to reside in the rules, and that afterwards, without the knowledge and against the will of the plaintiff, the said J. W. escaped out of the custody of the plaintiff, whereby the plaintiff became liable to pay to the said H. Merry and T. Merry, the sum for which the said J. W. was charged in execution; and the declaration went on further to aver, that while J. W. was out of the rules, H. and T. Merry sued out a writ of summons against the plaintiff in an action of debt, for the sum for which J. W. was charged in execution, and that they recovered that amount, and also 7*l.* 8*s.* 8*d.* for costs, and that the plaintiff was obliged to incur expense to the amount of £145, in the defence of that action; (a)

(a) See the case of *Merry v. Chapman*. 3 Per. & D. 25.



yet the defendant, not regarding his promise, would not indemnify the plaintiff or reimburse the sums he had been obliged to expend, and although the defendant had paid to the plaintiff a sum of £40, yet that the residue of the before-mentioned sums was still unpaid.

Plea, that after the said J. W. had been committed to the custody of the plaintiff as marshal, as in the declaration mentioned, and after the making of the promise in the declaration mentioned, and after J. W. was permitted to reside in the rules as in the declaration mentioned, one J. M. G. Underhill, the said H. Merry and T. Merry, and G. Rutland, intending to injure the defendant and make him liable to pay to the plaintiff as marshal the amount for which J. W. was in execution, and to obtain from the plaintiff or from the defendant the said amount, did, together with divers other evil disposed persons, conspire, combine, confederate, and agree together to cause some other creditor of J. W. to sue out a *capias ad respondendum* against J. W., and cause him to be arrested if he should go beyond the rules, and whilst he was out of the rules to cause him to be arrested and detained out of the rules under the last-mentioned writ, until H. Merry and T. Merry should be enabled to commence an action against the plaintiff for the escape of J. W., and to sue out and serve a writ of summons on the plaintiff in that behalf. The plea then stated as an overt act of the conspiracy, that H. Merry and T. Merry, and J. M. G. Underhill, did cause T. B. Lefevre, who was a creditor of J. W., for a debt exceeding £20, to wit, 158*l.* 6*s.* 8*d.*, to sue out a writ of *capias* against J. W., endorsed for bail to the amount of 158*l.* 6*s.* 8*d.*, and that this writ was directed and delivered to the sheriff of Surrey, who granted his warrant to G. Rutland, who, with J. M. G. Underhill, waited and watched till they saw J. W. pass the bounds of the rules and escape ("which is the same escape in the said declaration mentioned"), and that G. Rutland immediately arrested J. W., and gave notice of the arrest to J. N., who was the attorney of H. Merry and T. Merry in the action they had brought against J. W.; and the plea stated as a further overt act of the conspiracy, that G. Rutland refused to take J. W. to the prison of the sheriff of Surrey, situate within the rules, though required by J. W. to do so, but in pursuance of the conspiracy detained J. W. in the custody of the said sheriff, out of the rules, until H. Merry and T. Merry, by J. N. their attorney, had sued out and served the writ of summons in the declaration mentioned on the plaintiff, as such marshal as aforesaid; and the plea went on further to state, that if J. W. had not been so arrested and detained by G. Rutland, he could and would have voluntarily returned within the rules before any action for the said escape could have been commenced, and would then have stayed and remained within the rules; and the plea went on further to aver, that the plaintiff well knew all the premises hereinbefore stated, and might have pleaded the same in defence of the action brought against him, but he refused and neglected to plead the same as such defence as aforesaid, and wholly refused to permit the defendant to defend the said action, in the name of the plaintiff, although the defendant offered to do so at his the defendant's sole expense; but the plaintiff neglected altogether to plead such defence as aforesaid, by reason whereof alone judgment was given in the said action against the plaintiff, and the plaintiff was adjudged to pay the debt and costs, and

did incur the other charges as in the declaration is stated (concluding with a verification.

Replication, "That although true it is that the said writ of *capias ad respondendum* was sued out against the said J. W., directed to the said sheriff of the county of Surrey, and that the said warrant thereon was obtained directed to the said G. R. as in the said plea is alleged, yet that the defendant of his own wrong, and without the residue of the cause or matters of excuse by him in his said plea alleged, broke his said promise and undertaking in the said declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him" (concluding to the country).

*Kelly*, for the defendant, claimed the right to begin, as the proof of the issue lay on the defendant.

*Campbell*, A. G., for the plaintiff.—I submit that this is not one of the cases in which the defendant should begin, as the damages are unliquidated and unascertained. There is no reason for calling on the defendant to begin. The plaintiff must be compelled to give evidence, even if the defendant fails in making out his plea, as the plaintiff must show the amount of his damages. In the case of *Absalom v. Beaumont*, 1 M. & Rob. 441, Lord DENMAN is said to have ruled that "wherever any affirmative proof lies on the plaintiff to show what damages he is entitled to, he has a right to begin." That case was an action on a policy against fire, and all the pleas were affirmative; and his lordship is said to have distinguished the case from a life insurance, where the sum is ascertained. And in the case of *Cann v. Facey*, at the Exeter Summer assizes, 1835,<sup>(a)</sup> which was an action for shooting a dog, which the defendant justified, to prevent it from trespassing, Baron GURNEY held, that the plaintiff was entitled to begin, though the defendant offered to admit the value of the dog; for, per *Curiam*, "the plaintiff may have damages beyond that amount;" and a similar ruling by Lord TENTERDEN was cited. So in the case of *Mills v. Stephens*, tried at the Exeter Spring assizes, 1838,<sup>(a)</sup> Mr. Justice BOSANQUET held that the plaintiff was entitled to begin in a case of trespass for breaking into his house, where the plea was leave and license. Here the plaintiff is bound affirmatively to prove the amount of the damages, although the issue on the record is on the defendant.

*Kelly* cited the cases of *Carter v. Jones*, ante, vol. 6, p. 64, and *Reeve v. Underhill*, ante, vol. 6, p. 773.

COLERIDGE, J.—There is a note in Carrington & Payne (ante, p. 232), in which the whole matter is gone into.

*Kelly*.—The case of *Aston v. Perkes*, ante, p. 231, is also an authority in my favour.

COLERIDGE, J.—I think that the defendant must begin, and that the plaintiff must give evidence as to the amount of damages afterwards as part of his case. The rule of the judges<sup>(b)</sup> does not apply to actions of this sort; indeed (as I understand) it does not apply to any cases of contract, though certainly the decisions are not uniform. However, I have great satisfaction in thinking, that now I may be set right if either party is injured by my decision on this point.<sup>(c)</sup>

(a) Cited Ros. on Ev. 5th ed. 176.

(b) Referred to in the case of *Carter v. Jones*, ante, vol. 6, p. 64.

(c) See the case of the *School Trustees of Worcester v. Rowlands*, ante, p. 784.

The defendant began, and as he failed in proving his plea, there was a

Verdict for the plaintiff, damages £350.

*Campbell, A. G., and Hoggins*, for the plaintiff.

*Kelly, Archbold, and Montagu Chambers*, for the defendant.

## PROMOTION.

In the Vacation after Hilary Term, 1841, *William Wightman*, Esq., was appointed one of the judges of the Court of Queen's Bench, vice *Sir Joseph Littledale*, Knight, resigned.

## OXFORD SPRING CIRCUIT, 1841.

BEFORE MR. BARON GURNEY AND MR. JUSTICE COLERIDGE.

### READING ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

FOSTER v. POINTER.—p. 718.

In an action for a libel the declaration stated, that the defendant published a libel, "*contained in, and being an article, in a certain weekly printed publication, or paper, called the Paul Pry.*" At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from the *Paul Pry*, to several persons for them to read, and that they read it;—*Held*, that the judge at the trial might properly allow the record to be amended by striking out the above mentioned allegation, that the libel was contained in, and was an article in, the *Paul Pry*.

Where none of the parties lived in the assize town, the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and offered the expenses of going to fetch it. The defendant's attorney said, that that was of no use, as the paper was not in existence:—*Held*, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce.

The stat. 3 & 4 Vict. c. 24, applies to cases of libel, and therefore, if in a case of libel nominal damages be given, and the judge certifies that the grievance was wilful and malicious, the plaintiff will be entitled to his costs.

**LIBEL.**—The declaration stated, that the defendant “did publish, and caused and procured to be published, of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel, *contained in, and being an article in a certain weekly printed publication or paper called the Paul Pry*, and containing the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, ‘Libertines and professed seducers,’” &c., (setting out the libel.) **Plea**—not guilty

It appeared that the defendant had a printed slip of paper, which appeared to have been about half a column, which had been cut from a newspaper, and that he had taken this slip of paper to the shop of Mr. Brown, a bookseller in Windsor, and had there given it to some persons who had read it. This paper contained the alleged libel.

The commission-day at Reading was on Wednesday, the 24th of February, and it was proved that on Monday, the 22d, notice had been given to the defendant and his attorney to produce “a certain paper or publication called the Paul Pry, containing the libel mentioned in the declaration;” and it was further proved by Mr. Slocombe, the plaintiff’s attorney, that at about three o’clock on the afternoon of Wednesday, the 24th, at Reading, he saw the defendant’s attorney, Mr. Marlin, of Windsor, and that he then served Mr. Marlin with a notice to produce “a certain printed paper,” [describing it as having been produced by the defendant at the shop of Mr. Brown, and commencing with the words ‘Libertines and professed seducers,’] and Mr. Slocombe further said, “I put down five sovereigns, and asked Mr. Marlin to take as much as he thought proper for the trouble or expense of his going or sending a person to Windsor to fetch the paper.” Mr. Marlin replied, “It is of no use my going to Windsor after the paper, as it is not in existence.”

**Tulbot**, for the plaintiff, proposed to give secondary evidence of the contents of the paper.

**Ludlow**, Serjt., for the defendant.—I submit that the plaintiff is not entitled to give secondary evidence of the contents of the paper, as no sufficient notice has been given to produce the original. The first notice is clearly out of the question, as that is to produce the Paul Pry newspaper, which, for aught that appears, the defendant never had. And as to the second notice, I apprehend that a notice served in the assize town on the commission day is not good, unless the parties reside there.

**GURNEY**, B.—I think that secondary evidence of the contents of the paper is admissible. The defendant’s attorney saying that the paper was not in existence, gets rid of the objection as to the lateness of the service of the notice to produce.

A copy of the Paul Pry newspaper was put into the hands of the witnesses, and they stated that the slip of paper handed to them by the defendant contained the same words, and was in the same type as an article in the Paul Pry newspaper, which they pointed out.

**GURNEY**, B.—What evidence is there that the Paul Pry is a weekly publication, or that the slip of paper produced by the defendant ever formed part of it?

**Tulbot**.—The allegation that the libel was an article in the Paul Pry, is a superfluous allegation.

**GURNEY**, B.—It is; but have you not made it necessary to be proved, by stating it in your declaration?

Evidence was given that the *Paul Pry* was a weekly paper, and a copy of it was put in containing the libel.

*Talbot* applied for leave to amend, by striking out the allegation in the declaration respecting the *Paul Pry* newspaper.

GURNEY, B.—I will give my brother *Ludlow* leave to move to enter a nonsuit, but at the same time I must be considered as having made the amendment, if the court think it is a case in which I ought to allow an amendment.

Verdict for the plaintiff—Damages, one farthing.

GURNEY, B., certified under the stat. 3 & 4 Vict. c. 24, (a) that the grievance for which the action was brought was wilful and malicious. (b)

*Talbot* and *John Gray*, for the plaintiff.

*Ludlow*, Serjt., and *J. Jeffreys Williams*, for the defendant.

(a) By the stat. 3 & 4 Vict. c. 24, s. 1, the stat. 43 Eliz. c. 6, "so far as it relates to costs in actions of trespass or trespass on the case;" and so much of the stat. 22 & 23 Car. 2, c. 9, "as relates to costs in personal actions," are repealed; and by sect. 2 of the stat. 3 & 4 Vict. c. 24, it is enacted, "that if the plaintiff in any action of trespass, or trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." And by sect. 3 of the same statute it is provided and enacted, "that nothing herein contained shall extend to, or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

It should be observed, that these provisions only extend to actions of *trespass* and *trespass on the case*, and not to any other form of action: but ejectments being "actions of trespass in ejectment," [3 Bl. Com. ch. 11.] it may be a question whether they are or are not included in these provisions. See the case of *Doe d. Hughes v. Derry*, ante, p. 194.

(b) The certificate was in the following form: "I certify that the grievance for which this action was brought was wilful and malicious. Dated 25th February, 1841.

(Signed)

"J. GURNEY."

In the ensuing term, *Ludlow*, Serjt., applied to the Court of Exchequer for a nonsuit on the point reserved, if the court should think that this was not a proper case for the amendment. He also moved for a new trial on the ground that the notice to produce was not sufficient.

The court refused a rule on both points, and Baron ALDERSON said, "We think that the declaration was amendable and ought to be amended. It is just one of the cases where there should be an amendment."

On a subsequent day, after the plaintiff's costs had been taxed, *Ludlow*, Serjt., applied to set aside the certificate granted under the statute 3 & 4 Vict. c. 24, on the ground that under that statute the certificate was not grantable in a case of libel. The court granted a rule to show cause why the master should not review his taxation, and "why the certificate of Mr. Baron GURNEY, endorsed on the record, should not be set aside or withdrawn, and why the record should not be returned by the plaintiff to the associate for that purpose;" which rule was, after argument, discharged, with costs.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. DAY.—p. 722.

On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault. The attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl:—*Held*, that although *consent* on the part of the girl would put an end to the charge of assault, yet that there was a great difference between *consent* and *submission*, and that although, in the case of an adult, submitting quietly to an outrage of this kind would go far to show consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed.

**ASSAULT.**—The indictment contained two counts, the first of which charged the prisoner with having on the 11th of December, 1840, attempted to carnally know and abuse Eliza Massey, a girl under ten years old. The second count was for a common assault.

With respect to the age of Eliza Massey, she herself stated that she was ten years old on the 16th of January, 1841. Her mother was at home ill, and therefore could not attend the trial, and her father proved that Eliza Massey was not born in wedlock, and that he could not precisely state the time of her birth, as he was at that time at work at some distance from the place at which the mother was; and with respect to the assault it was proved by Eliza Massey, that, at about seven o'clock in the evening of the 17th of December, 1840, she was coming up Maidenhead Street, when she met the prisoner, who accompanied her up a dark lane, which was on her road home; that there he made an attempt on her, without any violence on his part, or *actual* resistance on hers; and that on the same evening she told her mother what had happened.

*J. J. Williams*, for the defendant, submitted that the first count could not be sustained, there not being sufficient evidence that the prosecutrix was under ten years of age at the time the offence was committed.

*J. G. Phillimore*, for the prosecution, submitted that there was evidence to go to the jury.

COLERIDGE, J.—I think the proof of the age is not sufficient. (a) *Mr. Williams* had better apply himself to the second count.

*J. J. Williams*, for the defendant, addressed the jury on the last count of the indictment, and contended, that that count being for a common assault only, consent or non-consent upon the part of the prosecutrix became material, and that as it was proved that she offered no resistance, but submitted quietly, it must be taken that she was consenting to the act, and therefore the prisoner must be acquitted. (b)

COLERIDGE, J., (in summing up.)—It has been contended by the learned counsel on behalf of the prisoner, that this case, being now reduced to a charge of common assault only, consent or non-consent on the part of the prosecutrix becomes material; and so indeed it does;

(a) See the case of *Reg. v. Wedge*, ante, vol. 5, p. 298, (24 E. C. L. R. 329.)

(b) See the case of *Reg. v. Martin*, ante, p. 85, and the cases there cited.

but then we must look at the nature of the circumstances from which consent is to be inferred. There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere *submission* involves *consent*. It would be too much to say, that an adult submitting quietly to an outrage of this description, was *not* consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.

Verdict—Guilty on the second count only.

*J. G. Phillimore*, for the prosecution.

*J. Jeffreys Williams*, for the prisoner.

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## OXFORD ASSIZES.

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(*Civil Side.*)

BEFORE MR. JUSTICE COLERIDGE.

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### BARNES and Others *v.* BUTCHER.—p. 725.

In an action by a banker as endorsee, against his customer as acceptor of a bill of exchange for £67, the defendant pleaded to the *whole declaration* a plea of set-off for money had and received. It was proved that the banker had a balance of £37 in his hands belonging to the defendant, for which latter amount the banker refused to honour the defendant's check, alleging that he held the £37 on account of this overdue acceptance:—*Held*, that the issue on the plea of set-off must be found for the plaintiffs, because it was pleaded to the whole declaration, and not pleaded as to £37 only, but that the jury ought to allow the £37 in reduction of the damages.

**ASSUMPSIT** by the plaintiffs as endorsees against the defendant as acceptor of a bill of exchange, dated the 10th of October, 1840, for 67*l.* 18*s.* 9*d.*, drawn by a person named Gandell, on the defendant, payable two months after date, to the order of the drawer. The declaration also contained a count upon an account stated. Pleas, first, a denial of the acceptance; second, a denial of the endorsement; third, as to £37, a payment of that sum; fourth, to the second count, non-assumpsit; fifth, to the *whole declaration*, a set-off to the amount of £250, for money lent, money had and received, and on account stated.

On the part of the plaintiffs, the bill of exchange, which was admitted under a judge's order, was put in.

The bill became due on the 13th December, 1840.

For the defendant, Mr. Reynolds, the cashier of the plaintiffs, who were bankers at Farringdon, was called; he stated that the defendant kept an account with the plaintiffs as his bankers. The plaintiffs' books containing the accounts were called for under a notice to produce, and

not being produced, the witness further stated that at the time when this bill became due, the defendant had a balance in the plaintiffs' hands of about £37, and that in the beginning of the month of January, the defendant drew a check for the £37, which the plaintiffs would not pay.

In his cross-examination by *Ludlow*, Serjt., for the plaintiffs, the witness stated that the plaintiffs would not pay the check, "because they held the £37 on account of this overdue bill."

*Ludlow*, Serjt., for the plaintiffs.—The defendant cannot avail himself of this £37 on these pleadings. The set-off is pleaded to the whole demand, not to the amount of £37 only. The issue on that plea must be found for the plaintiff.

*COLERIDGE*, J.—It must; and the defendant must have the benefit of the £37 in reduction of damages, on the plea of payment.

*Ludlow*, Serjt.—I submit that the plaintiff is entitled to recover the whole amount, and from the case of *Tuck v. Tuck*, 5 M. & W. 109, (a) it appears that the defendant must bring a cross-action for the £37.

*Carrington*, for the defendant.—The case of *Tuck v. Tuck* only decides, that, if a set-off be pleaded to the whole declaration, and the proof of it only goes to part, the issue must be found for the plaintiff, but in that case the defendant had the advantage of the set-off in mitigation of damages.

*COLERIDGE*, J.—Suppose that the bill had been put in with the payment written off it, do you say that the jury should give you a verdict for the whole amount?

*Ludlow*, Serjt.—The payment would then appear on the plaintiffs' evidence.

*COLERIDGE*, J.—It cannot signify by what evidence it appears, if the fact be proved to the satisfaction of the jury. I shall advise the jury to deduct the £37, the plaintiffs on this evidence have paid themselves that sum on account of the bill.

Verdict for the plaintiff for the amount of the bill and interest, after deducting the £37.

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*Ludlow*, Serjt.—I hope your lordship will allow me to apply to the Court of Queen's Bench to increase the amount of verdict.

*COLERIDGE*, J.—I will give you leave to move to increase the damages, as it may save the parties the expense of coming down again. (b)

*Ludlow*, Serjt., and *F. V. Lee*, for the plaintiffs.

*Carrington*, for the defendant.

(a) In the case of *Tuck v. Tuck*, it was held, that where a defendant, under a plea of set-off to the whole declaration, proves a sum owing to him from the plaintiff less than the amount of the claim that the plaintiff has established, the defendant is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for the plaintiff, unless where the defendant, by all his pleas taken together, covers the whole cause of action, and in those cases in which a defendant does not do so, his proper course is to plead the set-off only as to so much as he can prove.

(b) No motion was made.



(Crown Side.)

BEFORE MR. BARON GURNEY.

REGINA v. POOL.—p. 728.

A prisoner who is tried for manslaughter on the coroner's inquisition, may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85.

**MANSLAUGHTER.**—The prisoner was charged on the coroner's inquisition with manslaughter, in having killed William Wicks, by striking and beating him. The grand jury had ignored the bill of indictment which had been preferred against the prisoner for this alleged manslaughter.

As soon as the prisoner had been arraigned,

*Rickards*, for the prosecution, stated that the cause of the death of the deceased could not be sufficiently ascertained, and he, therefore, proposed not to offer any evidence.

**GURNEY, B.**—Taking that to be so, we should have evidence as to the blows, because on this inquisition the prisoner may be convicted of an assault under the 11th section of the stat. 1 Vict. c. 85. (a)

The case proceeded, but there being no evidence of any assault except a declaration of the deceased, which the learned baron held to be inadmissible, as not being in articulo mortis,

The prisoner was acquitted.

*Rickards* for the prosecution.

(a) By 7 Will. 4, 1 Vict. c. 85, s. 11, it is enacted, "that on the trial of any person for any felony whatever, where the crime charged shall include assault, the jury may acquit of the felony, and find the party guilty of an assault, if the evidence shall warrant such finding; and the party may be imprisoned for any term not exceeding three years, and hard labour may be added, and also solitary confinement, not exceeding one month at a time, or three months in any one year."

## WORCESTER ASSIZES

(Crown Side.)

BEFORE MR. BARON GURNEY.

REGINA v. GEORGE PRICE and RICHARD PRICE.—p. 729.

A. & B. were charged under the stat. 7 & 8 Geo. 4, c. 30, s. 17, with setting fire to a wood. It appeared that they set fire to a summer-house, which was in the wood, and that from the summer-house the fire was communicated to the wood:—*Held*, that A. & B. might be properly convicted on this indictment.

THE prisoners were indicted for setting fire to a wood under the 7 & 8 Geo. 4, c. 30, s. 17.

It appeared that the prisoners set fire to a summer-house, which was built of brick, thatched, and open, and was at the distance of several hundred yards from the house of the prosecutor, and therefore not falling within the term "outhouse." The summer-house was in the wood, and some of the trees overhung it, and their branches were burned by the fire, which consumed the summer-house, and also burned some of the trees.

*Whateley*, for the prosecution, in his opening said, that although the setting fire to the summer-house was not a felony, still it was an unlawful act, and as the probable consequence of that unlawful act was the burning of the trees, the prisoners were just as guilty as if they had set the trees on fire with their own hands.

GURNEY, B. (in summing up).—The prisoners are indicted for setting fire to a wood; now if they were guilty of setting fire to the summer-house, and by that means the wood was burnt, they are guilty of the offence charged, for it is quite immaterial by what means it was effected.

Verdict—Guilty.

*Whateley* and *Domville* for the prosecution.

## REGINA v. CURNOCK and STEPHENS.—p. 730.

An indictment for assaulting a gamekeeper with a weapon (under the stat. 9 Geo. 4, c. 64, s. 2), stated, that the defendants were in certain land of J. R., Earl of B., by night, armed with guns, for the purpose of destroying game, and that they were "then and there in the said land by night as aforesaid, by one W. R., the servant of the said J. R., Earl of B., then and there having lawful authority to seize and apprehend the said [defendants] found," and that the defendants with the guns assaulted and offered violence to W. R.:—*Held*, that the indictment was bad, as it did not sufficiently show that the defendants, when found by W. R., were committing any offence against the stat. 9 Geo. 4, c. 64.

ASSAULTING a gamekeeper with a weapon.—The first count of the indictment (a) was in the following form:—

"The jurors for our lady the queen, upon their oath present, that John Stephens, late of the parish of Madresfield, in the said county of Worcester, labourer, and William Curnock, late of the same parish, labourer, on the 3d day of January, 4 Vict., about the hour of two in the night of the same day, at the parish aforesaid, in the county aforesaid, by night did unlawfully enter certain enclosed land in the occupation of John Reginald Earl Beauchamp there situate; and were by night then and there unlawfully in the said land armed with certain guns, then and there for the purpose of taking and destroying game; and that the said John Stephens and the said William Curnock were

(a) This count was intended to be framed under the second section of the Poaching Act 9 Geo. 4, c. 69, which makes this offence a transportable misdemeanor.

then and there in the said land by night as aforesaid, by one William Ryall, the servant of the said John Reginald Earl Beauchamp (the said William Ryall then and there having lawful authority to seize and apprehend the said John Stephens and the said William Curnock) found, and that the said John Stephens and the said William Curnock with the guns aforesaid, which they the said John Stephens and William Curnock in both their hands then and there held, did then and there unlawfully assault, beat, and offer violence towards the said William Ryall, the said William Ryall then and there being lawfully authorized to seize and apprehend the said John Stephens and the said William Curnock, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity." Second count, for a common assault. The defendants were found guilty.

*Godson*, for the defendant Stephens in arrest of judgment.—The first count of this indictment is bad. Unless the defendants were found committing the offence the gamekeeper had no right to apprehend them. Now the indictment neither states that they were found committing the offence in the words of the act, nor sufficiently refers to the previous averments.

GURNEY, B.—Mr. *Lee*, what have you to say to this objection? Does the indictment sufficiently show that the defendants were found committing the offence?

*F. V. Lee and Whitmore*, for the prosecution.—The first part of the indictment alleges that the defendants entered and were in the land by night, and the second part sufficiently refers to the first part to incorporate it within it. The words "then and there by night as aforesaid," by reference to the previous part of the indictment sufficiently incorporate the purpose for which the defendants were there.

*Godson*.—The case of *Davies v. Rex*, 10 B. & C. 89, shows, that the words "then and there" only mean on the day and year aforesaid, at the parish aforesaid, in the county aforesaid; and the other words are not sufficient to incorporate the previous part of the indictment with the allegation in question.

*Greaves*, on the same side.—The cases of *Davies v. Rex*, and *Reg. v. Nicholas*, ante, vol. 7, p. 538, are clear authorities to show that the words "then and there" only refer to the day and parish previously mentioned, and "by night as aforesaid," only carries it one step further, and refers to the night generally. In *Reg. v. Wilkes*, Id. p. 811, which was a case on the 9th section of the statute, I objected, that, although the indictment was that the said A. B., &c., "then and there by night as aforesaid," being armed, it was insufficient, because it did not insert the words "at the time when they were in the land," and although Baron PARKE did not hold the objection fatal, still he clearly thought it entitled to great weight, as he desired that the words might in future be inserted. Now that was a much nicer objection than this, because there "as aforesaid" must refer to the time previously mentioned, here "as aforesaid" is said to refer to the purpose previously mentioned. The only thing "as aforesaid" can refer to is "night," for "then and there" are themselves words of reference. The indictment should either have averred that the defendants were found committing the said offence, or that they were found by night in the land armed as aforesaid for the purpose aforesaid.

*W. J. Alexander*, for the defendant Curnock.—The statute only authorizes the gamekeeper to apprehend persons who are then committing an offence against its provisions. The present indictment does not show that that was so, and it is, as I submit, therefore bad.

GURNEY, B.—As this is the first indictment that has come before me upon this section of the act of Parliament, I will consider the point and give judgment to-morrow.

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Baron GURNEY said, “I have considered the objection, and am of opinion that it is a good one, and the judgment must therefore be arrested on the first count of the indictment.

Judgment arrested on the first count, the defendants being sentenced on the second count.

*F. V. Lee* and *Whitmore* for the prosecution.

*Godson* and *Greaves* for the defendant Stephens.

*W. J. Alexander* for the defendant Curnock.

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## WORCESTER CITY ASSIZES.

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BEFORE MR. JUSTICE COLERIDGE.

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DOE on the demise of the Trustees of the Schools and Almshouse of the City of Worcester *v.* ROWLANDS.—p. 734.

In an action of covenant the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches—that the defendant did not occupy in a proper manner, and did not keep the premises in repair. Plea—that the defendant did occupy in a proper manner, and did keep the premises in repair:—*Held*, that on these issues the plaintiff had the right to begin.

In an action of covenant for non-repair of premises, held by the defendant under a lease which has several years to run, the proper measure of damages is not the amount that would be required to put the premises into repair, but the amount to which the reversion is injured by the premises being out of repair.

A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner.

COVENANT.—The declaration stated that the plaintiffs had, on the 14th of June, 1808, demised to the defendant certain premises, consisting of a warehouse, a stable, and garden-ground, situate at the Butts, in the city of Worcester, for the term of forty-one years from Lady-day, 1806, at a

rent of £12 a year; and that the defendants, in and by the said lease, covenanted to occupy the premises in a proper manner, and well and sufficiently to repair and uphold the buildings demised; and, if necessary, to rebuild the warehouse, and also to keep in repair the pales and fences. Breach—that the defendant did not well and sufficiently repair and uphold the buildings, and keep in repair the pales and fences, and that he did not occupy the demised premises in a proper manner. Pleas—that the defendant did well and sufficiently repair and uphold the building, and did keep in repair the pales and fences, and also that he did occupy the demised premises in a proper manner.

*Talfourd*, Serjt., for the defendant, claimed the right to begin.

*Ludlow*, Serjt., for the plaintiffs.—I submit that the plaintiffs must begin, by showing in what respect the defendant has broken his covenant. One of the issues is, whether the defendant has occupied in a proper manner. If the defendant is to prove good occupation, he must prove all that he has ever done from the beginning of his lease; and when he has proved ninety-nine things done, which the plaintiffs care nothing about, the defendant then comes to the hundredth, which is the real matter in dispute; and on the covenant to repair, the defendant will have to prove all that he has done, and that may be for the most part what we do not complain of.

COLERIDGE, J.—If there was no evidence offered on either side, which party would have the verdict?

*Ludlow*, Serjt.—I apprehend that that is not always the criterion, but that the question is, who is the substantial actor.

*Talfourd*, Serjt.—That way of putting it would always give the plaintiff the right to begin, as the plaintiff is always the actor in seeking damages. The decisions are not all of them easily reconciled; but at the last sittings there was an action of covenant against a master for not properly teaching his apprentice, and he pleaded that he did properly teach him; and the Lord Chief Justice TINDAL held that there was no issue on the plaintiff. My brother *Channel* was on the one side, and my brother *Bompas* on the other.

COLERIDGE, J.—There was a case at Bristol, where the question was, whether a horse was sound. (a) The defendant pleaded that he was sound, and I allowed him to begin; but I think I was wrong.

*Talfourd*, Serjt.—Unsound is an affirmative.

*Ludlow*, Serjt.—It is in your lordship's discretion; but if your lordship decides against me, I can have no new trial, if the court should think I ought to have begun.

COLERIDGE, J.—I think you should, if I decided against you, and the court should think that I was wrong in not letting you begin. (b) It would be a disadvantage to you, and I think that you ought to have an opportunity of having the point reconsidered.

*Ludlow*, Serjt.—If a defendant alleges collateral matter in answer to

(a) The case of *Fisher v. Joyce*, referred to in the case of *Osborn v. Thompson*, ante, p. 837.

(b) In the case of *Huckman v. Furnir*, 3 M. & W., 505, Lord Abinger and Baron Alderson intimated that the court might grant a new trial, if the judge at the trial had allowed a party to begin who had not a right to do so; although, in an earlier case, (the case of *Burwell v. Nicholson*, 1 M. & Rob. 304.) the L. C. J. said, that the court doubted, whether, under any circumstances, a new trial ought to be granted on the ground that the judge at Nisi Prius had come to an incorrect decision as to the right of beginning. "It seemed rather a matter of practice and regulation for the presiding judge to exercise his discretion upon, than one which the court in banc were to determine as matter of law:" but see the case of *Chapman v. Emden*, ante, p. 712.

the declaration, I apprehend that the defendant begins: but if the plea is a mere denial of the declaration, whether affirmative or negative, the plaintiff should begin.

COLERIDGE, J.—The rule of the judges, referred to in the case of *Carter v. Jones*, ante, vol. 6, p. 64, (25 E. C. L. R. 283,) is not a rule of general application, but only applies to particular actions, of which this is not one.

*Ludlow*, Serjt.—If, in an action of trespass, a right of way is set up, it is a new case; but these pleas are really no more than a denial of the plaintiff's cause of action.

COLERIDGE, J.—I think that the plaintiffs should begin. (a)

*Ludlow*, Serjt., opened his case, and stated, that since the granting of the lease, several cottages and other buildings had been erected on the demised premises, in addition to those which were there at the time of the granting of the lease, and that the whole of the buildings and fences were out of repair. He also stated that the gardens had been converted into masons' yards, and that the defendant had allowed footpaths to be made over a part of the demised premises.

To prove the want of repair, Mr. Edward Lucy was called. He said: "I am an architect and builder; I know the property at the Butts, in the possession of the defendant; on the 25th of February last I surveyed it; the property consists of a large warehouse, and also rooms over the warehouse which are let out for dwellings; the outer walls of the warehouse are in a shattery state; the arches of the windows are tumbling out, and it is, as I think, in a dangerous state; there are four small tenements; they are in a bad state, and want renovating; the roofs want repairing; the fence in front is in a very bad state; some other tenements are at the other end; they are also out of repair; there is some fence that has been attempted to be repaired; I have known the place for forty years; it was a garden then; it is now pigsties, bowling-alleys, cart-sheds, and stone-masons' yards; that is in my judgment not a proper occupation of garden-ground; it is a deterioration of the property; my estimate of the repairs is 157*l.* 12*s.*; but I could not undertake to put the premises in repair for that money."

In his cross-examination he said—I recollect the place in 1806 or 1808; part of it was then garden-ground. I consider the property worth less now than it was then. Four of the tenements have been built since 1808, and the four others were made out of the stable. I don't think £500 has been laid out on the place by Mr. Rowlands. My estimate includes the repairing of all the buildings that are there now. The tenements built of Broseley brick, which are furthest from the Severn, were built since the lease; the repairing of them would amount to 30*l.* The building opposite Broadfield was also built since the lease; the repair of that would be about 5*l.* The mason's shop we put a sovereign down for. I put down a sum of 69*l.* for buildings and fences. The want of repair arises not from any sudden cause, but from gradual decay and neglect.

On the part of the plaintiff it was proposed to show, that the defendant allowed foot-paths to be made over the property.

COLERIDGE, J.—How do you make this a breach of these covenants?

(a) See the cases of *Soward v. Leggat*, ante, vol. 7, p. 613, (32 E. C. L. R. 654,) and *Atton v. Perkes*, ante, p. 94, and the notes to that case and the case of *Chapman v. Emden*, ante p. 712.

*Ludlow*, Serjt.—I put it as occupying the land in an improper manner. I submit, that if a person rents gardens, it is a breach of covenant to occupy in a proper manner if he make pigsties and roads there, and allow windows to be opened.

*M Mahon*, on the same side.—If a person is to occupy gardens in a proper manner, it must be by occupying them as gardens.

*COLERIDGE, J.*—I think that the tenant's allowing foot-paths across the property is not a breach of this covenant, because the only way in which it could be so, is, that the landlord would be bound by what the tenant did, which he certainly would not be. (*a*)

*Tulfourd*, Serjt., for the defendant, submitted that the defendant was not liable at all for the non-repair of any building erected since the granting of the lease, and with respect to the original buildings, the jury ought to give very small damages; first, because the buildings were very old; and secondly, because the lease had several years to run, and whatever damages the jury gave in this action, the plaintiffs would not be bound, and could not be compelled, to lay them out in repairs.

*COLERIDGE, J.* (in summing up).—In this case there is, for all that appears, a valid subsisting lease of this property, which contains a covenant to repair, which has been to some extent broken; and for that breach of covenant the plaintiffs are entitled to damages, notwithstanding that the lease is in existence and has some years to run. If a lease were granted containing such a covenant as the present, and that lease had one hundred years to run, and the covenant was broken in the first year, the landlord would be entitled to some damages for that breach of covenant, though the lease would not expire for ninety-nine years to come; but in estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of the damages; for in such cases, when the damages are awarded to the landlord, he is not bound to expend them in repairs, neither can he do so without the tenant's permission to enter on the premises. The true question therefore is—to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run, it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease however will expire in about six years. It appears also that this property originally consisted of a warehouse, a stable, and gardens; and the plaintiffs say that the erection of the present tenements was wrongful; but they (waiving that for the present) have sent surveyors who make an estimate amounting to between £150 and £160. The defendant says, "I may have done wrong by putting up these tenements; but on the covenants contained in this lease I am only bound well and sufficiently to repair and uphold, and, if need be, to rebuild the warehouse and stable, and to keep the hedges, pales, and other fences in tenantable repair:" and I think that under this covenant the defendant is only bound to keep in repair the buildings which were on the premises at the time of the granting of the lease, and to rebuild them if necessary, and to keep up the fences; and that in estimating the damages you ought not to take into consideration the new cottages that have been built since the granting of the lease. The surveyors have mentioned a sum of £30 for the repair of the Broseley-brick cottages,

(*a*) See the case of *Wood v. Veal*, 5 B. and A. 454, (7 E. C. L. R. 158.)

and also sums of £5 and £1, for repairing some other buildings, all of which must be deducted if these buildings were not in existence at the time of the granting of the lease. The learned serjeant (*Talfourd*) has said that you must make a further deduction on account of the age of the building; but I do not go that length; for as the tenant is not only to repair but to rebuild if necessary, the plaintiffs are entitled to have such parts of the premises, as this covenant relates to, kept always in good repair. The question therefore that you have to determine is—how much the reversion is injured by the breach of this covenant, the covenant being limited to the original buildings and to the fences.

Verdict for the plaintiffs, damages £40.

*Ludlow*, Serjt., *Curwood*, and *M Mahon*, for the plaintiffs.

*Talfourd*, Serjt., and *R. V. Richards*, for the defendant.

### REGINA v. CHARLES THOMAS.—p. 741.

A. was treating B. at a beer-house, and A. wishing to pay, put down a sovereign, desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—*Held*, no larceny, as A. having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it.

**LARCENY.**—The prisoner was indicted for stealing a sovereign, the property of Thomas Hins.

It appeared that the prosecutor and the prisoner, having entered a beer-shop, were drinking together, and that the prosecutor, who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change, and upon her declaring her inability to do so she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "You won't come back with the change," to which the prisoner replied, "Never fear," and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor that he was not aware of the last remark of the prisoner, nor, at first, that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer.

*Streeten*, for the prisoner, submitted, that the intention of the prisoner was clearly to be collected from the evidence, and that as it appeared that the taking was with intent to get change, any subsequent felonious intent of converting it to his own use would not constitute a trespass sufficient to render it a felony; and that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny.

*Huddleston*, for the prosecution, submitted, that it did not appear by the evidence that the prosecutor had consented to the taking of the sovereign.

**COLERIDGE, J.**—I think that the passive conduct of the prosecutor amounted to a sufficient sanction of the taking.

*Huddleston*.—I submit that the prosecutor had not divested himself



of the property in the sovereign by even giving it to the prisoner for change, and that it remained his till it was actually changed.

COLERIDGE, (having conferred with GURNEY, B.)—It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny.

Verdict—Not guilty.

*Huddleston*, for the prosecution.

*Streeten*, for the prisoner.

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### STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

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BANNISTER and Another v. BANNISTER and Others.—p. 743.

The custom is that when butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate-roading, air-heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier.

ASSUMPSIT for work and labour. Plea—non assumpserunt, by all the defendants except George Bannister, and as to him judgment by default.

It was opened by *Ludlow*, Serjt., for the plaintiff, that this action was brought by the plaintiffs, who were butty colliers, against the defendants, as owners of the Triviale Colliery, for the sum of 149*l.* 17*s.* for 125 yards of gate-roading, 132 yards of air-heading, and about 42 tons of coals undergone. He admitted, that the plaintiffs had been paid for all the coal raised; but he submitted that the custom was, that, when butty colliers left working at a mine, after giving fourteen days' notice, they were entitled to be paid for gate-roading, air-heading, and coals undergone.

On the part of the plaintiff it was proved that the quantities of gate-roading, air-heading, and coals undergone were as before stated, and that the prices charged, which were according to a valuation made by Mr. Yardley, a mine-surveyor, were fair and reasonable; and it was proved by Mr. John Jones that he was present when Mr. Aston, one of the plaintiffs, gave a written notice to Mr. Charles Bannister, the managing clerk at the mine, that the plaintiffs intended to discontinue the working there.

Several witnesses were called, who stated that the custom was, that when butty colliers left without giving notice, they were not entitled to be paid for either gate-roading or air-heading, or coals undergone; but that if they left after notice, they were entitled to be paid for that species of work by the owner of the mine, or by the succeeding butty collier.

A letter from Mr. Hickman Bond, one of the defendants, was also given in evidence. It was as follows:—

“Sir,—If you will meet here to-morrow morning at nine o’clock, and bring or send the tools, &c., you took from here, by that time you can receive the amount of your valuation. “I am, sir, yours, &c.

“Mr. H. Bannister, Tividale,

“G. H. BOND.”

Tuesday, Sept. 10, 1839.”

It was opened by *Tulford*, Serjt., for the defendants, that he should call Mr. Charles Bannister to prove that he had never received any notice; and he should also call several witnesses to show, that, by the custom, the owner of the mine was never called on to pay for gate-riding and air-heading, and that if the butty collier left without notice, he was not entitled to be paid for the work by any one; and that if he left after notice he had no claim on the mine-owner, but was entitled to receive the amount due for this work from the succeeding butty collier.

For the defendants, Mr. Charles Bannister was called, and he stated that he had never received any notice from Mr. Aston; and with respect to the custom several witnesses were called, who stated that the custom was, that if the working of the mine was stopped, the butty collier was not paid for work of this kind till the working of the mine was recommenced by another butty collier, no matter at what distance of time, but the witnesses could give only a few instances within the last two or three years; and one of them, (Mr. Alton,) who was a ground-bailiff, and whose father and grandfather had been so before him, was aware of only two instances within his own knowledge where this had occurred; and he stated that, in one of those, a part of the butty collier’s claim had been liquidated by the mine-owner.

*Ludlow*, Serjt., in reply, observed that the custom contended for by the defendants came to this:—A butty collier might do this work in the year 1841, and because the mine-owner did not choose to have his mine worked till the year 1941, the butty collier’s representatives were to wait till that time to be paid.

GURNEY, B., (in summing up.)—This is an action brought by the plaintiffs, who were butty colliers, against the defendants, as mine-owners, for gate-ridings, air-headings, and coals undergone. The plaintiffs have rested their claim on a custom that, where butty colliers leave after notice, they shall be paid for these things by the mine-owner or the succeeding butty collier. The defendants allege that this is not the custom, and that the custom is, that the mine-owner is in no case liable to pay for work of this sort, but that the butty collier’s claim is only against the new butty collier; and that if the mine be not worked, the person who has done this work would have to go unpaid for any number of years. To show that this is the custom, you would, I think, require the evidence to be strong and complete; but even the witness, (Mr. Alton,) whose father and grandfather were ground-bailiffs before him, can find only two instances, and those within these three years. The plaintiffs say that nothing is to be paid if the parties leave without notice, and that is a reasonable custom. Then you will have to consider whether there was notice given in this case; and upon this point I am sorry to say that the evidence is completely contradictory, and you must decide between the two witnesses; and it is for you to say whe-

ther the note from Mr. Bond, which has been put in, does not show in what way the matter really stood, as in that note Mr. Bond recognised the valuation.

Verdict for the plaintiffs, damages 149*l.* 17*s.*

*Ludlow*, Serjt., and *F. V. Lee*, for the plaintiffs.

*Talfourd*, Serjt., and *R. V. Richards*, for the defendants.

(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. GRIFFITHS.—p. 746.

In a case of rape it appeared that the prisoner had been taken before the mayor of N., charged with this offence, and that the prosecutrix was then sworn, and her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates :—

*Held*, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N., without the production of that which was taken down on that examination.

**RAPE.**—The prisoner was charged with having ravished Mary Ann Lowe.

It appeared from the cross-examination of the prosecutrix, that she had twice charged the prisoner with the offence; the first time before the magistrates of the borough of Newcastle-under-Lyne, and the second time before the magistrates of the county of Stafford. It further appeared, that the prosecutrix, when before the borough magistrates, was sworn by the mayor, who took down her statement; but that, not being satisfied, he asked some further questions, to which the prosecutrix gave answers which were not taken down; and it was proved that the statement made by her, which was taken down, was not read over to her, or signed either by the magistrates or the prosecutrix. After this examination the prisoner was discharged, but he was afterwards again apprehended and taken before the county magistrates, by whom he was committed for trial.

*F. V. Lee*, for the prisoner, proposed to ask the prosecutrix, without producing that which was taken down by the Mayor of Newcastle, whether she had not said certain things on that occasion.

*Price*, for the prosecution, objected, that whatever was taken down by the Mayor of Newcastle must be put in.

*F. V. Lee*.—I submit that that is not necessary. This was not a deposition. It was not taken in conformity with the act of Parliament. It was not read over to the prosecutrix or signed by her. It was not signed by the magistrate, or even completed; and all that was written must be considered as mere notes or rough minutes taken by the mayor for his own guidance.

COLERIDGE, J., (having conferred with GURNEY, B.)—We are of

opinion that the questions may be put without the paper being produced.

The questions were put.

Verdict—Not guilty.

*Price*, for the prosecution.

*F. V. Lee*, for the prisoner.

REGINA v. HALLETT and Six Others.—p. 748.

If in a case of rape the jury are satisfied that non-resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of persons attacking her she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoner of the capital charge; but if they think from the whole of the circumstances that, although when the prosecutrix was first laid hold of it was against her will, yet that she did not resist afterwards, because she in some degree consented to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only.

A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and after reading the deposition (which preceded his own which he had signed) he stated that he believed, that that was the deposition which was read over to the witness:—

*Held*, that this deposition might be read to the witness by the officer of the court for the judge to examine her upon it.

**RAPE.**—The prisoners were indicted for having feloniously ravished Mary Maiden.

It appeared from the evidence of the prosecutrix, that on the night of the 22d of November she was at a public house at Wolverhampton, at which the prisoners and another person, who was not in custody, were, and that these eight persons followed her to the door of her lodgings, which was fastened on the inside, when the eight persons held her with her back against the door, all of them committing the offence one after the other. The prosecutrix admitted that she had been on the town since the time of the alleged offence, but denied that she had been so before, though she admitted that that was not the first time of her having had intercourse with the other sex.

To confirm the evidence of the prosecutrix, a girl, named Elizabeth Roden, was called; she stated that she lodged in the same house as the prosecutrix, which was a brothel, and that, having got up in consequence of hearing a noise on the outside of the house, she and the woman whose house it was, held the door on the inside to prevent its being burst open by the prisoners, who tried to get into the house. This witness also stated, that when the prosecutrix and the prisoners were at the door, she heard the prosecutrix say, "It is too bad for so many to be attacking one poor girl; but if you will go away, and come, one at a time, I will do what I can to satisfy you." This witness gave a different account of the transaction from that which she gave before the magistrates. She stated that she had been twice examined before the magistrates, and that what she said was taken down; and that on each occasion she had made her mark to her deposition after it had been read over to her.

COLERIDGE, J., on the application of *F. V. Lee* for the prosecution, allowed the two depositions of the witness to be shown to her.

The witness admitted her mark to the first of her depositions, but denied that the mark at the foot of the second was hers.

Neither the magistrate nor his clerk was at the assizes, and a constable named Jones, who was present when Elizabeth Roden was examined before the magistrate on the second occasion, was called, and he was desired to read over the second deposition of Elizabeth Roden, and having done so, he said, "This is the signature of the magistrate; I am not sure that I saw Elizabeth Roden make this mark, though I recollect seeing a pen in her hand. I heard her deposition read over to her, and I believe this to be the same that was read over to her, and my own deposition which was signed by me, immediately follows it."

*Allen*, for the prisoner.—I submit, that the witness cannot be examined from this paper without calling either the magistrate or the magistrate's clerk.

*F. V. Lee*.—From the cases of *Rex v. Hopes*, ante, vol. 7, p. 136, (32 E. C. L. R. 468,) and *Rex v. Foster*, Ib. 148, (32 E. C. L. R. 473,) it appears that it is not absolutely necessary to call either the magistrate or the magistrate's clerk, even where the statement is that of the accused party, and is to be used as evidence against him. If there is no evidence that this is the mark of the witness, this paper might be proved by any one who heard her make the statement.

COLERIDGE, J.—The cases referred to, are those of statements of prisoners which were evidence of themselves. This is a statement proposed to be put in merely to refresh the memory of the witness.

*Allen*.—When it is a mark and not a signature, the proper person to prove the correctness of the paper is the person who read it over to the party.

COLERIDGE, J.—Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?

*Allen*.—I apprehend that either the person who took it down, or the person who read it over to the witness should be called.

COLERIDGE, J.—The question that I have to decide is, whether this paper may be now read to the witness to examine her upon it. It bears a mark and the signature of the magistrate. The witness denies her mark; but the other witness, Jones, heard her examined, and has proved the magistrate's signature, and having read this paper believes it to have been correctly taken. I think on every principle of common sense it is receivable for the purpose proposed, but I do not inquire if it would be so if it were the statement of a prisoner to be used as substantive evidence against him on his trial.

The two depositions were read to the witness, and she was examined on them by the learned judge. (a)

COLERIDGE, J., (in summing up).—In considering this case as to the capital charge, you will have to say whether this offence was committed

(a) In the case of *Rex v. Oldroyd*, R. & R. C. C. 88, it was held by the twelve judges, that, when a witness upon a trial gives evidence contradictory to facts contained in a deposition made by such witness in a former proceeding, the judge may order such deposition to be read in order to impeach the credit of the witness. "In that case the determination of the judges was confined to the right of a judge to call for a witness's deposition in order to impeach the credit of a witness who, on the trial, should contradict what she had before deposed; but Lords Ellenborough and Mansfield, C. J., thought the prosecutor had the same right."

against the will of the prosecutrix, and whether she made every resistance that she could; but even if she at last consented to what was done, the prisoners may be found guilty of an assault, as there is no doubt that these persons coming and laying hold of her against the door was an assault; and that so far, at least, it was against her will, as she objected to so many being present at a time. However, it is well worthy of your consideration whether, although she at first objected, she might not afterwards (on finding that the prisoners were determined) have yielded to them, and in some degree consented; and this question is the more deserving of your attention when you come to consider what sort of person she was, what sort of house she lodged in, and that she herself told them that she should make no objection if they came one at a time. If there was non-resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of the prisoners she considered resistance dangerous and absolutely useless, the full charge is made out, and you ought to convict the prisoners of the capital offence: but if you think under all the circumstances that the prosecutrix, although at first objecting, at all consented to that which was done afterwards, you ought to convict the prisoners of the assault only.

Verdict—Guilty of an assault.

*F. V. Lee*, for the prosecution.

*Allen*, for the prisoners.

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REGINA v. HUGHES.—p. 752.

In a case of rape, if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to the rupture of the hymen.

**RAPE.**—The prisoner was charged with having feloniously ravished Mary Ann Wesley.

The facts of the case were very clearly proved by the prosecutrix, a girl between eleven and twelve years old, and by a woman who detected the prisoner committing the offence; but with respect to the penetration a surgeon was called, who deposed to the appearances in and about the child's private parts, and stated his belief that penetration had taken place, but that the hymen, which in the prosecutrix was placed at the usual distance from the opening, had not been ruptured.

*Allen*, for the prisoner, submitted, that as the hymen was entire there could not have been sufficient penetration of the person of the prosecutrix to constitute the capital offence of rape. He cited the cases of *Rex v. Gammon*, ante, vol. 5, p. 321, (24 E. C. L. R. 339,) and *Rex v. M<sup>r</sup> Rue*, ante, vol. 8, p. 641, (34 E. C. L. R. 562.) (a)

*COLERIDGE*, J., summed up the case to the jury, and desired them to find whether there had been penetration, and whether it had or had not proceeded to the rupture of the hymen.

Verdict—Guilty; the jury finding that there had been penetration, but that the penetration had not proceeded to the rupture of the hymen.

(a) See also the case of *Regina v. Allen*, ante, p. 81, and the case of *Regina v. Jordan*, ante, p. 118.

COLERIDGE, J.—I shall reserve this case for the consideration of the judges.

*M<sup>c</sup> Mahon*, for the prosecution.

*Allen*, for the prisoner.

BEFORE LORD DENMAN, C. J., LORD ABINGER, C. B., PARKE, B., ALDERSON, B., PATTESON, J., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., ROLFE, B., AND WIGHTMAN, B.

*Price* appeared to argue on the part of the prisoner.

COLERIDGE, J.—I reserved this case from respect to my brother GURNEX, on account of a dictum of his. (a) There is an express decision on this point by the twelve judges, (b) and my brother GURNEX says that he does not now hold the same opinion. There is, therefore, nothing in the case.

(a) In the case of *Rez v. Gammon*, ante, vol. 5, p. 321, (24 E. C. L. R. 339.)

(b) The case of *Rez v. Russen*, 1 Ea. P. C. 438, which is as follows:—"Benjamin Russen was master of a charity-school, and was charged with two forcible rapes on Anne Mayne, one of the girls of the said school, the first fact being just before, the other just after she attained her age of ten years. The child swore to a full proof in both respects, [proof of both penetration and emission being at that time essential,] and her testimony was corroborated by marks observed on her linen at the time, but she was deterred by the prisoner's threats from making any discovery till three or four months after the time. For the prisoner it was proved by two surgeons, whose testimony was corroborated by four others who had examined the child, that the passage of the parts was so narrow that a finger could not be introduced, and that the membrane called the hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken, so that she never could have been completely known by a man. But as this membrane was admitted to be in some subjects an inch, in others an inch and a half beyond the orifice of the vagina, Ashurst, J., who tried the prisoner, left it to the jury to say whether any penetration were proved, for if there were any, however small, the rape was complete in law. The jury found him guilty, and he received judgment of death; but before the time of execution the matter being much discussed, the learned judge reported the case to the other judges for their opinions, whether his direction were proper; and upon a conference it was unanimously agreed by all assembled, (in the absence of De Grey, C. J., and Eyre, B.,) that the direction of the judge was perfectly right. They held that in such cases the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. It was therefore properly left to the jury by the judge, and accordingly the prisoner was executed."

A short-hand report of the evidence in the case of *Rez v. Russen*, taken by Mr. Joseph Gurney, is contained in the short-hand writer's notes of the trials at the Old Bailey, in the October Sessions of 1777, p. 360, which will be found in the library of Lincoln's Inn, and also in the city library at Guildhall.

In the case of *Rez v. Russen* it is stated, that the membrane called the hymen "is an indubitable mark of virginity," and that "in some subjects it was an inch and in others an inch and a half from the orifice of the vagina." The first proposition appears to be much too strongly put, as several cases are mentioned by Dr. Davis, (Elem. of Midw. p. 102,) and Dr. Paris, (1 Par. & Fonb. Med. Jur. 203,) in which the hymen was entire during the pregnancy of the party, and in one case was obliged to be divided by a surgical operation at the time of the accouchement. With respect to the second proposition there may be some doubt, as in all the preparations in the museum of the Royal College of Surgeons, in which the hymen is shown, it is not more than a quarter of an inch from the orifice of the vagina.

## SHREWSBURY ASSIZES.

(Crown Side.)

BEFORE MR. BARON GURNEY.

## REGINA v. ANN WRIGHT, MARY WRIGHT, and GEORGE WRIGHT.—p. 754.

On a charge of child-murder it appeared that the child must have died before it had an independent circulation:—*Held*, that as the child had never had an independent circulation, the charge of murder could not be sustained.

On an indictment for child-murder, no one but the mother can be convicted of a concealment of the birth of the child.

MURDER.—The prisoner, Ann Wright, was charged with the murder of her child by suffocating it, and the other prisoners were charged as aiders and abettors.

*F. V. Lee*, for the prosecution, in his opening, said, that as the prisoners had no counsel, it was his duty to call the attention of the learned baron to the evidence of the surgeon, who would state, that, in his judgment, the child must have died before it was fully born, so as to have an independent circulation; and that, if his lordship agreed with the opinion expressed by Baron PARKE in the case of *Rex v. Enoch*,<sup>(a)</sup> it would not be necessary to proceed on the capital part of the charge.

GURNEY, B.—I entirely concur in the opinion of Baron PARKE, as expressed in the case of *Rex v. Enoch*.

Mr. Martin, a surgeon, was called, and he stated, that, in his judgment, the child must have died before it had an independent circulation.

*F. V. Lee*.—I propose to go into evidence as to the concealment; but I apprehend, that, under the 14th section of the stat. 9 Geo. 4, c. 31, I cannot affect the aiders and abettors with the concealment.

GURNEY, B.—I am of opinion, that, on this indictment, no one can be convicted of the concealment except the mother of the child.<sup>(b)</sup>

The prisoner, Ann Wright, was convicted of the concealment; and the other prisoners acquitted altogether.

*F. V. Lee*, for the prosecution.

(a) As to whether a person could be indicted for a misdemeanor in counselling a concealment of the birth of a dead child, see the case of *Rex v. Douglas*, ante, vol. 7, p. 644, (32 E. C. L. R. 670.)

(b) *Ante*, vol. 3, p. 339, (24 E. C. L. R. 446.)

## HEREFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

## REGINA v. CHARLES PAGE.—p. 756.

An indictment for uttering counterfeit coin, knowing it to be counterfeit, (after a previous conviction,) charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the



same to be false and counterfeit:"—*Held*, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to E. H., who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there."

An indictment stated, that at the assizes holden at H., on the 3d of August, 4 Will. 4, "C. P. (the present prisoner,) *together with* one T. P., by the name and description of C. P., late of B., in the county of H., labourer, and T. P., late of the same, labourer, *was* in due form of law tried and convicted," by a certain jury duly taken, "between our said late lord the king and the said C. P. and T. P.," upon an indictment against them for uttering counterfeit coin, they having other counterfeit coin in their possession, "and thereupon it was considered by the court there that the said C. P. should be imprisoned for two years." The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.:—*Held*, that this was no variance, and that this allegation in the indictment did not import that T. P. was convicted.

**FELONY.**—The indictment, which was upon sect. 7 of 2 Will. 4, c. 34, (a) for a felony stated, that, at the assizes holden at Hereford, on the 3d day of August, in the 4 Will. 4, "Charles Page, *together with* one Thomas Page, by the names and descriptions of Charles Page, late of the parish of Bromyard, in the county of Hereford, labourer, and Thomas Page, late of the same, labourer, *was* in due form of law tried and convicted by a certain jury of the country, duly taken and sworn, between our said late lord the king and the said C. P. and T. P. in that behalf, upon a certain indictment then and there depending against them the said C. P. and T. P.," for uttering one counterfeit shilling, "knowing the same to be false and counterfeit," having in their possession another counterfeit shilling. "And thereupon it was considered by the court there that the said Charles Page should be imprisoned and kept to hard labour in the house of correction of Hereford for two years." And that the prisoner having been so convicted, afterwards did utter a counterfeit half-crown to Elizabeth, the wife of Thomas Hale, "knowing the same to be false and counterfeit." (b) The record of the 4 Will. 4 was put in: it stated the conviction of Charles Page, and the acquittal of Thomas Page; and, (as it was stated at first,) contained the words "then and there" before "knowing the same to be false and counterfeit."

(a) Set out in Jerv. Arch. 8th ed. p. 503.

(b) The form of the indictment was as follows:—"Herefordshire, to wit. The jurors for our lady the queen, upon their oath present, that heretofore, (to wit,) at the assizes and general delivery of the jail of our lord the late king, holden at Hereford, in and for the county of Hereford, on Saturday, the 3d day of August, in the 4th year of the reign of our late sovereign lord William the Fourth, by the grace of God of the United Kingdom, &c., before the Right Hon. Sir N. C. Tindal, Knight, chief justice of our said late lord the king, of his Court of Common Pleas at Westminster; Sir John Gurney, Knight, one of the barons of our late lord the king, of his Court of Exchequer at Westminster, and others their fellows, justices, &c.; Charles Page, together with one Thomas Page, by the names and descriptions of Charles Page, late of the parish of Bromyard, in the county of Hereford, labourer, and Thomas Page, late of the same, labourer, was in due form of law tried and convicted by a certain jury of the country, duly taken and sworn between our said late lord the king and the said Charles Page and Thomas Page in that behalf, upon a certain indictment then and there depending against them the said Charles Page and Thomas Page, for that they, the said Charles Page and Thomas Page, on the 14th day of July, in the 4th year of the reign of our late sovereign lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the late king's current silver coin, called a shilling, unlawfully, unjustly, and deceitfully did utter and put off to one Mary Ann Watkins, spinster, knowing the same to be false and counterfeit, and that they, the said Charles Page and Thomas Page, at the time of such uttering and putting off the said piece of false and counterfeit coin as aforesaid, (to wit,) on the same day and in the year aforesaid, at the parish aforesaid, &c., had in their possession, besides the said piece of false and counterfeit coin so uttered and put off as aforesaid, one other piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the late king's current silver coin, called a shilling, knowing the said last-mentioned piece of false and counterfeit coin

*C. Phillips*.—1st, There is a variance. The present record omits “then and there,” in the writ of the former record. And the present record shows no offence; for, without the words, “then and there” before “knowing,” no offence is stated; knowing may mean at any other time than when the uttering took place. 2dly, There is a variance. The allegation in the present indictment means that both Charles Page and Thomas Page were convicted, whereas the latter was acquitted.

*Greaves and Skinner*, for the prosecution.—1st, The record produced has not the words “then and there;” 2dly, the offence is sufficiently stated even upon demurrer, without inserting the words “then and there” to the scienter; “knowing” is a participle in the present tense, and therefore imports that the knowledge existed at the time of the uttering. It has been held, (a) that an indictment, stating that “A. B. being an officer,” is a sufficient averment that A. B. was an officer at the time: but the record set out was, at all events, good after verdict, as it follows the words of the statute. 3dly, There is no variance or misdescription of the record. The indictment does not import that both the Pages were convicted, but only that Charles Page was convicted. Charles Page is the nominative to “was tried and convicted,” and the judgment shows that he alone was convicted. If both had been convicted, the indictment would have alleged that C. P. and T. P. were tried and convicted, and would have stated the judgment against both. At all events, if there be a misdescription, it is wholly immaterial. It would have been enough to have alleged that Charles Page was convicted, without introducing Thomas Page’s name at all. The introduction, therefore, in a parenthesis, of his name, cannot afford any ground for holding that there is a variance.

*COLERIDGE, J.*—First, as to the omission of the words “then and there” to the scienter: it is objected, that the indictment does not show any offence, the objection as to the variance being removed, because the original indictment does not contain the words “then and there.”

to be false and counterfeit, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, against the form of the statute, &c., and against the peace, &c.; And further, that the said Charles Page and Thomas Page, on the 14th day of July, in the 4th year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the late king’s current silver coin, called a shilling, unlawfully, unjustly, and deceitfully did utter and put off to the said Mary Ann Watkins, knowing the same to be false and counterfeit, in contempt of our said late lord the king and his laws, to the evil example, &c., against the form, &c., and against the peace, &c.: And thereupon it was considered by the court there, that the said Charles Page should be imprisoned and kept to hard labour in the house of correction for the county of Hereford for two years, as by the record thereof doth more fully appear. And the jurors aforesaid, now here sworn and charged to inquire for our said lady the queen for the body of the county of Hereford, upon their oath aforesaid, do further present that the said Charles Page, late of the parish of Ross, in the county of Hereford, labourer, having been so convicted as aforesaid, afterwards, (to wit,) on the 31st day of December, in the 4th year of our sovereign lady Queen Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, queen, defender of the faith, with force and arms, at the parish of Ross aforesaid, in the county of Hereford aforesaid, one piece of false and counterfeit coin, resembling and apparently intending to resemble and pass for a piece of the queen’s current silver coin, called a half-crown, unlawfully, deceitfully and feloniously did utter and put off to one Elizabeth, the wife of Thomas Hale, knowing the same to be false and counterfeit, in contempt of our said lady the queen and her laws, to the evil example, &c., against the form of the statute, &c., and against the peace, &c.

(a) See the cases of *Rex v. Johnson*, 2 Roll. Rep. 226; and *Rex v. Somerton*, 7 B. & C 463, (14 E. C. L. R. 84.)

Suppose the omission of these words would have made the original indictment bad on demurrer, yet after verdict it would have been good, being in the words of the statute; and that being so, the prosecutor had to set out a record without those words, and the prosecutor was right in not setting them out. As to the objection, that the present indictment discloses no offence: I at first thought that there was some weight in the argument, that the knowledge might have been before or after the uttering; but on the other hand, I am struck with the observation of Mr. *Greaves*, that the participle "knowing," in the present tense, must have reference to the act of uttering; and certainly the words of the statute are the same, and they must be taken to apply to the time of the uttering. The next objection divides itself into two points: the first is, whether there is any conviction and judgment alleged. Now, let us try that, by supposing that nothing had been said about Thomas Page, and it is clear that it would have been quite sufficient. But I am to take it with the words respecting Thomas Page; and then the question is, whether this is a variance in point of description. Now, if those words necessarily import that on the former indictment both were convicted, the production of this record would be a variance. Upon that my mind is not free from doubt. It says, that Charles Page, together with Thomas Page, by the names and descriptions of so and so, *was* convicted. I am inclined to think, that it means that Charles Page was tried and convicted. However, I have so much doubt, that I think I ought not to stop the case; but I will reserve the point.

Verdict—Guilty.

*Greaves*, and *Skinner*, for the prosecution.

*C. Phillips*, for the prisoners.

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In the ensuing term the case was considered by the fifteen judges, who held the conviction right.(a)

(a) See the following case of *Regina v. Jones and Page*.

## REGINA v. ANN JONES and CHARLES PAGE.—p. 761.

An indictment for knowingly uttering counterfeit coin, twice on the same day, charged an uttering of a counterfeit half-crown, and that the defendants on the same day, "one other piece of false and counterfeit [omitting the word "coin"], resembling, and apparently intended to resemble and pass for, a piece of the queen's current silver coin, called a half-crown, unlawfully," &c., "did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit:"—*Held*, that the omission of the word "coin" did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble and pass for a piece of the queen's current silver coin, called a half-crown:"—*Held*, also, that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner and not to "S. A., the wife of W. G.," who was the last antecedent, and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there."

On an indictment for a joint uttering of counterfeit coin, where both defendants are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin.

MISDEMEANOR.—The defendants were jointly indicted for uttering a counterfeit half-crown twice on the same day. The indictment charged that the defendants, on the 31st of December, 4 Vict., at, &c., "one piece of false and counterfeit coin, resembling, and apparently intended to resemble and pass for a piece of the queen's current silver coin, called a half-crown, unlawfully, unjustly, and deceitfully did utter and put off to Ann Green, single woman, knowing the same to be false and counterfeit; and that the said Ann Jones and Charles Page afterwards, to wit, on the day of such uttering and putting off *the said piece of false and counterfeit as aforesaid*, in the fourth year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, one other piece of false and counterfeit coin, resembling, and apparently intended to resemble and pass for a piece of the queen's current silver coin, called a half-crown, unlawfully, unjustly, and deceitfully did utter and put off to one Sarah Ann, the wife of William George, knowing the same to be false and counterfeit." *Contra formam statuti et contra pacem*.

It was proved, that the defendants were seen together on the morning of the 31st of December, 1840, and that they went about the town of Ross in Company, and that they went together to the George Inn at about half-past two P. M., and that Page went in, leaving Jones in the street, about twelve yards from the door; Page passed a bad half-crown to Ann Green in a room in the George, which was out of the sight of Jones; Page then came out and joined Jones, and they soon afterwards went together to the Sadlers' Arms, into which Jones went and passed another bad half-crown to Sarah Ann George, Page being on the outside of the house about twelve yards from the door, and out of sight from the place where Jones passed the half-crown. Jones was then apprehended, and Page was also apprehended at the place where Jones had left him.

*C. Phillips*, for the defendants.—I submit that the indictment is bad, first, because the words "then and there" are omitted before the word "knowing;" (a) secondly, the word "coin" is omitted after the word "counterfeit;" thirdly, the word "knowing" applies to Ann Green,

(a) See the preceding case.

the last antecedent, and not to the prisoners. Suppose it had been an uttering "to Ann Green, having a black gown on," then the word "having" would clearly have referred to Ann Green.

*Greaves.*—The first objection I answered in the last case. Secondly, the absence of the word "coin" makes nothing insensible. It is like the case of repeating the christian name without the surname, and it has been held, that if a wrong surname be given in the second instance, it may be rejected and the indictment be good. Lastly, reading the indictment according to common sense, no one can doubt that "knowing" refers to the defendants. In *Rex v. Wright*, 3 N. & M. 892, (a) it was held that the true rule is so to read an indictment as to make sense of it, and not to put any strained construction on it.

C. Phillips referred to the case of *Kelly v. Partington*, 2 N. & M. 460. (b)

*Greaves.*—All that was there decided was, that the words used did not amount to a libel.

COLERIDGE, J. (having conferred with GURNEY, B.)—Three objections have been made. The first is as to the absence of the words "then and there," as to which it has been said that "knowing" might refer to the past or the present. But reading the word "knowing" as a participle in the present tense, I must take it to import the present time. In order to make it mean anything else, something else must be imported, as "before that," or "after that." The second objection is the absence of the word "coin," and as to that I am of opinion that I may reject the words "of false and counterfeit," and then it will stand, that they "afterwards, to wit, on the day of such uttering and putting off *the said* piece as aforesaid," which will be good. The last objection was the one about which alone I had any doubt, and that was the absence of any thing pointing the word "knowing" to the defendants, so that it may be said

(a) In that case the indictment charged that the defendant, at the township of Wavertree, on a highway *there*, leading from Wavertree towards Childwall to another highway leading from Wavertree towards Little Wootton, by a wall *there* by him erected, had encroached. It was contended, that the word *there* must be taken to refer to the last antecedent, and must be taken to mean Little Wootton; but Lord Chief Justice TINDAL, in delivering judgment in the Exchequer Chamber, said—"It is contended in argument by the plaintiff in error, that the word 'there' must of necessity be referred to the last antecedent, that is, to Little Wootton. The answer appears to us to be, that the only way of reading the indictment, so as to make sense of it, is by considering the township of Little Wootton to be stated in the indictment merely as the terminus of one of the cross highways, and in that case there can be no ambiguity in the construction of the indictment, as the word 'there' cannot refer to that highway, but must of necessity refer to the highway in question, namely, that at Wavertree; and we think that if there is no necessary ambiguity in the construction of the indictment, we are bound not to create one, by reading the indictment in the only way which will make it unintelligible. In *Ogle's case* (2 H. P. C. 180) the sense is ambiguous. The assault may as well have been made at N. in the county *aforesaid*, as at F. in the county *aforesaid*, of which place the defendant is described by his addition. It is just as sensible whether the reference is made to the one or to the other. There was therefore an uncertainty in that case, which was held to be fatal. But in this case the nuisance by erecting a wall, which is local, must be at Wavertree, where the road is already described to be; it could not possibly be at Wootton. There is therefore no uncertainty, and the word 'there' must consequently be held to refer to the only antecedent which can make sense of the indictment, that is, to Wavertree."

(b) In that case the declaration stated that the defendant said of the plaintiff "she secreted 1s. 6d. under the till, *stating these are not times to be robbed*;" and this was held to import that the plaintiff, when secreting the 1s. 6d., had used the latter words, and that therefore the declaration did not contain that which was actionable *per se*; and Mr. Justice J. PARKE said, "We can only construe the words in their grammatical sense."

to refer to Ann Green. There is no obscurity in the statute, and the precedents certainly run "he the said A. B., knowing," and no doubt the indictment would have been better drawn if it had so stated; but still if this indictment read according to common sense is intelligible, that is sufficient. I must take the indictment by itself without the aid of the statute, but I own that I think that any one reading it would understand that the word "knowing" referred to the defendants. All that is said to be done in the indictment is said to be done by the defendants, and therefore "knowing" must be taken to refer to them in the absence of anything else. My brother GURNEY is entirely of the same opinion. However, I feel considerable difficulty in saying that there is any evidence of a joint uttering by both the defendants. Mr. *Greaves*, how do you say there was a joint uttering?

*Greaves*.—I say that the uttering of Page, when Jones stood at the door of the George Inn, was the act of Jones as well as Page; and the uttering of Jones, when Page stood at the door of the Sadlers' Arms, was the act of Page as well as of Jones, and I rely on the cases of *Rex v. Manners*, ante, vol. 7, p. 801, and *Rex v. Skerrit*, ante, vol. 2, p. 427, and, I ought to add, that it seems that those cases have been considered as though they were felonies; whereas they were misdemeanors, and in misdemeanor every one is a principal, whether present at the fact or not.

COLERIDGE, J.—I think that the case of *Rex v. Skerrit* is the nearest to this.

*C. Phillips* addressed the jury for the defendants.

COLERIDGE, J. (in summing up).—The question here is, whether you are satisfied that, in point of fact, both these prisoners did the act. In order to illustrate the difficulty I feel, suppose Ann Jones in the morning had uttered a bad half-crown, and Charles Page in the afternoon had uttered another, it is clear that Ann Jones would have had nothing to do with what Charles Page did, or Charles Page with what Ann Jones did, and therefore both would be guilty of a single uttering only; but the way in which it is sought to make out that both joined in uttering is this: They say that at the time Ann Jones uttered, Charles Page was so near that the act she did might be considered as his act; but I doubt very much whether the evidence shows that that was so. It seems to me, that the true question is this, whether the one was remaining so near to the other as to help the other to get rid of the counterfeit coin. I own I see considerable difficulty on this evidence in finding both the prisoners guilty, but you may find either guilty.

The jury found both the defendants guilty.

*Greaves*, and *Skinner*, for prosecutors.

*C. Phillips*, for defendants.

## MONMOUTH ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

## JENKINS v. PHILLIPS.—p. 766.

In an action for words the declaration stated, that the defendant said of the plaintiff, "He is a thief, a swindler, and a forger," &c. The defendant pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration. The judge at the trial allowed the declaration to be amended under the stat. 3 & 4 Will. 4, c. 42, s. 23, by inserting the Welsh words, and directed the trial to be postponed till the next day, on the terms of the plaintiff paying the costs of the day, and making a deposit of £15 with the associate for those costs, subject to taxation; and his lordship said, that if on the next day the defendant's counsel would give him reason to believe, that the defendant would justify the Welsh words, his lordship would then put the plaintiff to withdraw the record.

In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those Welsh words in the declaration.

In cases of doubt the judge at the trial will allow amendments under the stat. 3 & 4 Will. 4, c. 42, s. 23, because that section provides a remedy if the judge allows an amendment which ought not to be made, but gives no remedy in any case in which the judge has refused to allow an amendment.

**SLANDER.**—The declaration stated, that the plaintiff was a Baptist minister, and was retained and employed by the members of a Baptist congregation at Blaenafon, in the county of Monmouth, for great gain, profit, and reward, paid to the plaintiff in that behalf, to preach the gospel, and that the defendant spoke the following words of the plaintiff:—"He is a thief, a swindler, and a forger, and I have letters in my pocket to prove it. I have the letters at Bristol that he is a forger. He stole wood, the property of Francis James." The declaration also stated, as special damage, that the plaintiff had been "dismissed by the said members from the situation and office of minister to the said Baptist chapel, and had lost all the profits and emoluments which would otherwise have arisen and accrued to him, the plaintiff, as such minister or preacher as aforesaid, by being continued in his said situation, as he might and otherwise would have been." Plea—Not guilty.

On the part of the plaintiff three witnesses were called to prove the speaking of the words: they were all examined in the Welsh language through an interpreter, and they all stated that the words were spoken by the defendant in the Welsh language, but when translated the words proved were to precisely the same effect as those set forth in the declaration.

*Ludlow*, Serjt., for the defendant.—I submit that this is a fatal variance. The Welsh words should have been set out in the declaration, and also a translation. (a)

*Talfourd*, Serjt., for the plaintiff, applied for leave to amend under the twenty-third section of the stat. 3 & 4 Will. 4, c. 42, (b) by inserting the Welsh words in the declaration.

(a) See the cases of *Zenobio v. Axtell*, 6 T. R. 162, and *Cook v. Cox*, 3 M. & S. 110; and also as to Welsh words the case of *Slater v. Franks*, Hob. 126, and an anonymous case, *Id.*

(b) Set out ante, vol. 6, p. 531, n. (a), (25 E. C. L. R. 527.)

*Whateley*, for the defendant.—We, by our plea, only deny speaking the English words.

*Talfourd*, Serjt.—No one could be misled; whether a person is called a thief, a swindler, and a forger, in one language or another, can make no difference.

*Ludlow*, Serjt.—I recollect a case in which Baron GURNEY, after conferring with Mr. Justice PATTESON, would not allow an amendment to be made by inserting additional words in the declaration.

COLERIDGE, J.—That is a very different case.

*Ludlow*, Serjt.—If we had been conscious of having spoken the words in the Welsh language, we might have suffered judgment to go by default.

*Talfourd*, Serjt.—In the case of *Guest v. Elwes, Esq.*, 2 N. & P. 230, which was an action against a sheriff for an escape, in which the defendant pleaded not guilty, and that he did not arrest the party; there was no amendment made at the trial; and the jury found both the issues for the defendant, and also found that the defendant had been guilty of negligence in not arresting the party, and that the plaintiff had sustained damages to the amount of 30*l.*, and the plaintiff had judgment on that finding under the 24th section of the stat. 3 & 4 Will. 4, c. 42.

*Ludlow*, Serjt.—The case of *Guest v. Elwes* will stand as a single case for 500 years.

*Whateley*.—If your lordship allows this amendment, it will be an entirely new declaration. The plaintiff in his declaration says, that the defendant spoke certain words; and the defendant denies that he did so. The plaintiff now wishes to say that the defendant spoke other words in another language, but of the same meaning. The defendant might have justified the latter words; and can it be said that this is an amendment “not material to the merits of the case?” The amendments contemplated, no doubt, were either amendments of some matter of form, or a slight inaccuracy of words.

*Ludlow*, Serjt.—Here is not a mere variance of some of the words, but every word is different.

COLERIDGE, J.—I confess that I do not think that this goes beyond those amendments which the statute authorizes. The statute provides a remedy, if the judge at the trial allows an amendment which ought not to be permitted; but there is no remedy where the judge does not allow the amendment, therefore, in cases of doubt, I would allow the amendment to be made.

*Ludlow*, Serjt.—The costs ought to be paid to us, and the record withdrawn, to let the defendant plead *de novo*.

*Whately*.—We must have the words written on the record before we go on.

COLERIDGE, J.—Certainly. The provisions of the act of Parliament are, that where the variance is not material to the merits of the case, and is one by which the opposite party *cannot be prejudiced* in the conduct of his action, prosecution, or defence, the record shall be forthwith amended; but where the variance is in some particular not material to the merits, but such as that the opposite party *may have been prejudiced* in the conduct of his action, prosecution, or defence, the amendment is to be upon payment of costs, withdrawing the record, or postponing the trial, as the judge shall think reasonable. It is under the latter branch of this provision that I here give the plaintiff leave to amend; it is be-



ter to postpone the case till to-morrow, and the plaintiff must pay the costs of the day.

*Ludlow*, Serjt.—Then we must plead *instante*, which is a hardship on the defendant.

COLERIDGE, J.—They are really the same words only in a different language. You cannot be prejudiced. It is not enough for you to tell me that you may justify, but you must convince me that you would do so. Give me the least reason to suppose that you will justify the speaking of these Welsh words, and I will make the plaintiff withdraw the record. I shall allow the amendment, and let the case stand over till to-morrow; and if you, after considering it to-night, will tell me that you will justify, I will put the plaintiff to withdraw the record.

*Tulfourd*, Serjt.—They should also say, that they would have justified before, if the declaration had stated the words to have been spoken in the Welsh language.

COLERIDGE, J.—You have no right to insist on that term.

*Ludlow*, Serjt.—The costs of the day ought to be taxed, and paid immediately.

Mr. C. Bellamy, (the associate.)—The costs are taxed in London.

COLERIDGE, J.—The plaintiff should deposit £15 with Mr. Bellamy.

*Tulfourd*, Serjt.—Why should the plaintiff be obliged to make a deposit more than on a postponement for the absence of a witness?

COLERIDGE, J.—It is the price of your being saved from much worse. You must deposit £15, subject to taxation hereafter.

*Ludlow*, Serjt., stated that his client entirely withdrew any imputation that he had made on the plaintiff; and, by consent,

A juror was withdrawn.

*Tulfourd*, Serjt., and *Godson*, for the plaintiff.

*Ludlow*, Serjt., and *Whately*, for the defendant.

See the case of *Foster v. Pointer*, ante, p. 718, and the case of *Doe d. Bennett v. Long*, post, p. 773.

### LLOYD v. WALKEY.—p. 771.

In an action for negligence in not properly securing a cow of the defendant in a slaughter-house, the declaration stated, that by means thereof the cow "ran at, butted at, go<sup>rd</sup>, killed, and destroyed" a cow of the plaintiff. Plea, a payment of 30s. into court, and that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages:—*Held*, that the defendant could not go into evidence to show, that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea.

CASE.—The declaration stated that the plaintiff, on, &c., "was lawfully possessed, as of his own property, of a certain cow of the value of £20, which was then standing in a certain public slaughter-house, for the purpose of being slaughtered and cut up, and sold by the plaintiff in the way of his, the said plaintiff's, trade of a butcher; and the defendant was also then possessed of a certain other cow, which he, the defendant, then brought to and placed in the said slaughter-house, the said cow of the said plaintiff then being in the said slaughter-house as aforesaid; and it then became and was the duty of the defendant to tie up and secure his said cow in the said slaughter-house, so that she might be prevented from injuring the said cow of the plaintiff. Yet the de-

fendant, not regarding his duty in that behalf, did not tie up nor secure his said cow in such a manner as to prevent her from injuring the said plaintiff's said cow, nor in any manner whatever, but then left her at large in the said slaughter-house, and so negligently and improperly conducted himself in that behalf, that, by means of the premises, the said cow of the said defendant there ran at, butted at, gored, *killed, and destroyed* the said cow of the plaintiff, and also by means of the premises the said cow of the plaintiff then became of no value to the plaintiff, and wholly lost to the plaintiff, to the damage of the plaintiff of £20." Plea—a payment into court of 30s., and "that the plaintiff has not sustained damages to a greater amount than the said sum of 30s., *in respect of the causes of action in the declaration mentioned*," (concluding with a verification.) Replication, that the plaintiff "has sustained damages to a greater amount than the said sum of 1l. 10s. *in respect of the causes of action in the declaration mentioned*," (concluding to the country.)

It was proved, on the part of the plaintiff, that his cow was in the slaughter-house, properly secured, and that the defendant's cow gored her.

*Whately*, for the defendant, proposed to give evidence to show that the plaintiff's cow was not killed by the defendant's cow, but that the plaintiff's cow, after being hurt by the defendant's cow, was killed by a butcher. He submitted that the payment of money into court only admitted damages to the amount paid into court.

COLERIDGE, J.—I think that I ought not to receive evidence that the death of the cow was caused by other means than those stated in the declaration, because I think that the plea admits that the death of the cow was caused in the manner stated in the declaration.

The evidence was rejected.

Verdict for the plaintiff, damages £2 beyond the sum paid into court.

*Ludlow*, Serjt., and *W. J. Alexander*, for the plaintiff.

*Whately*, for the defendant.

DOE on the Demise of BENNETT v. LONG and Others.—p. 773.

A. was possessed of lands for more than 20 years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife: *Held*, that though B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as her heir on her death in 1838.

B. had concurred, with other members of his family, in letting land to C. as tenant from year to year, and it was agreed that the rent should be paid to D. as agent for the family. B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—*Held*, that if the jury were satisfied that the fair meaning of this was, that C. asserted that B. and himself were not in the relation of landlord and tenant, this was a disclaimer; and that C. was not entitled to notice to quit.

If in ejectment the lessor of the plaintiff rely on a disclaimer, it will be no objection to him recovering, that the disclaimer was on the day of the demise laid in the declaration.

Amendments under the 23d section of the stat. 3 & 4 Will. 4, c. 42, cannot be made after verdict.

EJECTMENT to recover a house and premises, situate in the parishes of Roget and Magor. The day of the demise laid in the declaration was the 27th of October, 1840.

It appeared that the lessor of the plaintiff was the eldest son of both his father and mother, and that the father was in possession of the property more than sixty years ago, and continued in possession till his death, he having died in the house in the year 1817. His widow continued in possession till her death in 1838.

*R. V. Richards*, for the defendant.—The lessor of the plaintiff claims as the heir of his father, and he has been out of possession more than twenty years since his father's death.

COLERIDGE, J.—The widow was in possession more than twenty years, and the lessor of the plaintiff is her heir.

*R. V. Richards*.—If they had not carried it back to the father it might have been so. The widow had sufficient possession to bar an entry, but no seisin in fee.

*Ludlow*, Serjt., for the plaintiff.—The widow's possession was originally rightful or wrongful. If she had originally a rightful possession, the property descended to her heir; if her possession was originally wrongful, she got a title by her twenty years' possession, which would also descend to her heir.

*Whateley*, on the same side.—As the widow had the possession for more than twenty years, she, under the stat. 3 & 4 Will. 4, c. 27, had a fee.

*R. V. Richards*.—Whether this statute will or will not work injustice, is not for us to consider. The lessor of the plaintiffs claims as heir of his father, and he was kept out of possession by his mother; and if the stat. 3 & 4 Will. 4, c. 27, had never passed, the mother's possession would not have been adverse to the heir, and therefore could not have been a descendible estate.

COLERIDGE, J.—I will give you leave to move.

It was opened by *R. V. Richards*, for the defendant, that the defendant Long was tenant to the lessor of the plaintiff and the other members of his family, and that that tenancy had never been determined.

To prove this, Mr. Baldwyn was called. He said—"In the month of September, 1838, I was present when it was agreed by the lessor of the plaintiff and the other members of his family to let this property to the defendant Long for £30 a year, from the 2d of February, 1839. It was then stated, that the family of the Bennetts were tenants in common, and they asked me to receive the rent for them."

In reply, Mr. T. G. Philpotts was called to prove a disclaimer. He said—"On the 27th of October, 1840, I accompanied the lessor of the plaintiff to the defendant; I read over a description of the property from an abstract which I now produce, and the defendant said he was in possession of the whole of it. The lessor of the plaintiff said, after me, 'I hereby demand rent from you, not having ever received any.' The defendant replied, 'You are not my landlord.' The lessor of the plaintiff then said, 'I hereby demand possession of the whole of the premises,' repeating the description from the abstract. The defendant refused to give them up."

It was also proved by a clerk of Mr. Philpotts, that when he served the declaration in ejectment on the 30th of October, 1841, the defendant Long said, "James Bennett [lessor of the plaintiff] is not my landlord."

*R. V. Richards* objected, that the plaintiff must be nonsuited, as the

disclaimer was on the day of the demise laid in the declaration. He cited the case of *Doe d. Lewis v. Cowdor*, 1 C., M., & R. 398. (a)

COLERIDGE, J.—In the case of *Doe dem. Graves v. Wells*, 2 P. & D. 396, (b) it was held, that a demise in ejectment laid on a day on which the forfeiture of a lease was incurred, to commence from two days previous, was good. I think this is no ground of nonsuit.

*Ludlow*, Serjt., in reply.—It is not essential to a disclaimer, that the person should claim the property as his own; and if a tenant denies that another person is his landlord, that is a sufficient disclaimer; and if that person be his landlord, he may recover the demised premises by ejectment, without any notice to quit.

COLERIDGE, J., (in summing up).—I think that we should infer that this property belonged to the mother of the lessor of the plaintiff; that it survived to her upon her husband's death, and descended to the lessor of the plaintiff, as her heir, upon her death in the year 1838. Taking that to be so, the lessor of the plaintiff would be entitled to the property; but then the defendant in effect says, "I am your tenant, and you cannot recover the property by this ejectment, as there has been no notice to quit." To prove the tenancy Mr. Baldwyn has been called, and his evidence would be a complete answer to the action, whatever we may think of the title, unless the lessor of the plaintiff has made out to your satisfaction that the defendant has disclaimed. If you let land to a person from year to year, you cannot in general recover back your land without a notice to quit; but if your tenant says, "I deny that you are my landlord—I am not your tenant," he cannot insist upon notice to quit, and you might recover your property from him by an ejectment, although you had given no notice to quit. In the present case it is proved by Mr. Philpotts, that the defendant said to the lessor of the plaintiff, "You are not my landlord." Now, if the defendant had said, that he did not pay the rent to the lessor of the plaintiff, because it was to be paid to Mr. Baldwyn for the whole family, that would have been no disclaimer; and if, on that being said, possession had been demanded, the lessor of the plaintiff would not have been entitled to possession merely because he did not get his rent. However, it is proved in addition to this, that on the 30th of October, when the declaration in ejectment was served, the defendant Long said, "James Bennett is not my landlord." This being after the day of the demise laid in the declaration, would not be important except as evidence to explain what had occurred on the previous demand of possession; and you will say whether the fair meaning of all this is, that the defendant asserted that the lessor of the plaintiff and himself were not in the relation of landlord and tenant, for, if he did, the lessor of the plaintiff is entitled to

(a) The question in that case was, whether certain letters amounted to a disclaimer; and in that case Baron Parke, in delivering judgment, said, "We think that the letters did not amount to a disclaimer; and even if they did, such disclaimer would not be sufficient, because the letters were written *after* the day of the demise; and if they are put as an admission of a previous disclaimer, it is clear that they ought to amount to a recognition of a disclaimer antecedent to the date of the day of the demise."

(b) In the case of *Doe d. Wrangham v. Hervey*, 3 Wils. 274, the ejectment was by the heir, who claimed by descent. The ancestor died on the 1st of January. The demise laid in the declaration was on the 1st of January, to hold from previous 31st of December, and it was held good, and the plaintiff succeeded in the ejectment. The case of *Doe d. Graves v. Wells* also decides, that a denial by parol of a landlord's title does not incur a forfeiture of a lease for years; and Mr. Justice Patteson there observes, that "there are many cases where a term from year to year has been forfeited by disclaimer, but those cases turn on the doctrine of waiver."

recover in this ejectment. But if you think that the defendant meant not to dispute that the lessor of the plaintiff was his landlord, but merely to say that the rent was to be paid to Mr. Baldwyn, that would not be a disclaimer, and the defendant would be entitled to your verdict.

Verdict for the plaintiff.

*R. V. Richards* asked for leave to move to enter a nonsuit, on the ground that the disclaimer was on the day of the demise.

*Whateley* applied to amend the declaration under the 23d section of the stat. 4 & 5 Will. 4, c. 42, (a) by altering the day of demise.

*R. V. Richards*.—I object to any amendment after verdict.

COLERIDGE, J.—I think, on considering the terms of the statute, that it does not apply after verdict. The provisions as to withdrawing the record and postponing the trial, all apply to amendments before verdict. I think that I cannot give leave to amend; (b) but I shall not give any leave to move to enter a nonsuit.

*Ludlow*, Serjt., and *Whateley*, for the plaintiff.

*R. V. Richards*, and *Hanmer*, for the defendant.

(a) Set out ante, vol. 6, p. 531, n. (a), (25 E. C. L. R. 527.)

(b) See the case of *Jenkins v. Phillips*, ante, p. 766.

## GLOUCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. JAMES PORTER, JOHN THOMAS the elder, and WILLIAM THOMAS.—p. 778.

A special constable duly appointed under the stat. 1 & 2 Will. 4, c. 41, is appointed for an indefinite time, and remains a constable till his services are either determined or suspended under the 9th section of that statute, and, being so appointed under that statute, he has all the authority of an ordinary constable until his services are either suspended or determined.

MURDER.—The first count of the indictment charged that the prisoners, on the 16th day of August, 1840, at the parish of St. George, in the county of Gloucester, feloniously, &c., did make an assault upon James Nutt Pearce, and that they fractured his skull by striking him on the head with a stone, of which he languished till the 7th of September, and then died at the parish of St. James, in the city of Bristol. The second count was similar, but charged the prisoners John Thomas, the elder, and James Porter, as principals in the first degree, and William Thomas as principal in the second degree. The third count charged John Thomas, the elder, as principal, in the first degree, and the other prisoners as principals in the second degree; and stated the death to have been caused by beating. The fourth count charged the prisoner Porter as principal in the first degree, and the other prisoners as principals in the second degree; and stated the death as in the first count. (a)

(a) John Thomas, the younger, had originally been included in the indictment, but as to him the bill had been ignored.

It appeared that John Thomas, the younger, was, on the night of the 16th of August, 1840, charged with robbing a garden of a person named Gough, and that he was given into the custody of the deceased, who was engaged by the owners of gardens at St. George's, near Bristol, as a private watchman. It further appeared, that while the deceased was proceeding with John Thomas, the younger, to the station-house, the three prisoners attacked him, and that he was struck on the head with a stone; and in order to show that the deceased was a constable at the time that he took John Thomas, the younger, into custody, the following appointment was given in evidence:—

“Gloucestershire, } We, the undersigned, two of his majesty's jus-  
 (to wit). } tices of the peace of the county of Gloucester, act-  
 ing for the division of Bristol, in the said county, do  
 hereby nominate and appoint James Nutt Pearce to act as a special  
 constable for the parish of Saint George, in the said division, until he  
 receives notice that his service is suspended or determined, according to  
 the tenor of the oath this day taken and subscribed by him. Given  
 under our hands the ninth day of February, 1832.

“H. W. NEWMAN,

“WILLIAM FRIPP.

“Your powers, &c., as a special constable, extend not only for the parish for which you are appointed, but throughout the county of Gloucester.”

*Godson*, for the prisoners.—It is not proved that the deceased was a constable on the 16th day of August, 1840. The appointment put in is dated the ninth day of February, 1832, and is signed by two magistrates. That appointment is founded on the stat. 1 & 2 Will. 4, c. 41, which received the royal assent on the 15th October, 1831. By that statute (after reciting that it was expedient to make other provisions for the better preservation of the public peace), it is enacted by the first section, “that in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices respectively shall seem fit and necessary, for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place;” and the magistrates are empowered to administer an oath to the special constables, the form of which is given by the act. It is manifest from this statute, that the intention of the legislature was that these special constables

bles should be appointed where either a riot or tumult existed or was apprehended, and the provisions of this act could never be intended to apply to a private watchman looking after gardens nine years after ; nor could the legislature intend that these special constables should remain constables all their lives.

COLERIDGE, J.—I do not see why not. By the 9th section of this statute it is enacted, “that the justices who shall have appointed any special constables under this act are hereby empowered, or the justices acting for the division or limits within which such special constables shall have been called out, at a special session to be held for that purpose, or the major part of such last-mentioned justices at such special session, are hereby empowered to suspend or determine the services of any or all of the special constables so called out, as to the said justices respectively shall seem meet ; and notice of such suspension or determination of the services of any or all of the said special constables shall be forthwith transmitted by such respective justices to one of his majesty’s principal secretaries of state, and also to the lieutenant of the county.”

*Godson*.—I submit that reference being had to the causes for passing this act, and to the preamble of it, this cannot be considered to be a case within its provisions ; and that the deceased, at the time when he received this injury, cannot be considered as acting as a special constable under the stat. 1 & 2 Will. 4, c. 41. It is further to be observed, that the staff which would be given to him as a special constable under that act is not produced.

COLERIDGE, J.—The constable’s staff is certainly not essential to his acting.

*Godson*.—By the 10th section of the act every special constable is, within one week after the expiration of his office, to deliver up his staff, and as his staff is not produced it leads to an inference that his office had expired, and that he had given it up.

*W. J. Alexander*, on the same side.—It is contended on the part of the prosecution that the deceased was a constable, and to prove that an appointment is put in. Now, the object of that species of appointment was to guard the persons and property of the inhabitants of a place where any riot or tumult existed, or was apprehended, and the regular constables were not sufficient : hundreds and thousands were sworn in as special constables under this statute, and at the time of the riots of 1830, nearly every householder was a special constable. If the doctrine contended for on the other side be correct, every one of them is now a constable for all purposes, unless he has been formally dismissed from his office under the 9th section of this statute, and there is no reason to believe that that has ever been done, and if it has not been done all those persons have at this hour not only the authority of constables, but also all the protection of constables.

COLERIDGE, J.—I will not trouble Mr. *Greaves*, as I have a very clear opinion on this point. By the appointment which has been put in, this person was to serve as a constable, and to continue in that office and act as a special constable until he received notice that his services were suspended or determined according to the tenor of his oath. Now the oath, the form of which is given in the first section of the statute, is this :—“ I, A. B., do swear, that I will well and truly serve our Sovereign Lord the King in the office of special constable for the parish [or township] of \_\_\_\_\_, without favour or affection, malice or ill-will ; and that I will to the best of my power cause the peace to be kept and pre-

served, and prevent all offences against the persons and properties of his Majesty's subjects; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God." From this we may collect the duties of these special constables, and the reason of their appointment, and it is not because the preamble and the object of an act of Parliament do not go so far as the enacting words that they therefore control them. It is not contended by the learned counsel for the prisoners that, to make this a good appointment, it must be shown that a credible witness was examined before the appointment took place, nor that the deceased took the oath prescribed by the act of Parliament, and it would be highly inconvenient if such proof were required. I take it therefore to be clear that the deceased had a good appointment, and then the question arises, whether having had a good appointment it is good several years afterwards. Now by the 9th section of the act of Parliament the magistrates are authorized to suspend or determine the services of these special constables. What is the inference? that unless the magistrates have suspended or determined their services, the appointment is indefinite in point of time, and remains valid and in force till it is either suspended or determined. It is also said, that as no staff is produced the deceased must be taken to have given it up. I do not see that by this act of Parliament it is directed that any staff should be given to these special constables on their appointment.<sup>(a)</sup> Seeing that the deceased had a valid appointment under this act of Parliament, which appointment is not shown to have been determined, and seeing also that by the fifth section of the act it is enacted, "that every special constable appointed under this act shall, not only within the parish, township, or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices so appointing him, have, exercise, and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has within his constablewick by virtue of the common law of this realm, or of any statute or statutes." I think that the deceased was a good common constable, on the 16th of August, 1840, he having been made a special constable under this act of Parliament.

The prisoners were found guilty of manslaughter.

*Greaves and Skinner*, for the prosecution.

*Godson and W. J. Alexander*, for the prisoners.

(a) We believe that there is no provision at all in the stat. 1 & 2 Will. 4, c. 41, as to the staves of these special constables, except that which is contained in the 10th section, which provides, that every special constable, within a week after the expiration of his office, shall give up "every staff, weapon, and other article which shall have been provided for such special constable under this act."

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### REGINA v. RODWAY.—p. 784.

On an indictment for larceny it appeared that a landlord went to his tenant (who had removed all his goods) to demand rent amounting to 12*l.* 10*s.*, taking with him a receipt ready written and signed, the tenant gave him £2, and asked to look at the receipt. It was given to him, and he refused to return it or to pay the remainder of the rent. It was proved by the landlord that at the time he gave the prisoner the receipt, he thought the prisoner was going to pay him the rent; and that he should not have parted with the receipt unless he had been paid all the rent, but that when he put the receipt into the prisoner's hands he never expected to have the



receipt again, and that he did not want the receipt again, but wanted his rent to be paid :—*Held*, a larceny, and that the fact of the tenant giving the £2 made no difference.

**LARCENY.**—The prisoner was indicted for stealing a receipt, which in the first count of the indictment was stated to be “one piece of paper, stamped with a certain stamp denoting the payment of a duty to our said lady the queen, of sixpence of the property goods and chattels” of Richard Lambert; 2d count, for stealing “one piece of paper of the value of one penny.” (a)

The prosecutor proved that the prisoner rented some premises of him for £25 a-year, and that on the day on which he quitted, there being half-a-year’s rent due, he took a stamped receipt ready written and signed to the premises, off which the prisoner had removed all his goods. The prosecutor at the desire of the prisoner went into a room in his house, where the prisoner pulled out a bag of money, and asked the prosecutor whether he had brought a receipt, and the prosecutor said that he had, and the prisoner asked to look at it; the prosecutor gave him the receipt, which the prisoner took, and put two sovereigns into the prosecutor’s hand and immediately went away; and upon the prosecutor afterwards asking him for the remainder of the money, he said he had got his receipt and he should not pay it. The prosecutor stated, that at the time he gave the prisoner the receipt he thought the prisoner was going to pay him the rent; that he should not have parted with the receipt unless he had been paid all the rent; but that when he put it in the prisoner’s hands he never expected to have the receipt again, and that he did not want the receipt back again, but wanted his rent to be paid.

*Selfe*, for the prisoner, submitted that this was not a larceny.

*Greaves*, for the prosecution, cited *Oliver’s case*, (b) as in point. Here, it was clear, the prosecutor never intended to part with the receipt unless he was paid all the rent. The prisoner, on the contrary, never intended to pay the rent, and obtained the receipt by means of fraud. The property in the receipt, therefore, was not changed, and the case amounted to larceny.

**COLERIDGE, J.**—I think it is a larceny. The prisoner had removed his goods off the premises, so that the prosecutor could not distrain; and then the prisoner induces the prosecutor to part with the receipt, by asking to look at it, and it is delivered to him for *that* purpose. It is quite clear, also, that the prosecutor never intended to give the prisoner the receipt till he was paid all the rent.

*Selfe*.—There is £2 paid.

**COLERIDGE, J.**—I think that makes no difference.

Verdict—Not guilty.

*Greaves*, for prosecutor.

*Selfe*, for prisoner.

(a) See the case of *Rex v. Bingley*, ante, vol. 5, p. 602.

(b) Tried at the Northumberland Summer Assizes, 1811, cited 4 Taunt. 374. In that case the prisoner had offered to give the prosecutor gold for bank-notes; and upon the prosecutor laying down some bank-notes for the purpose of having them changed for gold, the prisoner took them up and went away with them, promising to return immediately with the gold. The prisoner did not return, and the prosecutor never saw him again till he was apprehended. Baron Wood “held that the case clearly did amount to larceny, if the jury believed the intention of the prisoner was to run away with the notes and never to return with the gold: whether the prisoner had at the time the animus furandi was the sole point upon which the question turned.”

## REGINA v. HEWINS.—p. 786.

On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, *or any three or two of them*, were commanded to examine the witnesses:—*Held*, a fatal variance, and the judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15.

Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the grand jury.

The judges are unwilling to allow the amendment of variances which might have been avoided by ordinary care.

In an indictment for perjury, charged to have been committed before commissioners to examine witnesses in a Chancery suit, it was alleged that a suit was depending, and that a commission was issued for the examination of witnesses, and that interrogatories were exhibited, (the 9th of which was set out;) and it was averred that “upon the examination of the said J. H. (the defendant) upon the said interrogatories, it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to, and stated by the said J. H. upon his oath, in answer to the said 9th interrogatory.”—Whether this is a sufficient averment of materiality—*Quære?*

**PERJURY.**—The first count of the indictment stated, that a certain cause was depending in the Court of Chancery, in which the guardians of the poor of the Evesham Union were plaintiffs, and the Rev. Hugh Smith was defendant, concerning a certain contract and purchase of four cottages at Weston-sub-Edge, “and that such proceedings were thereupon had that afterwards, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, a certain commission directed to Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, gentlemen, was issued out of the said Court of Chancery in the said cause, whereby, amongst other things, authority was given to the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, any three or two of them, to examine all witnesses whatsoever upon certain interrogatories to be exhibited to them the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, as well on the part of the said complainants as on the part of the defendant, or either of them, in the said cause; and whereby also the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, [omitting “or any three or two of them,”] were, amongst other things, commanded to examine each of the said witnesses on their respective corporal oaths first taken before the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek, or any three or two of them, the said Robert Hiorne Hobbes, William Wilton Woodward, William Kendall, and Oswald Cheek; and the jurors aforesaid, upon their oaths aforesaid, do further present that in and by the 9th interrogatory exhibited to the said commissioners in the said cause, the said witnesses were interrogated as follows, that is to say,” [here the 9th interrogatory was set out.] And that the defendant, one of the witnesses to whom the interrogatories were to be and were administered, came before the said Robert Hiorne Hobbes, William Wilton Woodward, and William Kendall, three of the said commissioners, to be examined as a witness on the part of the said defendant on the said interrogatories, and before them (they “then and there being such commissioners as aforesaid, and then and there having sufficient and competent power and authority to administer an oath to the said J. H. in that behalf”) was duly sworn. The count then contained the following averment of materiality—“And

the jurors aforesaid, upon their oaths aforesaid, do further present that, upon the examination of the said Joseph Hewins upon the said interrogatories, it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to and stated by the said Joseph Hewins upon his oath, in answer to the said 9th interrogatory." The count then stated the evidence given by the present defendant (which related to a vestry meeting which had been held at Weston-sub-Edge,) and assigned perjury upon it. The 2d count did not state the commission, but merely stated that Messrs. Hobbes, Woodward, and Kendall were "commissioners duly appointed to take the examination of the said witnesses on the said interrogatories," and that they had power to administer the oath; but in other respects it was nearly similar to the first count. The 3d count stated the commissioners to be commissioners acting by virtue of a commission for the examination of witnesses issued out of the Court of Chancery, in a cause depending there, and at issue between the guardians of the poor of the Evesham Union and the Rev. Hugh Smith, and averred that they had power to administer an oath. In other respects it was similar to the 2d count, except that it contained no averment of materiality.

The commission was put in and read. It was directed to the four commissioners, and authorized them, or any three or two of them, to examine all the witnesses of both parties on interrogatories, and commanded them, "*or any three or two of them,*" to examine each of the said witnesses on their respective corporal oaths, first taken before the commissioners, or any three or two of them.<sup>(a)</sup>

It appeared that the present defendant had been sworn and examined before three of the commissioners only, (Messrs. Hobbes, Woodward, and Kendall.)

*Godson and Francillon*, for the defendant.—There is a fatal variance in the setting out of the commission. The mandatory part of the commission contains the words "*or any three or two of them,*" which would empower any two to act. In the setting of this out on the record, those words are omitted.

COLERIDGE, J.—I think that this variance is fatal to the first count.

*Greaves*, for the prosecution, asked to be allowed to amend under the stat. 9 Geo. 4, c. 15, commonly called Lord Tenterden's Act.

*Godson*.—I submit that this amendment ought not to be allowed. In the case of *Jelf v. Oriel*, ante, vol. 4, p. 22, (19 E. C. L. R. 257,) it was laid down, that even in a civil case an amendment under this act of Parliament should not be allowed, when there was a variance which would not have occurred if common care had been used; and in the case of *Rex v. Cooke*, ante, vol. 7, p. 559, (32 E. C. L. R. 629,) Mr. Justice PATTESON would not allow an indictment to be amended by inserting the time at which a judgment was entered up, instead of an allegation that it was entered up "*in or as of Trinity Term;*" and his lordship said, that in criminal cases amendments should be made very sparingly.

COLERIDGE, J.—I think that I ought not to allow this amendment. I entirely agree with my brother PATTESON, that the discretion of the judges, as to amending in criminal cases, ought to be exercised very sparingly. One objection to readily permitting an amendment in an indictment is, that by the amendment a presentment on the oath of the

<sup>(a)</sup> The commission was in the usual form, which will be found in any of the works on the practice of the Court of Chancery.

grand jury is altered. I am also unwilling to amend variances which, by ordinary care in collation, might be avoided.

*Godson* and *Francillon*, for the defendant, objected that the averment of materiality, in the second count of this indictment, was insufficient, there being no statement of the alleged perjury being material to the Chancery suit, or to any question in that suit, and that there not being in this indictment any averments from which the court here could judge of the materiality of the alleged perjury, the second count of the present indictment was bad.

COLERIDGE, J.—I have some doubt whether the averment of materiality is sufficient, and I will reserve the point if it should become necessary.

The case proceeded, and the defendant was acquitted on the merits.

Verdict—Not guilty.

*Greaves* and *Keating*, for the prosecution.

*Godson* and *Francillon*, for the defendant.

#### The QUARTER SESSIONS occurring during the ASSIZES.—p. 790.

Where the Quarter Sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is for the Quarter Sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day.

THE Quarter Sessions for the county of Gloucester were held on the 6th of April, 1841. The judge on the crown side of the assizes was still sitting for the trial of the prisoners of that county, but the grand jury assembled under the assize process had been discharged. The court of Quarter Sessions desired the opinion of his lordship on the following questions:—1st, Whether the court of Quarter Sessions could proceed to inquire and try prisoners while the judge of assize was sitting, the grand jury convened under his process having been discharged; 2d, Supposing they could not properly proceed to the trial of prisoners, whether they were bound to adjourn; or, whether after having finished such business as came before them of another kind, they might consider the sessions as completed.

COLERIDGE, J.—The first question you have put is, whether the court of Quarter Sessions could proceed to inquire and try prisoners while the judge of assize was sitting here, the grand jury convened under his process having been discharged. That question at first seemed to present no difficulty, but certainly upon principle it does not seem to be quite so clear. But looking at the universal practice and the general understanding, and considering what great inconvenience would follow if any doubt should arise, whether the jurors were properly sworn or the prisoners properly tried, I have come very clearly to the practical conclusion, that I should not advise you to try any prisoners, and I express myself in this guarded way as I don't think it perfectly clear. (a) The

(a) Before the stat. 25 G. 3, c. 18, it was considered that the authority of the Court of Oyer and Terminer at the Old Bailey was suspended by the sitting of the Court of Queen's VOL. XXXVIII. 58 2 Q

second question was, supposing that the court of Quarter Sessions could not properly proceed to the trial of prisoners, whether they were bound to adjourn, or whether they might, after having finished such business as came before them of another kind, consider the sessions as completed. If by that question is meant whether the justices would be liable to an information for not proceeding, or whether the court of Queen's Bench would direct them by mandamus to proceed, or whether the prisoners could complain, I don't think the justices would be bound to proceed; but when we consider that we have statutes as early as the reign of King Edward the Third,<sup>(a)</sup> clearly providing for the holding of sessions four times in every year, at a time when the trial of prisoners must have been the principal business of such sessions, and that on a late occasion the very inconvenience now occurring came under the contemplation of the legislature and provisions were made to remedy it,<sup>(b)</sup> I own that it seems to me that the magistrates will hardly act under the spirit of those acts, unless they adjourn, but I by no means say that they are bound to do so.

The sessions adjourned for a week.<sup>(c)</sup>

Bench in term time; and by that statute, after reciting that "whereas by the present law of this realm the power and authority of justices appointed and authorized under and by virtue of any commission of Oyer and Terminer, or any commission of gaol delivery, awarded into and for any county or place, are suspended by the coming and sitting of his Majesty's Court of King's Bench, in such county or place; and whereas it has oftentimes happened that the gaol of Newgate, in London, hath not been delivered of all the prisoners in it, nor the business of a session of gaol delivery of the said gaol of Newgate, for the county of Middlesex, finally concluded before the essoign day of term, and the sitting of his said Majesty's Court of King's Bench at Westminster, in the said county of Middlesex, by reason whereof divers prisoners in the said gaol of Newgate have remained untried at such sessions, and have been kept and continued in the said gaol until the following session, to the great inconvenience of the public, to the manifest hindrance and delay of justice, to the prevention of speedy and condign punishment being inflicted on offenders, and to the great increase of the number of prisoners confined in the said gaol, from which the most alarming and dangerous consequences are at times dreaded and likely to ensue," it is enacted "That when any session of oyer and terminer and gaol delivery of the said gaol of Newgate, for the said county of Middlesex, shall have been begun to be holden before the essoign day of any term, that the same session shall and may be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such essoign day of any term, or the sitting of his said Majesty's Court of King's Bench at Westminster, or elsewhere, in the said county of Middlesex."

(a) The stat. 36 Edw. 3, c. 12.

(b) See the stat. 4 & 5 Will. 4, c. 47.

(c) See the opinion of Sir Samuel Sheppard and Sir Robert Gifford, in Sir George Chetwynd's Ed. of Burn's Justice, tit. Sessions, I.

## NON-PAROCHIAL REGISTERS.

THE statute 3 & 4 Vict. c. 92, intituled "An Act for enabling Courts of Justice to admit non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages" (which received the royal assent on the 10th of August, 1840) has made some very important alterations in the law of evidence.

By sect. 1, of that statute, certain non-parochial registers there referred to, are directed to be deposited with the registrar-general in his office; and by section 2 of the same statute, the registration commissioners are authorized, *within twelve calendar months from the passing of this act*, "to inquire into the state, custody, and authenticity of every register or record of birth, baptism, naming, dedication, death, burial, and marriage, *which shall be sent to them within three calendar months from the passing of this act*; and, such as they shall find accurate and faithful, they shall certify under the hands and seals of three or more of them (of whom the registrar-general shall not be one), as fit to be placed with the other registers and records hereby directed to be deposited in the said office."

By sect. 3 of the same statute, every place appointed by the registrar-general, with the approval of three commissioners of the treasury, is to be deemed part of his office; and by sect. 6, "all registers and records," deposited by virtue of this act, except (except the registers of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint, and elsewhere, which were deposited in the registry of the Bishop of London, in the year 1821, by order of the Secretary of State), are to be "deemed in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions" contained in this act.

Under the second section of this statute, a great number of non-parochial registers have been sent to the registration commissioners and certified by them.(a)

We have been favoured by Mr. Burn, the secretary of the registration commission, with the following list of the registers that have been made evidence under this statute:—

The Registers of the French Churches in England, commencing in the year	1567
_____ German Chapels	do. 1669
_____ Dutch Chapel Royal	do. 1680
_____ Swiss Church	do. 1762
_____ Presbyterians throughout England and Wales	do. 1642
_____ Independents	do. 1644
_____ Baptists	do. 1642
_____ Scotch Churches in England,	do. 1758
_____ Society of Friends, throughout England and Wales,	do. 1644
_____ Wesleyan Methodists,	do. 1772
_____ Methodist's New Connexion,	do. 1787
_____ Primitive Methodists,	do. 1818
_____ Bible Christians,	do. 1817
_____ Inghamites,	do. 1758
_____ Moravians,	do. 1742
_____ Lady Huntingdon's Connexion,	do. 1752
_____ Calvinistic Methodists,	do. 1762
_____ Swedenborgians,	do. 1787
The Registers from Dr. Williams's Library in Redcross street,	do. 1742
_____ the Paternoster Row Registry	do. 1808
The Bunhill Fields' Registers	do. 1718
The Registers of the Liverpool Necropolis	do. 1825
_____ Deadman's Place Cemetery, Southwark,	do. 1788
_____ Leeds Cemetery,	do. 1836
_____ Walworth Burial Ground,	do. 1819
_____ Ecclesall Cemetery,	do. 1884
_____ Norwich Cemetery,	do. 1821
_____ Roman Catholic Chapels, of about one-third of England(b)	_____

(a) We believe that about 10,000 register books have been authenticated under this statute, and are deposited in the office of the Registration Commission in Rolls' Yard.

(b) The residue of these registers remain at the chapels to which they relate.

The 9th and 10th sections of the stat. 3 & 4 Vict. c. 92, provide for the granting of extracts from these registers, to be authenticated by the seal of the registrar-general's office: and by sect. 11 of the same statute, it is enacted, "That in case any party shall intend to use in evidence on the trial of any cause in any of the courts of common law, or on the hearing of any matter, which is not a criminal case, at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing; and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service, or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence, at such trial or hearing, if the judge or court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided:" and by sect. 12 it is enacted, "That, in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall, nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries which he shall intend to use in evidence." The 13th, 14th, 15th, and 16th sections of the statute contain nearly similar provisions as to courts of equity, the master's office, and the ecclesiastical courts; but by sect. 17 it is enacted, that in all criminal cases the original register or record must be produced.

The registers of the Jews (which we believe are written in the Hebrew language) remain at the synagogues to which they respectively relate. The registers of baptisms, marriages, and burials in Bengal, at Madras, in Bombay, and at St. Helena, are deposited at the East India House; and the registers of the marriages, births, baptisms, and burials of British subjects beyond seas, which have been transmitted from the different British embassies and factories on the continent of Europe and elsewhere, are deposited in the registry of the Bishop of London, with the exception of the registers of marriages at and near Lisbon, which are deposited in the Vicar-General's Office in Doctors' Commons. The registers of the Jews, the East India registers, and the registers of the British embassies and factories, therefore are not at all affected by the stat. 3 & 4 Vict. c. 92.

# INDEX

TO THE

## PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

### A.

#### ABDUCTION.

1. On an indictment for abduction on the stat. 9 Geo. 4, c. 81, s. 19, the jury ought not to convict the prisoner, unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady, such as his stating that he had seen the will of one of her relatives (naming him), and that she would have £220 a-year, are important for the consideration of the jury in coming to a conclusion whether the prisoner was actuated by motives of lucre or not. *Regina v. Barratt*, 887
2. If the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 86, s. 11. *Ibid.*
3. A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken, a letter was found in a writing-desk in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Ibid.*

#### ABORTION.

*See* ACCESSARY BEFORE THE FACT, 1.

#### ABUSING FEMALE CHILDREN.

1. Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Regina v. Martin*, 218
2. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ibid.*
3. An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M. against the private parts of her the said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R.:"—*Held*, that the second count was bad, as it did not allege that E. R. was between the ages of ten and twelve:—*Held*, also, that the words "the said E. R.," merely meant that she was the same person as was mentioned in the first count, but that those words did not import unto the second count the description of E. R. with respect to her age. *Regina v. Martin*, 215
4. Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Ibid.*

#### ACCESSARY AFTER THE FACT.

*See* RECEIVER.

To substantiate the charge of harbouring a felon it must be shown, that the party



charged did some act to assist the felon personally. *Regina v. Chapple*, 355

### ACCESSARY BEFORE THE FACT.

See SUICIDE.

1. A. was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessory before the fact. A. did not appear to take his trial, but B., who was on bail, appeared:—*Held*, that under these circumstances, B. was not compellable to plead to the indictment, and the judge allowed B. to be admitted to bail. *Regina v. Ashmall*, 286
2. An indictment stated that a certain evil-disposed person stole certain goods; that L. C. incited him to do so; that E. C. did the same; that E. M. received a portion of the property knowing it to have been stolen: it also charged A. A. and the before-mentioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all except L. C., who was merely charged as accessory before the fact, and judgment was given upon the charges of receiving only. *Regina v. Casper*, 289
3. Whether a person charged as a principal in the same indictment with a person charged as accessory, is a competent witness against the accessory, without being first either acquitted or confessing and suffering his punishment—*Quære. Regina v. Lyons*, 555
4. Whether a statement that the principal felon stole the property, which statement is in the usual form of an indictment for larceny, except that it gives no addition to the prisoner's name, and does not contain the words *contra pacem*, &c., is in law an indictment against the principal, or merely inducement to the statement of the charge against the accessory—*Quære. Ibid.*
5. But seeme that it is an indictment. *Ibid.*

### ACCOUNT STATED.

See WITNESS, 5.

### ACCUSE, THREATENING TO; AND OBTAINING MONEY THEREBY.

See THREATENING TO ACCUSE.

### ACQUITTAL.

Three persons were indicted for a rape, and were also indicted for the murder of the party alleged to be ravished. Before the trial on the indictment for the rape, the counsel for the prosecution asked to have one of the prisoners acquitted, that he might call him as a witness against the others. This was opposed by the prisoners' counsel:—*Held*, that in cases of this kind the Court will, if it sees no cause to the contrary, intrust it to the discretion of the counsel for the prosecution to determine whether he will have a prisoner

acquitted before the trial commences to enable him to call such prisoner as a witness against the other prisoners. *Regina v. Owen*, 83

### ACTION, NOTICE OF.

See NOTICE OF ACTION.—POUND-KEEPER, 1, 3.

### ADMINISTERING POISON.

See MURDER, 3.

### ADMISSION.

Where, by a judge's order, a copy of a letter sent by R. to M., dated December 10, 1830, was ordered to be admitted, it is not enough to put in the notice to admit and the judge's order, and to put in a copy of a letter from R. to M. of that date; but if a witness also prove that he was at the judge's chambers when the order was made, and that he produced to the clerk of the opposite attorney the copy of the letter proposed to be given in evidence, that is sufficient. *Clay v. Thackrah*, 47

### ADVERSE POSSESSION.

See EJECTMENT, 3, 7.

### AFFIDAVIT.

See CROSS-EXAMINATION, 2.

### AFFIDAVIT, TO HOLD TO BAIL IN REVENUE CASES.

See CROSS-EXAMINATION, 1.

### AGENT'S COMMISSION.

1. A. acted under a written agreement as the commission agent of B. in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—*Held*, that if in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately. *Marshall v. Parsons*, 656
2. *Held*, also, that this was a question for the jury. *Ibid.*

### AGREEMENT.

See LANDLORD AND TENANT, 4.—STAMP, 1.

### AMENDMENT.

1. The plaintiff, a journeyman carpenter, sued his master on the custom of the trade by which the master, when the

- journeyman is sent to work in the country, has to pay the coach fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for misconduct, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. *Read v. Dunsmore*, 588
2. In an action for a libel the declaration stated, that the defendant published a libel, "*contained in, and being an article in, a certain weekly printed publication or paper called The Paul Pry.*" At the trial it was proved that the defendant gave a printed slip of paper, which appeared to have been cut from *The Paul Pry*, to several persons for them to read, and that they read it:—*Held*, that the judge at the trial might properly allow the record to be amended by striking out the above-mentioned allegation that the libel was contained in, and was an article in, *The Paul Pry.* *Poster v. Pointer*, 718
  3. In an action for words the declaration stated, that the defendant said of the plaintiff, "He is a thief, a swindler, and a forger," &c. The defendant pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration. The judge at the trial allowed the declaration to be amended under the stat. 3 & 4 Will. 4, c. 42, s. 23, by inserting the Welsh words, and directed the trial to be postponed till the next day, on the terms of the plaintiff paying the costs of the day, and making a deposit of £15 with the associate for those costs, subject to taxation; and his lordship said, that if on the next day the defendant's counsel would give him reason to believe, that the defendant would justify the Welsh words, his lordship would then put the plaintiff to withdraw the record. *Jenkins v. Phillips*, 766
  4. In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those Welsh words in the declaration. *Ibid.*
  5. In cases of doubt the judge at the trial will allow amendments under the stat. 3 & 4 Will. 4, c. 42, s. 23; because that section provides a remedy if the judge allows an amendment which ought not to be made, but gives no remedy in any case in which the judge has refused to allow an amendment. *Ibid.*
  6. Amendments under the 23d section of the stat. 3 & 4 Will. 4, c. 42, cannot be

made after verdict. *Doe d. Bennett v. Long*, 778

7. On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine witnesses:—*Held*, a fatal variance, and the judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15. *Regina v. Hewins*, 786
8. Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the grand jury. *Ibid.*
9. The judges are unwilling to allow the amendment of variances, which might have been avoided by ordinary care. *Ibid.*

## ANIMALS, CRUELTY TO.

See POUND-KEEPER, 4, 5, 6, 7.

## APPREHENSION.

See NOTICE OF ACTION.—SPECIAL CONSTABLE.

## APPRENTICE.

In an action by the master of an apprentice for an injury done to him per quod servitium amisit, the declaration alleged as special damage, that the apprentice was permanently injured, and could never again be capable of serving the plaintiff as his apprentice during the remainder of the term:—*Held*, that the jury might award damages for the loss of the master up to the end of the term, by reason of the permanent injury of the apprentice, and that they were not limited to give damages for the loss of the master up to the time of the commencement of the action only. *Hodgson v. Stallbrass*, 63

## ARMS, LOADED, ATTEMPTING TO DISCHARGE.

See ATTEMPTING TO DISCHARGE LOADED ARMS.

## ARSON.

1. In a case of arson it was proved that "the floor near the hearth was scorched. It was charred in a trifling way. It had been at a red heat, but not in a blaze:"—*Held*, that this would be a sufficient burning to support an indictment for arson. *Regina v. Parker*, 45
2. A. & B. were charged under the stat. 7 & 8 Geo. 4, c. 30, s. 17, with setting fire to a wood. It appeared that they set fire to a summer-house, which was in the wood, and that from the summer-house the fire was communicated to the wood:

—*Held*, that A. & B. might be properly convicted on this indictment. *Regina v. Price*, 729

### ASSAULT.

See ABUSING FEMALE CHILDREN.—ASSAULTING A GAMEKEEPER.—FIGHTING.—RAPE, 8, 9.

1. Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Regina v. Martin*, 213
2. The person making such an attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ibid.*
3. An indictment in the first count charged the defendant with having assaulted "E. R., an infant above the age of ten years and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the defendant "unlawfully did put and place the private parts of him the said T. M. against the private parts of her the said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R." *Regina v. Martin*, 215
4. *Held*, that the second count was bad, as it did not allege that E. R. was between the ages of ten and twelve:—*Held*, also, that the words "the said E. R.," merely meant that she was the same person as was mentioned in the first count, but that those words did not import unto the second count the description of E. R. with respect to her age. *Ibid.*
5. Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Ibid.*
6. If a prisoner be indicted for any felony which includes an assault, he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad. *Regina v. Nicholls*, 267
7. If on a trial of an indictment for a rape, it appear that the prisoner was under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina v. Brimilow*, 366
8. On an indictment for abduction on the stat. 9 Geo. 4, c. 31, s. 19, if the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina v. Barrett*, 387
9. A. was indicted for assaulting a policeman in the execution of his duty. It appeared that the policeman had gone into a public-house where the defendant was having high words with the landlady. The defendant tried to go into a room in the house in which a guest was, and the policeman, without being desired to do so, collared him, and prevented his going into the room, and A. struck the policeman, and several blows passed on both sides:—*Held*, that if the jury were satisfied that no breach of the peace was likely to be committed by the defendant on the guest in the room, it was no part of the policeman's duty to prevent the defendant from entering it; but, assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, the defendant would be liable to be convicted of a common assault. *Reg. v. Mabel*, 474
10. On an indictment for a felony, the jury ought not to convict the prisoner of a completely independent and distinct assault. *Reg. v. Guttridge*, 471
11. If a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life, if the pistol had gone off, *semble*, that this is an assault, even though the pistol is, in fact, not loaded. *Reg. v. St. George*, 483
12. On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself. *Ibid.*
13. A. presented a loaded pistol at B., but was prevented from pulling the trigger:—*Held*, that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B. *Ibid.*
14. In an action for an assault, the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." To this the defendant pleaded not guilty, and it was proved that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head saying, that if the plaintiff was not quiet, he would blow his brains out:—*Held*, that if the defendant, at the time he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would be no assault:—*Held*, also, that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball,

and shot, and that unless the jury were satisfied that the pistol was loaded, they ought to find for the defendant. *Blake v. Barnard*, 626

15. On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault. The attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl:—*Held*, that although consent on the part of the girl would put an end to the charge of assault, yet that there was a great difference between consent and submission, and that although in the case of an adult submitting quietly to an outrage of this kind would go far to show consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear under the circumstances in which she was placed. *Regina v. Day*, 722

#### ASSAULTING A GAMEKEEPER.

An indictment for assaulting a gamekeeper with a weapon (under the stat. 9 Geo. 4, c. 64, s. 2), stated that the defendants were in certain land of J. R., Earl of B., by night, armed with guns, for the purpose of destroying game, and that they were "then and there in the said land by night as aforesaid by one W. R., the servant of the said J. R., Earl of B., then and there having lawful authority to seize and apprehend the said [defendants] found," and that the defendants with the guns assaulted and offered violence to W. R.:—*Held*, that the indictment was bad, as it did not sufficiently show that the defendants, when found by W. R., were committing any offence against the stat. 9 Geo. 4, c. 64. *Reg. v. Curnock*, 730

#### ASSAULTING A POLICEMAN.

See ASSAULT, 7.

#### ASSIGNMENT.

See BILL OF SALE, 1, 2.—SHERIFF, 1, 2, 3.

#### ASSUMPSIT.

See PLEADING, 4, 5.

#### ATTEMPTING TO DISCHARGE LOADED ARMS.

See ASSAULT, 11, 12, 13, 14.

1. If a person intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms "by drawing a trigger, or in any other manner," within the stat. 1 Vict. c. 85, ss. 3 & 4, as the words "in any other manner" in that statute, mean something analogous to drawing the trig-

ger, which is the proximate cause of the loaded arm going off. *Regina v. St. George*, 483

2. The applying a lighted match to a loaded match-lock gun, or the striking the percussion cap of a percussion gun, would be sufficient attempts within these enactments. *Ibid*.
3. An indictment on the 7 Will. 4 & 1 Vict. c. 85, ss. 3 & 4, charged the prisoner with attempting to discharge at the prosecutor a certain blunderbuss, loaded with gunpowder and divers leaden shots. It appeared that the prisoner, on a refusal by the prosecutor to give him up some title-deeds, addressed him in these words: "Then you are a dead man," and immediately unfolded a great coat which he had on his arm, and took out a blunderbuss, but was not able to raise it to his shoulder, or point it directly at the prosecutor, before he was seized. The blunderbuss was found to be very heavily loaded, but the flint had dropped out, and was discovered between the lining of the great coat.—*Held*, that the evidence was not sufficient to sustain the charge in the indictment. *Regina v. Lewis*, 523

#### ATTESTATION.

1. The attestation of a deed was in the following form:—"Sealed and delivered by the within-mentioned C. A., in the presence of R. P. C." It was proved by the attesting witness that the signature R. P. C. was of his handwriting, and that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed:—*Held*, sufficient, and that the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference. *Doe d. Counsell v. Caperton*, 112
2. It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity. A will was attested by the signature T. B. V. and the marks of C. and M. D. All these were dead; the signature of Mr. V. was proved, and the daughter of C. and M. D. proved that they were both dead, and that when alive they lived near the testator, no other persons of those names living anywhere in that neighbourhood; and this witness also stated that M. D. could not write, and C. D. could write his name only:—*Held*, sufficient. *Ibid*.
3. Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say on this evidence, whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it. *Burling v. Paterson*, 570

## ATTESTING WITNESS.

See WITNESS, 2, 3.

## ATTORNEY.

See COMPANY, 4.—EVIDENCE, 2, 15.—TREASON, 6, 13.

A. accepted a bill for £15, drawn on him by B., which B. endorsed to C., and which was dishonoured. B. owed A. a balance of £102, and several months after, on B. & C. balancing their account, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B. After this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—*Held*, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W. in an action for money had and received; and that their having acted *bonâ fide* on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action. *Carman v. Edwards*, 596

## ATTORNEY, POWER OF.

See EVIDENCE, 2.

## AUCTIONEER'S COMMISSION.

The plaintiff was employed to sell ground rents by auction, on the terms of receiving a commission of one per cent. "on sale." After he had advertised the sale, but before the day of sale, the defendant sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. The question left to the jury was, whether this custom was so notorious, that the defendant must have known it; and that if so, it was engrafted on the contract. The jury found for the plaintiff for the full commission. *Rainy v. Vernon*, 559

## AUTREFOIS ACQUIT.

See BURGLARY WITH VIOLENCE.

## BAIL.

See ACCESSARY BEFORE THE FACT, 1.—POSTPONING TRIAL.—TRAVERSE.

## BAILEE.

See BURGLARY, 1.

## BAILMENT.

See GOODS LENT.

1. If A. place a dog with B., and the dog be received by B., to be kept by him for reward, to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the onus lies on B. to acquit himself by showing that he was not in fault with respect to the loss. *Mackenzie v. Coz*, 632
2. Form of plea that the defendant did not receive the goods to be kept for reward. *Ibid*.

## BANKERS' CHECK.

See BILL OF EXCHANGE, 3, 4.—PLEADINGS (FORMS OF), 3, 4, 5, 6.

## BANKRUPT.

1. The protection given by the stat. 2 & 3 Vict. c. 29, s. 1, to contracts with bankrupts, and executions against their property *bonâ fide* executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. *Byers, Assignee of Clark, v. Southwell*, 320
2. *Semble*, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt. *Id*.

## BEGIN, RIGHT TO.

1. In an action on a bill of exchange by endorsee against acceptor, the defendant pleaded pleas denying the acceptance and the endorsement, and also two pleas of payment, upon all which issue was joined. The defendant's counsel, at the trial, offered to admit the acceptance and endorsement, and wished to begin:—*Held*, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin. *Pontifex v. Jolly*, 202
2. In assumption for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a special plea justifying the dismissal, upon which issue was taken:—*Held*, that on this issue the defendant was entitled to begin. *Harnett v. Johnson*, 206
3. In an action of trespass for taking the plaintiff's goods, the defendant pleaded—1st, as to part of the goods, that he took them as a distress for an annuity, payable to M. A.; and, secondly, as to the residue, he justified the taking as a distress for rent due to J. A. Replication to the 1st plea, that the annuity was not in arrear; and to the 2d, non tenuit:—*Held*, that, on

these pleadings, the defendant was entitled to begin. *Aston v. Perkes*, 281

4. In an action to recover damages for the non-performance of several contracts, by which the defendants undertook to deliver divers quantities of spelter within certain specified times. The defendant pleaded, 1st, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and, 2d, that he would have delivered the spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff:—*Held*, that the defendant had the right to begin. *Steinkeller v. Newton*, 818
5. As to the right to begin in those cases which are not within the rule of the judges as to personal injuries, libel, and slander, but where the affirmative of the issue is on the defendant:—*Held*, that it must be left to the judge to decide in each particular case, whether the substantial question is the assessment of damages, and if it is, the plaintiff will be entitled to begin. *Hoggett v. Esley*, 324
6. In assumpsit on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound; and the defendant only pleaded that it was; upon which plea issue was joined:—it was *Held*, that the plaintiff had the right to begin. *Osborn v. Thompson*, 387
7. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and, 2d, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin. *Bingham v. Stanley*, 374
8. If in assumpsit the defendant plead his discharge under the Insolvent Debtors' Act, and no other plea, and the plaintiff by his replication deny the plea, the defendant must begin. *Lambert v. Hale*, 506
9. In assumpsit by the holder against the acceptor of a bill of exchange, the declaration stated that *the drawer endorsed to the plaintiff*. The defendant pleaded that the bill was drawn and accepted for his accommodation, and handed to the drawer that he might get it discounted; that the drawer endorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which facts the plaintiff had notice:—*Held*, that on this state of

the pleadings the defendant must begin.

*Lees v. Hoffstadt*, 599

10. In assumpsit by the marshal of the Queen's Bench prison, the declaration stated that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W. That the plaintiff did allow J. W. to reside in the rules, and that he escaped, and the plaintiff was obliged to pay the amount for which J. W. was imprisoned and other expenses. Plea, that A., the execution-creditor and others, conspired to cause another creditor of J. W. to sue out a bailable writ against J. W., and to cause him (if he should go beyond the rules) to be arrested and detained out of the rules till A. could commence an action against the marshal for the escape of J. W., and that in pursuance of that conspiracy a bailable writ was sued out by L., a creditor of J. W., and a warrant granted thereon, upon which J. W. was arrested and detained out of the rules till the marshal was sued for the escape; and that J. W. could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action. Replication, admitting the writ and warrant, with de injuriâ as to the residue:—*Held*, that on these pleadings the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea. *Chapman v. Emden*, 712
11. The rule of the judges as to the right to begin does not extend to actions of covenant; and semble, that it does not extend to any cases of contract. *Ibid.*
12. *Semble*, that the court above would grant a new trial, if the judge allowed a party to begin who had not a right to do so. *Ibid.*
13. In an action of covenant the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair. Breaches—that the defendant did not occupy in a proper manner, and did not keep the premises in repair. Plea—that the defendant did occupy in a proper manner, and did keep the premises in repair:—*Held*, that on these issues the plaintiff had the right to begin. *Doe d. Trustees of Worcester School v. Rowlands*, 784

## BIGAMY.

1. In Ireland the marriage of two Roman Catholics by a Roman Catholic priest is good; and if a person at the time of such marriage declares himself to be a Roman

- Catholic, and the woman be a Roman Catholic, this is a good marriage as against him; and if he be afterwards tried for bigamy on this marriage (he having been before married to another wife who was still alive), he will not be allowed to set up his supposed Protestantism as a defence to the charge. *Regina v. Orgill*, 80
2. To prove such a marriage, evidence was given that the Rev. W. O'S. (who officiated) acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin, and that having asked the man if he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married:—*Held*, sufficient. *Ibid.*
  3. *Seemle*, that the true construction of the 22d section of the 9 Geo. 4, c. 31, in relation to the offence of bigamy, is this: not that the party, charged to be deprived of the benefit of its provision as a defence, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant during the whole of those seven years that she was alive. *Regina v. Cullen*, 681
- BILL OF EXCHANGE AND PROMISSORY NOTE.**
- See BEGIN, RIGHT TO, 7, 9—EVIDENCE, 6, 7.*
1. In an action on a promissory note the defendant pleaded, that the note was given under a parol agreement that the defendant should renew it when due, by paying discount and giving another note, and that he offered to do so; the plaintiff took issue on this plea:—the Judge at the trial, as the plaintiff had taken issue on the plea, would not prevent the defendant from going into evidence in support of this plea, although it was suggested that the plea was bad, as setting up a parol agreement to vary a written instrument. *Holt v. Miers*, 191
  2. Where a defendant pleaded that a promissory note, on which the plaintiff sued as payee, was given to the plaintiff as trustee for W., and that W. had made a bargain for its renewal on certain terms stated in the plea, and the plaintiff took issue on this plea:—*Held*, that evidence of the actual bargain made by an agent of the defendant with W. might be given in evidence, but that evidence of anything that W. said at any other time was not receivable. *Ibid.*
  3. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2d, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check:—*Held*, that on these pleadings the defendant must begin. *Bingham v. Stanley*, 374
  4. For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession. *Ibid.*
  5. A party being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated that he put a letter containing the notice of dishonour into the post at one o'clock p. m. on the 28th. The post mark on the letter was the 29th:—*Held*, that if the jury were satisfied that the letter was put into the post sufficiently early for the party in the ordinary course of the post to have received it on the 28th, it was sufficient, and that its having been delayed in the post-office would make no difference. *Stocken v. Collins*, 633
  6. A notice of dishonour, which states that a bill of exchange "has been dishonoured," is sufficient, although it does not state that the bill has been presented. *Ibid.*
  7. A. having been in partnership with B., on the dissolution undertook to collect and pay the partnership debts: A. & B. during the partnership had kept a joint account with a certain Branch Bank; but after the dissolution there was only a single account of A. kept there. A. having greatly overdrawn that account, obtained a promissory note for £500 from B. his former partner, which he endorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch, the clerk who managed the branch promising that it should not be presented. He however kept it, and it was found among the securities of the branch, in his portfolio, when he was discharged from his situation:—*Held*, that the directors of the bank might recover the amount from B. *Bosanquet v. Forster*, 659
  8. A customer of a branch belonging to the London and Westminster Bank, having overdrawn his account, previous to a quarterly inspection of the affairs of the

branch, handed over to the clerk who superintended the business of the branch, and who was his friend, a check for £500, which was entered to the credit of the customer; the clerk promising that it should not be presented, but should be returned after the inspection was over. This check the customer had obtained from an acquaintance, giving him his own check for the same amount in exchange. It was not returned by the clerk to the customer according to his promise, but was found by the directors of the bank among the papers of the branch in the clerk's portfolio, after he had been discharged from his situation:—*Held*, that the directors might recover the amount of the check from the defendant. *Bosquet v. Corser*, 664

9 To assumpsit on a bill of exchange for £150 by the executors of the endorsee against the acceptors, the defendants pleaded, that, on the day when the bill became due, they duly paid and honoured it when presented, according to the tenor and effect of it and of their promise, and then paid the said sum, to wit, £150, the amount made payable by the said bill. It appeared, that, before the bill became due, the endorsee, not having any banker of his own, handed the bill to a friend, in order that he might present it at the bank of Messrs. W. and Co., where it was made payable. This friend endorsed the bill, and got it discounted at the Bank of England; but afterwards receiving an intimation from the party from whom he received it, that it was not to be noted, sent the amount of the bill to the banking-house at which it was payable, on the understanding that he was to have the bill delivered up to him. The acceptors kept cash at that banking-house, and when the bill had been paid, the transaction was entered in their account as if the money to meet the bill had been paid by them; but the bill was delivered up to the party who, in fact, paid in that money. The jury having on this issue found a verdict for the defendants, the Court of Common Pleas set it aside, on the ground that this payment could not, under the circumstances, be considered as a payment by or on the behalf of the acceptors, but must be taken to have been a payment for the honour of the endorser. *Deacon v. Stodhart*, 685

10. The defendants also pleaded that the acceptance was an accommodation acceptance for the drawer, with the knowledge of the endorsee; and that the drawer became insolvent, and the endorsee, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several back debts and liabilities. The plea averred that the defendants and the two other creditors did discharge and release their several debts, &c.; and then went on to state that the endorsee,

in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was then an averment that the other creditors had released their debts. The replication to this plea stated that the endorsee did not agree in manner and form as in the plea mentioned. The evidence was, that the endorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said, on one occasion, that he knew the bill was an accommodation bill, and he should not call on the defendants to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement, signed by the creditors, contained these words: "We, the undersigned, do hereby agree to accept of a release from the said E. A. [the drawer] of the equity of redemption, &c.; and we agree, upon the execution of such deed, to execute releases," &c. The endorsee died, and the action on the bill was brought by his executors:—*Held*, that the allegations in the plea were not sustained by the evidence. *Ibid*.

## BILL OF SALE.

See *SHERIFF*, 8.

1. Goods were taken under a f. fa. as the goods of Sophia W., and on an issue to try whether the goods were the property of the plaintiff, it was proved that the goods, prior to 1836, belonged to Martin W., when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W. with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid £128 to the official assignee for Martin W.'s interest in the goods. Early in 1839, Martin W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a f. fa. against Sophia W. The goods always had remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never was in possession of them:—*Held*, that the plaintiff had made out his property in the goods, and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent. *Burling v. Paterson*, 570
2. *Held*, also, that the fact, that the assignment was kept at Martin W.'s house, was immaterial, and that it was also immate-



rial that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them would pass by the execution of the deed. *Burling v. Paterson*, 570

8. If a person, expecting a fieri facias will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the fieri facias, and an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was bona fide meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor, and this is a question of fact, and not a question of law. *Riches v. Evans, Esq.* 640

4. The fact that a deed of this kind was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud. *Ibid.*

## BIRMINGHAM.

See PARISH.

## BOARD AND LODGING.

See CONTRACT, 1.—CHILDREN, 1, 2.

## BRIDGE.

See COMPANY, 7.

## BROKER'S COMMISSION.

See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.

1. *Semble*, that the broker's commission on the freight of a ship is five per cent., unless there be a special agreement or the ship be chartered upon a tender. *Browne v. Nairn*, 204
2. The usage is, that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. *Burnett v. Bouch*, 620
3. If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for

that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other. *Ibid.*

4. A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party: they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff for procuring a charter for a vessel called the W.," &c.:—*Held*, sufficient. *Ibid.*

## BURGLARY.

See HOUSE AND GOODS OF A CONVICTED FELON.—VENUE, 1.

1. A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but he should tell K. of it, and that he sometimes bought goods for the shop, and sometimes K. did it:—*Held*, that M. was a bailee, and that the goods in the shop might properly be laid as his property. *Regina v. Bird*, 44
2. It being proved as to the breaking that the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till the prisoner pushed it in and stole the goods:—*Held*, a sufficient breaking. *Ibid.*

## BURGLARY, WITH VIOLENCE.

If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence. *Regina v. Gould*, 364

## BURNING.

See ARSON.

## BUTTY COLLIERS.

See COLLIERS.

## CALLS.

See RAILWAY, 1.

## CARPENTER.

1. The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the

journeyman is sent to work in the country, has to pay the coach fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. *Read v. Dunsmore*, 588

2. If a master carpenter sends his men from London to work at a gentleman's house, in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman, the master dismissed the journeyman, the judge left it to the jury to say whether the master was not justified in such dismissal. *Ibid.*
3. Forms of declaration and plea. *Ibid.*

#### CARRIER.

1. In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. *Muddle v. Stride*, 380
2. Whether, in such a case, on the arrival, and detention by foul weather, of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quære?* *Ibid.*

#### CATTLE.

See POUND-KEEPER, 4, 5, 6, 7.

#### CENTRAL CRIMINAL COURT.

See VENUE, 1.

#### CERTIFICATE FOR COSTS.

See COSTS—EJECTMENT, 6—LIBEL.

#### CHALLENGE.

1. The provisions of the stat. 6 Geo. 4, c. 50, s. 29, with respect to challenging jurors by the crown, is a mere re-enactment of the law on this subject, as it was before the passing of that statute. *Regina v. Frost*, 136
2. The challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath is begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *Id.* 137
3. On the trial of an action to recover a £500 penalty for bribery, alleged to have been committed at the election of members of Parliament for the borough of L., which was to be tried by a special jury the attorney on each side had given to the associate a list of names of certain common jurors whom he did not wish to be called. With the omission of those jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a tales had been prayed:—*Held*, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed except for cause. *Marsh v. Coppock*, 480
4. *Held*, also, that it was no cause of challenge that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury, who had tried another action between other parties for bribery, alleged to have been committed at the same election. *Ibid.*
5. If on the trial of a case of felony the prisoner peremptorily challenge some of the jurors, and the counsel for the prosecution also challenge so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and as each juror then appears, for the counsel for the prosecution to state their cause of challenge, and if they had no cause and the prisoner does not challenge, for such a juror to be sworn. *Regina v. Geach*, 490
6. It is no cause of challenge of a juror by the counsel for the prosecution in a case of felony, that the juror is a client of the prisoner who is an attorney. *Ibid.*
7. Nor that the juror has visited the prisoner as a friend since he has been in prison. *Ibid.*
8. In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification. *Ibid.*

# CHANCERY (ORDER OF THE COURT OF).

See EVIDENCE, 8.

## CHECK.

See BILL OF EXCHANGE, 3, 4, 8—PLEADINGS (FORMS OF), 3, 4, 5, 6.

## CHELSEA PENSION.

1. The provisions of the stat. 7 Geo. 4, c. 16, s. 38, extend to the forging and uttering a receipt or other document, relating to a Chelsea pension, *supposed to be payable*; and are not confined to cases of forging and uttering receipts, and other documents, relating to pensions in actual existence. *Regina v. Pringle*, 408
2. An indictment on that statute charged the prisoner with having forged and uttered "a certain receipt, relating to and concerning the payment of a certain pension, to wit, 4*l.* 1*1s.* 0*d.*, *supposed to be payable* to one N. M., as an out-pensioner of the Royal Hospital for soldiers at Chelsea, in the county of Middlesex:—*Held*, good. *Ibid.*

## CHILDREN.

1. No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. *Seaborne v. Maddy*, 497
2. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. *Ibid.*

## COIN.

1. An indictment for uttering counterfeit coin, knowing it to be counterfeit (after a previous conviction) charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit:—"*Held*, that the allegation of the scierter was sufficient, and that the word "knowing," must be taken to apply to the prisoner, and not to E. H., who was the last antecedent, and that the scierter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Regina v. Page*, 756
2. An indictment stated, that at the assizes holden at H., on the 3d of August, 4 Will. 4, "C. P. (the present prisoner), *together with* one T. P., by the name and description of C. P., late of B., in the county of H., labourer, and T. P., late of the same, labourer, was in due form of law tried and convicted," by a certain jury duly taken, "between our said late lord the king and the said C. P. and T. P.," upon an indictment against them for uttering counterfeit coin, they having other counterfeit coin in their possession, "and

thereupon it was considered by the court there that the said C. P. should be imprisoned for two years." The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.:—*Held*, that this was no variance, and that this allegation in the indictment did not import that T. P. was convicted. *Ibid.*

3. Form of indictment for uttering counterfeit coin after a previous conviction. *Ibid.*
4. An indictment for knowingly uttering counterfeit coin, twice on the same day, charged an uttering of a counterfeit half-crown, and that the defendants on the same day "one other piece of false and counterfeit [omitting the word 'coin'] resembling, and apparently intended to resemble and pass for a piece of the queen's current silver coin, called a half-crown, unlawfully," &c., "did utter and put off to one S. A., the wife of W. G., knowing the same to be false and counterfeit:—"*Held*, that the omission of the word "coin," did not render the indictment bad, as the words "false and counterfeit" might be rejected as surplusage, and the indictment would then be, "one other piece resembling, and apparently intended to resemble and pass for a piece of the queen's current silver coin, called a half-crown:—"*Held*, also, that the allegation of the scierter was sufficient, and that the word "knowing" must be taken to apply to the prisoner and not to "S. A., the wife of W. G.," who was the last antecedent, and that the scierter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." *Regina v. Jones*, 761
5. On an indictment for a joint uttering of counterfeit coin, where both defendants are not present at the time of the uttering, the true question seems to be, whether the one was so near the other as to help the other to get rid of the counterfeit coin. *Ibid.*

## COLLIERS.

The custom is that when butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate roading, air heading, or coals underground; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier. *Bannister v. Bannister*, 743

## COMMISSION.

See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.—BROKER'S COMMISSION.

## COMPANY.

1. By the Cheltenham and Great Western Union Railway Act, 6 Will. 4, c. lxxvii, it

is enacted, that in an action for calls on shares in that company, the book of shares, under the seal of the company, shall be *prima facie* evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836:—*Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. *The Cheltenham Union Railway Co. v. Price*, 55

2. Form of declaration, *Ibid.*
3. Form of plea that the defendant was not a proprietor, *Ibid.*

4. In an action by the solicitor of an intended company for preparing their co-partnership deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitor in preparing the deed. *Bell v. Francis*, 66

5. Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons who are liable to pay the salaries of their secretary, &c., unless it be shown that the secretary, &c., agreed to look to some other fund for payment. *Kerridge v. Hesse*, 200

6. And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became so while the plaintiff continued secretary, it will be for the jury to say whether the defendant did not continue to employ the plaintiff on the same terms on which he was originally engaged. *Ibid.*

7. A corporation aggregate, or a railway company, are liable to be indicted for breaches of duty, such as the non-repair of bridges, which it is their duty to repair. If they are indicted in Q. B., they can appear by attorney, but if they are indicted at the assizes, *semble*, that they cannot appear there by attorney, but should apply for a writ of certiorari, and appear by attorney in Q. B.; and if they do not, there may be a distress ad infinitum against them. *Regina v. The Birmingham and Gloucester Railway Co.* 469

#### COMPOUNDING FELONY.

See *FORGOING A PROSECUTION*.

#### CONCEALMENT OF BIRTH.

On an indictment for child murder, no one

but the mother can be convicted of the concealment of the birth of the child. *Regina v. Wright*, 754

#### CONFESSION.

See *DEPOSITION*, 3.

1. On the trial of the indictment for the rape, it was proposed to put in the depositions of each of the prisoners taken on oath at the inquest held on the party alleged to have been ravished. It appeared that each of the prisoners was in custody at the inquest; that no inducement to confess was held out, and that each was asked if he wished to make a statement, and said that he did. The judge received the statements in evidence, but said he would reserve the point if it should become necessary. *Regina v. Owen*, 88
2. Where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved. *Regina v. Gould*, 864

#### CONSPIRACY.

See *TREASON*, 15.—*UNLAWFUL ASSEMBLY*.

1. On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble, for the purpose of exciting terror in the minds of her majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was a superintendent of police, whether persons complained to him of being alarmed by these meetings:—*Held*, that the evidence was receivable, and that it was not necessary to call the persons who made the complaints. *Regina v. Vincent*, 275
2. A. was charged with having conspired with W. J. and others unknown, to raise insurrection and obstruct the laws. It was proved that A. and W. J. were members of a Chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone:—*Held*, that on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the race-course to the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction. *Regina v. Shellard*, 277

#### CONSTABLE.

See *SPECIAL CONSTABLE*.

## CONTRACT.

*See CHILDREN.*

1. A. and his wife boarded and lodged in the house of B. the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board and lodging:—*Held*, that neither the services on the one hand, nor the board and lodging on the other, could be charged for unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid; but, that if that were not so, no *ex post facto* charge could be made on either side. *Davies v. Davies*, 87
2. A. sued B., C., and D. in a *joint* action for an attorney's bill. B. plead *nunquam indebitatus*, and C. and D. suffered judgment by default:—*Held*, that in order to entitle A. to a verdict against B. the jury must be satisfied that there was a *joint* contract with A. by B., C., and D. *jointly*, and that it was not sufficient to show that there was a *separate* contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone. *Robeson v. Ganderton*, 476

## CONVICTION.

*See PREVIOUS CONVICTION.*

1. Magistrates having convicted a party under the Highway Act, they drew up a conviction and returned it to the clerk of the peace, and on an action being brought against them, they put in the conviction returned to the clerk of the peace (which was open to some formal objections), and also another conviction drawn up afterwards in a more formal shape:—*Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case. *Selwood v. Mount, Esq.* 75
2. *Semble*, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity, than of one who cannot do so. *Ibid.*

## COPARTNERS.

*See COMPANY.*

## CORONER.

*See MANSLAUGHTER, 4, 5.*

## CORONER'S INQUISITION.

*See MANSLAUGHTER, 6.*

## CORPORATION.

*See COMPANY.*

1. *Primâ facie*, it must be presumed that the books of a corporation, which existed

before the Municipal Reform Act, are in the possession of the new corporation which succeeded them under that act; but if it be shown that the old corporation, before their dissolution, deposited them with a banker, and that from his hands they passed into the Master's office of the Court of Chancery, this rebuts the presumption. *Corporation of Ludlow v. Charlton, Esq.* 242

2. In an action brought by the new corporation, it appeared that the defendant had presented a petition to the vice-chancellor to allow the production of these books on the present trial, which petition was opposed by the present plaintiffs, and dismissed with costs:—*Held*, that under these circumstances the defendant was entitled to give parol evidence of the contents of the books. *Ibid.*
3. A corporation came to a vote that if C. would alter the site of a house, the corporation would pay him £500.—This resolution was entered in the corporation book, and C. altered the site of the house:—*Held*, that the resolution was not valid, as it was not under the corporate seal. *Ibid.*
4. An old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity had paid rent to the secretary to the old corporation up to Lady-day, 1886:—*Held*, that this was a good payment, and might be taken advantage of in an action brought by the new corporation for the rent. *Ibid.*

## COSTS.

*See HIGHWAY, 1, 2, 3.*—DISOBEDIENCE OF ORDER FOR COSTS.—EJECTMENT, 6.—LIBEL, 10.

Certificate as to cost of several pleas under the stat. 4 Anne, c. 16, s. 5. *Read v. Thoyts*, 615

## COUNSEL.

*See TREASON, 4, 8.*

1. Where a special plea has been demurred to, the defendant's counsel has no right at the trial to allude to the statements in it in his address to the jury. *Ingram v. Lawson*, 826
2. The counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown, and to state, that if such attack should be made, he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned Judge, made in a case tried some years before, on the nature and effect of circumstantial evidence—if he adopts them as his own opinions and makes them part of his own address to the jury. *Regina v. Courvoisier*, 862

3. If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury. *Regina v. Courvoisier*, 362
4. Where a Queen's counsel was instructed to argue a criminal case for a defendant, on a point reserved for the consideration of the fifteen Judges, but at the time fixed for the argument had not obtained a license from her Majesty to argue against the Crown, but only a certificate from the Secretary of State's office, the Court directed the argument to stand over for such license to be obtained. *Regina v. Jones*, 401
5. Where no counsel is engaged for the prosecution, and the depositions are handed, by direction of the Court, to a gentleman at the bar, he should consider himself as counsel for the Crown, and act in all respects as he would if he had been instructed by the prosecutor; and should not consider himself merely as acting in assistance of the Judge, by examining the witnesses. *Regina v. Littleton*, 671
6. The fifteen Judges, on a case reserved, will not hear counsel for the prosecution if no counsel appears for the prisoner. *Regina v. Davies*, 428

# COURT ROLL.

See EVIDENCE, 2, 3.

# COVENANT.

See LANDLORD AND TENANT, 6, 7, 8, 9, 10.

# COVENANT TO INSURE.

See LANDLORD AND TENANT, 9, 10.

# COVENANT TO REPAIR.

See LANDLORD AND TENANT, 6, 8.

# CROSS-EXAMINATION.

1. On the trial of an information by the Attorney-General for penalties, the defendant (who had been held to bail) had subpoenaed the officer from the Queen's Remembrancer's Office to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him the defendant's counsel wished to put in the affidavit:—*Held*, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way; but that if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by

- the witness, and as related to the defendant himself. *The Attorney-General v. Bond*, 189
2. On an application for a new trial, one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office copy of her affidavit, which was ordered by a Judge's order (in the usual form) to be admitted as a true copy:—*Held*, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon. *Davies v. Davies*, 252
3. If it be shown that depositions were regularly returned by the magistrate to the proper officer, and it be proved by the latter that they cannot be found, after diligent search, the prisoner's counsel may cross-examine from copies of them, those copies being proved to be correct by the magistrate's clerk. *Regina v. Shellard*, 277
4. A prisoner's counsel has no right to ask a witness for the prosecution, whether he has *always* told the same story, the question ought to be:—"Have you always said so except before the magistrates?" *Ibid.*
5. On the trial of A., for attempting to discharge loaded arms at B., B., with a view to discredit his evidence, was cross-examined as to whether he had not used violent language towards his father, which he admitted: *Held*, that on re-examination, B. might be asked as to how his father had acted towards him before he used the language that had been cross-examined to. *Regina v. St. George*, 483
6. It was proposed to ask a witness as to what another witness had said on other occasions than that which was the subject of the trial:—*Held*, that that could not be done, as what a witness has said at other times, is only matter for the cross-examination of the witness himself. *Ibid.*
7. In a case of rape it appeared that the prisoner had been taken before the mayor of N., charged with this offence, and that the prosecutrix was then sworn and her statement taken down by the mayor, who then asked her some further questions, the answers to which were not taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates:—*Held*, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor of N. without the production of that which was taken down in that examination. *Regina v. Griffiths*, 746
8. A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark which she denied

to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and, after reading the deposition (which preceded his own which he had signed), he stated that he believed that that was the deposition which was read over to the witness:—*Held*, that this deposition might be read to the witness by the officer of the Court for the Judge to examine her upon it. *Regina v. Hallett*, 748

#### CRUELTY TO ANIMALS.

See POUND-KEEPER, 4, 5, 6, 7.

#### CUSTOM OF TRADE.

See AGENT'S COMMISSION—AUCTIONEER'S COMMISSION—BROKER'S COMMISSION—CARPENTER—COLLIERS.

#### CUTTING.

See WOUNDING.

#### DAMAGES.

See APPRENTICE—LANDLORD AND TENANT, 6—NEGLIGENCE, 8.

#### DAMAGES, MITIGATION OF.

See PLEADING, 6.

#### DECLARATION IN ARTICULO MORTIS.

See DYING DECLARATION.

#### DEED.

See ATTESTATION.—FORGERY, 7.

#### DEMOLISHING HOUSES.

1. A. and others were indicted for feloniously demolishing the house of B. It was proved that A. and a mob of persons assembled at H.; A. there addressed the mob in violent language, and led them in a direction towards a police-office about a mile from H., some of the mob from time to time leaving and others joining. At the police-office the mob broke the windows, and then went and attacked the house of B., and set it on fire—A. not being present at the attack on the house or at the fire:—*Held*, that on this state of facts A. ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at H. was, nor whether any of the mob, who were at H., were the persons who demolished B.'s house. *Regina v. Howell*, 437
2. If rioters attack a house, and have begun to demolish it, but leave off of their own accord after having gone a certain length, and before the act of demolition is completed, this is evidence from which a jury might infer that they did not intend to

demolish the house; but if the mob were prevented from going on by the interference of the police or any other force, that would be evidence to show that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the stat. 7 & 8 Geo. 4, c. 80, s. 8. *Regina v. Howell*, 437

2. Destroying movable shop-shutters is not a beginning to demolish within that statute, as they are not part of the freehold. *Ibid.*
4. If rioters destroy a house by fire, that is as much a demolition within the stat. 7 & 8 Geo. 4, c. 80, s. 8, as if any other mode of destruction were used. *Ibid.*
5. If a part of the object of rioters be to demolish a house, it makes no difference that they also acted with another object, such as to injure a person who had taken refuge there. *Ibid.*

#### DEMURRAGE.

If there be no contract as to demurrage a ship-owner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially. *Horn v. Bensusan*, 709

#### DEPOSITION.

See CONFESSION, 1.—CROSS-EXAMINATION, 3, 7, 8.—TREASON, 5.

1. In a case affecting the life of a party, it is very desirable that the magistrate who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read to prove the correctness of what he took down; but it is not absolutely necessary, in point of law, that he should be called, and the depositions, if admissible in other respects, may be read on proof of his handwriting. *Regina v. Pikesley*, 124
2. Where a magistrate returns with the depositions that a prisoner was sworn and made a statement, the statement cannot be received in evidence against him, although a witness state that he was not in fact sworn. *Ibid.*
3. On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence. *Regina v. Owen*, 238
4. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by a collision between a brig and a barge, is receivable in evidence in an action for the negligent management of the brig, if the witness be shown to be beyond sea. *Sills v. Brown*, 601

#### DEPOSITION ON INTERROGATORIES.

See PERJURY, 2, 5.

1. It is no objection at *Nisi Prius* to the re-

ception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller v. Newton*, 813

2. To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written contemporaneously with the transaction it refers to; and where a witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English courts, of compelling the production of the letter.

*Ibid.*

## DESTROYING MINING ENGINES.

See MINING ENGINES.

## DESTROYING A WILL.

See WILL, SECRETING.

## DISCLAIMER.

See LANDLORD AND TENANT, 11, 12.

## DISOBEDIENCE OF AN ORDER FOR COSTS.

The quarter sessions of a county made regulations as to the expenses to be allowed in cases of felony, and by one of them directed that the taxed bill of costs should be annexed to the order for their payment. These regulations were confirmed by a judge under the stat. 7 Geo. 4, c. 64, s. 26. In a case of felony the clerk of assize made out the items of the costs allowed, and on the other half of the same sheet of paper wrote the order for payment of their amount. The attorney for the prosecution tore off the first half of the paper, which contained the items, and presented the other half to the county treasurer for payment. The treasurer refused to pay:—*Held*, that, on account of the mutilation of the order, the treasurer was not indictable for this refusal. *Regina v. Jones*, 401

## DYING DECLARATION.

1. A boy between 10 and 11 years of age was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him that he was aware that he would be punished hereafter if he said what was untrue:—*Held*, that a declaration made by him at this time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. *Regina v. Perkins*, 895
2. In a case of murder, it appeared that two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she *had been in hopes* she would have got better, but *as she was getting worse*, she thought it her duty to mention what had taken place. Immediately after this she made a statement:—*Held*, that this statement was not receivable in evidence as a declaration in articulo mortis, as it did not sufficiently appear that, at the time of the making of it, the deceased was without hope of recovery. *Regina v. Megson*, 418

## EASEMENT.

1. To an action of trespass on land the defendant pleaded that for 20, 30, 40, and 60 years he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. Replication, denying the rights claimed.

It appeared that within 40 years B. had been lessee of the mill under one landlord, and of the land under another:—*Held*, that this was such a unity of possession as prevented his having an easement on the land. *Clay v. Thackrah*, 47

2. *Held*, also, that this unity of possession need not be specially replied: and that without a special replication the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence. *Ibid.*
3. *Held*, also, that B.'s lease of the land having expired more than 80 years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right. *Ibid.*
4. Form of plea and replication. *Ibid.*

## EJECTMENT.

See LANDLORD AND TENANT.

1. In ejectment the lessor of the plaintiff



- made out his title as the heir of W. G. The defendant put in the will of W. G. made in 1837, devising the property to the lessor of the plaintiff and T. G.:—*Held*, that the lessor of the plaintiff might put in another will of W. G. made in 1838, devising the whole property to the lessor of the plaintiff, and that the lessor of the plaintiff was not bound to make this will part of his original case. *Doe d. Goslee v. Goslee*, 46
2. Under these circumstances the defendant's counsel will be allowed to reply on the new case set up by the lessor of the plaintiff, and the counsel for the plaintiff has the general reply. *Ibid*.
  3. A. in the year 1819 agreed to purchase lands of B. for £670, and paid a deposit of £10. The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so at Michaelmas in the year 1819. A. continued in possession, and neither paid any more of the purchase-money nor any rent or interest, and in 1822 A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters:—*Held*, that these facts were no bar to B. in ejectment brought within twenty years after, Michaelmas, 1839, as A. coming in under an intended purchase was in equity the owner of the land, with a liability to pay the purchase-money, and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will. *Doe d. Counsell v. Caperton*, 112
  4. In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of the defendant. *Doe d. Haden v. Burton*, 254
  5. If A. be put into possession of a cottage by parish officers, and the lord of the manor prevail on A. to give up the possession of the cottage to him and the lord of the manor put B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as under these circumstances neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it. *Ibid*.
  6. Whether in ejectment the lessor of the plaintiff must have a certificate under the stat. 3 & 4 Vict. c. 24, to entitle him to costs—*quæra*. *Doe d. Hughes v. Derry*, 494
  7. A. was possessed of lands for more than 20 years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife:—*Held*, that though B. could not recover in ejectment as the heir of his father, because more than 20 years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as her heir on her death in 1838. *Doe d. Bennett v. Long*, 778
- ### EMBEZZLEMENT.
- See LARCENY, 1.
- ### ENGINES FOR WORKING MINES, DESTROYING.
- See MINING ENGINES.
- ### ENGRAVING FORGED FOREIGN NOTE PLATES.
- See FORGERY, 1, 9.
- ### ESTATE.
- See EJECTMENT, 7.
- ### EVIDENCE.
- See ADMISSION.—BIGAMY.—COMPANY, 1.—CONFESSION.—CONSPIRACY.—CORPORATION, 1, 2.—CROSS-EXAMINATION.—DEPOSITION.—EASEMENT, 3.—EXAMINATION OF WITNESSES.—LIBEL, 4, 5, 8.—NEGLIGENCE, 8.—NON-PAROCIAL REGISTERS.—NOTICE TO PRODUCE.—PLEADING, 1, 4, 5.—PREVIOUS CONVICTION.—RAPE, 6, 7.—SCHOOL.—SHERIFF, 1, 2.—WITNESS.
1. In an action against the directors of an intended company, it was proved, (in order to let in secondary evidence of their minute-books, called for under a notice to produce), that four months before the trial, the late secretary had the books in a desk at the office of the Company, and that he then gave up the key of the desk to the manager of the Company, who acted for the directors:—*Held*, sufficient. *Bell v. Francis*, 66
  2. A court roll stating that a surrender was by power of attorney, would be secondary evidence of the power of attorney if the power of attorney cannot be found after a sufficient search. *Doe d. Counsell v. Caperton*, 112
  3. The steward of a manor proved that where a surrender was by power of attorney, the practice was to keep the power of attorney with the court rolls. The power in question which was for a surrender in 1814, could not be found either with the court rolls or any where in the office in which the court rolls had been kept ever since 1814, both by the present steward and his predecessor, who was steward in 1814:—*Held*, sufficient to let in secondary evidence. *Ibid*.
  4. In a former action between the same parties, in which the plaintiff sued in per-

- son, certain statements were made in the defendant's plea which were not denied by the replication, which only denied other parts of the plea; there had been a trial, but no judgment: *Held*, that neither the issue delivered by the plaintiff himself, nor the Nisi Prius record in the former action, was admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, and not denied by the replication. *Holt v. Miers*, 191
5. A letter written by a party is not admissible in evidence in his own favour, except as a notice or a demand. *Richards v. Frankum*, 221
6. On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum:—"This draft was signed in my presence, on the date within named. (Signed) N. D.:"—*Held*, that the plaintiff must call N. D. to prove the making of the note:—*Held*, also, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an endorsement on the note as well as what was written on the face of it. *Ibid.*
7. The note was endorsed by the plaintiff as follows:—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of, &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:"—*Held*, that this endorsement did not require a stamp. *Ibid.*
8. The document delivered out by the registrar of the Court of Chancery, as the order of the court, is the original order, and to make it evidence it is not necessary that it should be compared with any book of the orders of the court. *Corporation of Ludlow v. Charlton*, 242
9. In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman in charges for the building of the cottage which are there stated to have been paid by the lord of the manor are not admissible in evidence on the part of the defendant. *Doe d. Haden v. Burton*, 254
10. It is no objection at Nisi Prius to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it were executed without any notice to the plaintiff to enable him, if he pleased, to put cross interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the court, if they have been received at Nisi Prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller v. Newton*, 818
11. To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced:—*Held*, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English courts, of compelling the production of the letter. *Ibid.*
12. A declaration on a check on a banker, stated that the plaintiff drew his check on W. & Co., and delivered it to B. L., who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L., as the nominal value of counters to play at an unlawful game, as B. L. knew, and that before the plaintiff took the check he had notice of the premises; and 2d, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check. For the defendants the plaintiff's attorney was called, who was also the attorney of B. L.:—*Held*, that he might be asked where he last saw B. L., and whether he had ever seen B. L. and the plaintiff together; but that he could not be asked whether he had ever seen this check in B. L.'s possession. *Bingham v. Stanley*, 874
13. A prisoner was taken into custody at the house of his brother on a charge of abduction. When he was taken a letter was found in a writing-desk, in the room in which he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police officer was going to open it, when the prisoner told him it had nothing to do with the business that he had come about:—*Held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Regina v. Barratt*, 887
14. A. and B. were separately indicted for publishing the same libel. Both indictments contained the same prefatory allegations. A. was tried first; and on the trial of B. such of the witnesses as had been also examined on the trial of A., had (by consent) their evidence read over to them from the judge's notes, B. being allowed to further cross-examine them. *Regina v. Lovett*, 462
15. It was proved, that, before the bringing of the action Mr. L., who was the plain-

tiff's attorney on the record, had written to the defendant for payment of the debt for which the action was brought, and it was proposed on the part of the defendant to give evidence of what Mr. L. had said after he had so written, and before the action:—*Held*, that this evidence was not receivable without further proof of the agency of Mr. L. *Pope v. Andrews*, 564

16. The depositions of a witness taken before the coroner on an inquiry touching the death of a person killed by a collision between a brig and a barge, is receivable in evidence in an action for the negligent management of the brig, if the witness be shown to be beyond sea. *Sills v. Brown*, 601

17. A nautical witness cannot be asked on the trial of an action for the negligent management of a ship, whether he thinks having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*

18. Evidence of a practice in contravention of a by-law is not receivable. *Ibid.*

19. A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it, of his having done so. *Long v. Hitchcock*, 619

20. The plaintiff is to prove his case to the satisfaction of the jury; and, if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict. *Ibid.*

21. A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount; and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach, that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evidence to show that the lead was of inferior quality. *Pegg v. Stead*, 636

21. On a count for a quantum valebant, the plaintiff may give evidence of an agreed price for the goods, and the defendant, in such a case, on a plea of non assumpsit, may also go into evidence to induce the jury not to give that price, by showing that the articles delivered were inferior to those that the price was agreed to be paid for. *Ibid.*

#### EVIDENCE IN REPLY.

*See* TREASON, 18.

#### EXAMINATION OF WITNESSES.

In criminal cases, though the counsel for

the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking him any questions on the part of the prosecution; yet, *semble*, that it is better that he should be examined, whether his evidence be favourable to the prosecution or not, as the only object of the investigation is to discover the truth. *Regina v. Bull*, 22

#### EXECUTION.

*See* BILL OF SALE.

#### EXPENSES OF PROSECUTIONS.

*See* DISOBEDIENCE OF ORDER FOR COSTS.—HIGHWAY, 1, 2, 3.

#### EXPENSES OF WITNESS.

*See* WITNESS, 5.

#### FALSE IMPRISONMENT.

*See* IMPRISONMENT.

#### FALSE PRETENCES.

An indictment for false pretences charged, in the first count, that the defendant "unlawfully did falsely pretend to one J. B., that he, the said J. T. was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the moneys of J. L. The second count charged, that he falsely pretended to J. L. that W. P. had said that J. L. was to give him, the said J. T. (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—*Held*, that both these counts were bad, in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53. *Regina v. Tully*, 227

#### FATHER.

*See* CHILDREN.

#### FELON'S GOODS.

*See* HOUSE AND GOODS OF A CONVICTED FELON.

#### FELONY, COMPOUNDING.

*See* FOREGOING A PROSECUTION.

#### FELONY WHICH INCLUDES AN ASSAULT.

*See* ASSAULT, 6, 7, 8, 10, 11, 12, 18, 14.

#### FIGHTING.

All struggles in anger, whether by fighting

or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *Regina v. Canniff*, 359

**FIRE.**

*See* ARSON.

**FOOD SUPPLIED TO IMPOUNDED CATTLE.**

*See* POUND-KEEPER, 4, 5, 6, 7.

**FOREIGN NOTE-PLATE, FORGED.**

*See* FORGERY, 1-9.

**FORFEITURE.**

*See* LANDLORD AND TENANT, 9, 10, 11, 12.

**FORGERY.**

*See* CHELSEA PENSION.

1. The 18th section of the stat. 11 Geo. & 1 Will. 4, c. 66, applies to plates of promissory notes of persons carrying on their business of bankers in the province of Upper Canada. *Regina v. Hannon*, 11
2. A paper in the following form held to be a request for the delivery of goods, though not addressed to any one:—"Augt. 3, '39—One 16-in. helmet scoop—one 4 qt. kettle—Jas. Hayward." *Regina v. Pulbrook*, 87
3. A prisoner was indicted on the stat. 2 & 8 Will. 4, c. 123, s. 3, for forging a warrant for the payment of money (not setting it out). The forged paper was as follows:—"This is to satisfy that R. R. as swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria (signed), J. N. 4l. 10s. 0d." It was proved, that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay 4l. 10s. 0d.:—*Held*, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that as it appeared that this document, if genuine, would have been a voucher for the payment of the money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money. *Regina v. Rogers*, 41
4. If, in an indictment for forgery, the instrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and averments to show that the document comes within the designation given of it in the indictment, are now (in this form of indicting) unnecessary. *Ibid.*
5. A forged paper, in the following form,—"Please let the lad have a hat, and I will answer for the money. E. B.," is a forged request for the delivery of goods, and is not the less so because it may also be a forged undertaking for the payment of money. *Regina v. White*, 282

6. A count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as "a certain forged request for the delivery of goods to one J. R.," is good under the stat. 2 & 8 Will. 4, c. 122, s. 2, and is not too general. *Regina v. Robson*, 423
7. A count in an indictment for uttering a forged deed described it as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. W. of the one part, and D. G. of the other part, purporting to be an under-lease by the said R. W. to the said D. G. of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of £8, payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment, by the said D. G. to the said R. W., of the yearly rent of £8:—"—*Held*, good, under the stat. 2 & 3 Will. 4, c. 123, s. 2. *Regina v. Davies*, 427
8. If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has been since paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering. *Regina v. Geach*, 499
9. Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 19. The plates were engraved by an Englishman, who was an innocent agent in the transaction. It appeared that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction. The questions left to the jury were, 1st, whether the two who gave the order for the engraving knew the nature of the instrument; and, 2dly, whether all three concurred in the order given. The judge told the jury that in order to find all three guilty, they must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated to the other two, and that all three concurred in the

employment of the engraver. His lordship also said, that he was inclined to think that if the prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not; but intimated that, if it became necessary, that matter might be made the subject of further consideration. The jury found the two guilty who gave the order, and added that they considered they knew the nature of the instrument. The third prisoner was acquitted. *Regina v. Mazeau*, 676

#### FOREGOING A PROSECUTION.

The law does not authorize a private person to forego a prosecution upon any terms; and even if a promise be given and broken in such a manner as a jury would consider scandalous, yet, in point of law, that will not make any difference. *Regina v. Daly*, 842

#### FRAUD.

See BILL OF SALE.

#### FRAUDS, STATUTE OF.

See GOODS SOLD.

#### FREIGHT.

See BROKER'S COMMISSION.

#### GOODS OF A CONVICTED FELON.

See HOUSE AND GOODS OF A CONVICTED FELON.

#### GOODS LENT.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—*Held*, that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. *Lord Camoys v. Scurr*, 883

#### GOODS SOLD.

See PLEADING, 4, 5.

In assumpsit for goods sold and delivered, where the price is above £10, and nothing was paid as earnest to bind the bargain, nor was there any memorandum in writing, signed by the defendant or his agent: two things must be proved to entitle the plaintiff to recover; first, that the defendant in fact ordered the goods; and secondly, that he accepted them with an intent to take to them as owner. *Smith v. Roll*, 696

#### GRAND JURY.

1. The Grand Jury had come into court and had been discharged and had left the court, but had neither left the building nor separated. The judges directed them to be sent for back into court, and directed another bill of indictment (the witnesses

on which were going abroad) to be sent before them. *Regina v. Holloway*, 43  
2. If one of the grand jurors be a Quaker, the indictments should commence, "The jurors for our lady the queen upon their oath and affirmation present." &c. 78

#### GUARANTEE.

In an action for goods sold the defendant pleaded that the defendant and M. had agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication—denying the agreement, and denying that the plaintiffs had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action, Mr. L., who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt, and it was proposed to give evidence of what Mr. L. had said after he had so written and before the action:—*Held*, that such evidence was not receivable without further proof of the agency of Mr. L. It was afterwards proved by Mr. L. that M. had asked him to propose to the plaintiff to accept his guarantee, and that Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks and then returned it.

*Held*, that if the plaintiffs did not return the guarantee within a reasonable time, they must be taken to have accepted it, and that unexplained—three weeks was an unreasonable time:—*Held*, also, that if M. was worth nothing, and was a mere man of straw, that fact would make no difference on these pleadings, as the plaintiffs had not replied fraud, but had denied that they had accepted the guarantee. *Pope v. Andrews*, 564

#### HABEAS CORPUS ACT.

See POSTPONING TRIAL, 6.

#### HIGH TREASON.

See TREASON.

#### HIGHWAY.

1. A prosecutor had obtained a summons under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50, calling on the parish surveyors to show cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates (under the 95th section) ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the crown side of the assizes, and the defendants found guilty:—*Held*, that the prosecutor was entitled to an order, under the 95th section, to have his

costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the judge. *Regina v. Inhabitants of Yarkhill*, 218

2. A complaint was made to magistrates, under the 94th section of the Highway Act, 5 & 6 Will. 4, c. 50, that a way alleged to be a highway was out of repair; the magistrates ordered an indictment against the inhabitants of the parish, which was found, and removed by certiorari, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected that this provision as to costs, only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by certiorari. The judge refused the order. *Regina v. Inhab. of Chedworth*, 285

3. *Semble*, that the 95th section of the act as to payment of costs out of the highway rate, and the 98th section as to costs to be paid by any defendant where the defence is frivolous, are distinct in their operation, and are not to be connected. *Ibid.*

4. *Semble*, that the magistrates are not bound to make their order in terms exactly following those contained in the information. *Ibid.*

#### HORSE-STEALING.

A., who intended to sell his mare, sent his servant with her to M. fair, the servant having no authority either to sell the mare or deal with her in any way. The prisoner asked the servant the price, and desired the servant to trot her out, and the prisoner then went to two men, and having talked to them went away. These two men then came up and persuaded the servant to exchange the mare for a horse they had, and they would give £24 for the chop. They changed the saddles, and without giving any money rode away with the mare, leaving the servant with a horse of little value. Four days after the prisoner sold the mare at B., stating that he had got her in a chop at M. fair:—*Held*, that as the servant had the mere charge of the mare, and had no right to deal with the property in her, the prisoner ought to be convicted of stealing her, provided that the jury were satisfied that the prisoner was in league with the two other men, and that they three, by a fraud in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare. *Regina v. Sheppard*, 121

#### HOUSE AND GOODS OF A CONVICTED FELON.

A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count, laying the property of the goods in the queen. It was shown by proof of the record that the husband of Elizabeth A. had been convicted of felony, and it was also proved that he was still in prison under his sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in the possession of the house and goods till they were stolen by the prisoner:—*Held*, that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the queen, although there had been no office found, and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported. *Regina v. Whitehead*, 429

#### HOUSEBREAKING.

*See* HOUSE AND GOODS OF A CONVICTED FELON.

#### HUSBAND AND WIFE.

1. The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency. *Fresstone v. Butcher*, 643
2. If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers' from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. *Ibid.*

## IMPRISONMENT.

1. Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statements, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such a course of proceeding, it must be shown that what was done amounted to a breach of the peace. *Wooding v. Oxley*, 1
2. A. telling a policeman to take charge of B., is the same as his telling a policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A. *Wheeler v. Whiting*, 262
3. *Semble*, that in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff was there making a great disturbance, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad. *Ibid.*

## INDEMNITY.

See CONVICTION, 2.

## INDICTMENT.

See ACCUSARY BEFORE THE FACT, 3, 4.—AMENDMENT, 7, 8, 9.—ASSAULTING A GAMEKEEPER.—BURGLARY, 1.—CHELSEA PENSION.—COIN.—COMPANY, 7.—FALSE PRETENCES.—FORGERY, 4, 6, 7.—HIGHWAY, 1.—PERJURY, 2, 5.—RAPE, 8.—RECEIVERS, 1.—ROBBERY.—VENUE.—WILL, SECRETING.

A. and B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4. and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina v. Henry*, 809

*Indictments, Forms of*

[Those marked (\*) were either *held* to be not good, or to be open to objection.]

1. For having a forged foreign note-plate, 11

2. For forging a warrant for the payment of money (not setting it out), 41
3. For forging a request for the delivery of goods, 282, 423
4. For forging a deed (not setting it out), 427
5. For stealing and for destroying a will, 89
6. For concealing a will,\* 89
7. For conspiring to excite discontent and disaffection, 91, 275, 277
8. For an unlawful assembly, 91
9. For an attempt to abuse a female child,\* 215
10. For false pretences in ordering goods,\* 227
11. For attempting to procure abortion by means of an instrument, 236
12. For obtaining money as a composition for forbearing to prosecute on a penal statute, 368
13. For forging a receipt as to a Chelsea pension, 408
14. For attempting to discharge loaded arms, 483
15. For manslaughter caused by negligently navigating a vessel, 672
16. For assaulting a gamekeeper (on the stat. 9 Geo. 4, c. 69, s. 2),\* 730
17. Indictment for uttering counterfeit coin after a previous conviction, 757, n.
18. Averment of materiality on an indictment for perjury before commissioners,\* 786

## INFORMATION.

See THREATENING TO LAY AN INFORMATION, AND OBTAINING MONEY THEREBY.

## INJURIES BY RIOTERS.

See DEMOLISHING HOUSES.

## INNKEEPER.

See LIEN.

## INSANITY.

See PRACTICE.—TREASON, 25, 26.

## INSOLVENT.

See BEGIN, RIGHT TO, 8.

1. If an insolvent debtor in his schedule describe a debt due by him to be for "drawing deeds," that will be taken to include not the mere drawing only, but also the stamps, journeys, taking instructions, and everything else respecting them. *Lambert v. Hale*, 506
2. If an insolvent in his schedule state a debt due from him to be £10, and it be really £42, whether this mis-statement, if arising from mistake, be aided by the 63d section of the Insolvent Debtors' Act. 7 Geo. 4, c. 57—*Quære*. *Ibid.*

## INSURANCE.

See LANDLORD AND TENANT, 9, 10.

INTENT.

See FORGERY, 8.—LIBEL, 6.

I. O. U.

See STAMP, 3.

- JOINT CONTRACT.

See CONTRACT.

JURORS.

See CHALLENGE.—TREASON, 9, 10, 11.

JURY.

See GRAND JURY.

LANDLORD AND TENANT.

See SHERIFF, 1, 2, 3.

- A., himself a leaseholder of a house, entered into an agreement with B. to grant him an under-lease of the house for twenty years and a fraction, from Midsummer, 1836. B. entered into possession, and paid rent to A., and underlet a portion of the house to C. from Michaelmas, 1836, and received from C. the first quarter's rent, due at Christmas, 1836. On the 11th January, 1837, B., wishing to part with his interest before the execution of the lease, wrote to A. requesting him to insert the name of D. instead of his. D., a few days after, sent to A. a written consent to become his tenant, on the same terms as B. had agreed to; and, in consequence, the lease was, on the 15th of March, 1837, granted by A. to D., instead of to B. D. brought an action for use and occupation against C., to whom B. had underlet a part of the house, and claimed the quarter's rent due at Lady-day, 1837:—*Held*, that he was entitled to recover. *Green v. London Cemetery*, 6
2. A party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises:—*Held*, that he was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises. *Cowie v. Goodwin*, 378
3. A notice to quit "on St. Michaelmas Day," is *prima facie* a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time. *Doe d. Willis v. Perrin*, 467
4. A. being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., allowing A. 12s. a week, "and allowing him and

his family to reside and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to be put an end to by three months' notice or three months' wages:—*Held*, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. *Doe d. Hughes v. Derry*, 494

5. *Held*, also, that no notice to quit was necessary, if the service was put an end to. *Ibid*.
6. In an action of covenant for non-repair of premises, held by the defendant under a lease which has several years to run, the proper measure of damages is not the amount that would be required to put the premises into repair, but the amount to which the reversion is injured by the premises being out of repair. *Doe d. Trustees of Worcester School v. Rowlands*, 784
7. A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner. *Ibid*.
8. A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it. *Doe d. Pittman v. Sutton*, 706
9. A lessee covenanted to insure, and the premises were uninsured for a week:—*Held*, in an ejectment for a forfeiture for a breach of this covenant, that the lessor could not recover if he, by his conduct, had led the lessee to believe that the premises were properly insured by himself. *Ibid*.
10. A lease (among other covenants) contained a covenant by the lessee to insure, with a proviso that if he did not do so the lessor might insure and distrain on the lessee for the premiums. The lease contained the usual proviso as to forfeiture. Whether the lessee's omitting to insure would incur a forfeiture—*Quare*. *Ibid*.
11. B. had concurred, with other members of his family, in letting land to C. as tenant from year to year, and it was agreed that the rent should be paid to D. as agent for the family. B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—*Held*, that if the jury were satisfied that the fair meaning of this was, that C. asserted that B. and himself were not in the relation of landlord and tenant, this was a disclaimer: and that C. was not entitled to notice to quit. *Doe d. Bennett v. Long*, 773
12. If in ejectment the lessor of the plaintiff rely on a disclaimer, it will be no objection to his recovering, that the dis-



claimant was on the day of the demise laid  
in the declaration. *Ibid.*

### LARCENY.

See HORSE-STEALING.—HOUSE AND GOODS  
OF A CONVICTED FELON.—MARKET OVERT.  
—RECEIVERS, 3.

1. A was indicted for embezzlement as clerk and servant to the prosecutor, and B. was charged as accessory. It appeared that A. was only employed as a town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A., he entered only one in the order book; but B., who was the prosecutor's carman, delivered both articles to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6s. 6d., and B. entered the second article at the bottom as 4s. 6d. A afterwards received of the customer the whole of the 11s., but only accounted to the prosecutor for the 6s. 6d.:—*Held*, that the offence committed was not embezzlement, but larceny. *Regina v. Wilson*, 27
2. A person who steals goods in France, cannot be tried in England for the offence, though he be found in possession of the stolen property there. *Regina v. Madge*, 29
3. If a person, not being the servant of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his own use, he is guilty of larceny. *Regina v. Jenkins*, 38
4. Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for a minute, took it out of the box and put it into his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing:—*Held*, on the trial of the prisoner for stealing the pin, that, under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it, and also that the prosecutors ought to have called the person who served in the shawl department, and that their not doing so was a circumstance which would justify the jury in looking with some suspicion at the case. *Regina v. Box*, 126
5. Though to make a thing the subject of an indictment for larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *Regina v. Morris*, 349
6. If the owner of goods employ a person, not in his service, to take them to a particular place, show them to a customer, and bring them back, without authorizing him to sell them to, or leave them with the customer, and he, instead of taking the goods to the specified place, sell them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only, and not the possession of the goods. *Regina v. Harrey*, 353
7. The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem it and restore it, is a defence not to be generally encouraged; though, if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be, that if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being enabled shortly by the receipt of money to take it out and restore it, he ought to be acquitted, but otherwise not. *Regina v. Phetheon*, 552
8. A. was treating B. at a beer-house, and A. wishing to pay put down a sovereign desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change:—*Held*, no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it. *Regina v. Thomas*, 741
9. On an indictment for larceny it appeared that a landlord went to his tenant (who had removed all his goods) to demand rent amounting to 12l. 10s., taking with him a receipt ready written and signed; the tenant gave him £2, and asked to look at the receipt. It was given to him, and he refused to return it or to pay the remainder of the rent. It was proved by the landlord that at the time he gave the prisoner the receipt, he thought the prisoner was going to pay him the rent; and that he should not have parted with the receipt unless he had been paid all the rent, but that when he put the receipt into the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt again, but wanted his rent to be paid:—*Held*, a lar

oeny, and that the fact of the tenant giving the £2 made no difference. *Regina v. Rodway*, 784

**LARCENY IN A FOREIGN COUNTRY.**

See LARCENY, 2.

**LARCENY (BY A SERVANT).**

If a servant take his master's property and hand it over to another as a gift, it is as much a felony as if he sell it or take it to a pawnbroker's and pledge it. *Regina v. White*, 844

**LARCENY IN A SHOP.**

A shop to be within the stat. 7 & 8 Geo. 4, c. 29, s. 15, and 1 Vict. 90, (as to breaking into shops), must be a shop for the sale of goods, and a mere workshop will not be sufficient. *Regina v. Sanders*, 79

**LEASE.**

See LANDLORD AND TENANT.

**LENT GOODS.**

See GOODS LENT.

**LIBEL.**

1. In an action for a libel upon a ship, imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. *Ingram v. Lawson*, 326
2. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was *Held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. *Ibid*.
3. Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult: and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that, and be calculated to excite tumult, it is a libel. *Regina v. Collins*, 456
4. A defendant was tried for publishing a letter, purporting to be the resolutions of a body of persons calling themselves the General Convention, and in one part of it stated that an outrage had been committed on the people of Birmingham by a force "acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people." A witness for the Crown stated in his cross-

examination, that he had formerly belonged to the Convention, but had since resigned, and had become a town councillor of Birmingham. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel:—*Held*, that this could not be done. *Regina v. Collins*, 456

5. If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant.—*Regina v. Lovett*, 462
6. If a paper, published by the defendant, has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent every one must be taken to intend the natural consequences of what he has done. *Ibid*.
7. A. and B. were separately indicted for publishing the same libel. Both indictments containing the same prefatory allegations. A. was tried first, and on the trial of B. such of the witnesses as had been also examined on the trial of A. had (by consent) their evidence read over to them from the Judge's notes, B. being allowed to further cross-examine them. *Ibid*.
8. In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character. The plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription:—*Held*, that there was evidence to go to the jury in support of the allegation in the declaration. The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—*Held*, that the plaintiff could not go into evidence to show that his wife was a respectable person, as on these pleadings she must be taken to be so:—*Held*, also, that the plaintiff could not go into evidence to show that his wife had become ill and died soon after the publication of the libels. *Guy v. Gregory*, 584
9. In an action for a libel the declaration stated, that the defendant published a libel, "contained in, and being an article in, a certain weekly printed publication, or paper, called the *Paul Pry*." At the trial it was proved that the defendant gave a

printed slip of paper, which appeared to have been cut from the Paul Pry, to several persons for them to read, and that they read it: *Held*, that the Judge at the trial might properly allow the record to be amended by striking out the above mentioned allegation, that the libel was contained in, and was an article in, the Paul Pry. *Foster v. Pointer*, 718

10. The stat. 3 & 4 Vict. c. 24, applies to cases of libel, and therefore if in a case of libel nominal damages be given, and the Judge certifies that the grievance was wilful and malicious, the plaintiff will be entitled to his costs. *Ibid*.

#### LIEN.

1. An innkeeper has no lien on a horse placed in his stable for the amount of its keep unless it be placed there by a guest. *Binns v. Pigott*, 208
2. If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse. *Ibid*.

#### LIMITATIONS.

1. The acknowledgment in writing to take a case out of the Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Bucket v. Church*, 209
2. *Seemle*, that there is some doubt whether it is a question for the Judge or for the jury to determine whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled, the learned Judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury. *Ibid*.

#### LOADED ARMS, ATTEMPTING TO DISCHARGE.

See ATTEMPTING TO DISCHARGE LOADED ARMS.

#### LUNATIC.

See PRACTICE.—TREASON, 25, 26.

#### MAINTENANCE.

See CHILDREN.

#### MANSLAUGHTER.

See MURDER.—SHOOTING.

1. The killing of a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the

party must be such as to render it necessary, on the part of the party killing, to do the act in self-defence. *Regina v. Bull*, 22

2. All struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. *Regina v. Canniff*, 359
3. Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct. *Regina v. Taylor*, 672
4. In a case of manslaughter, it is the duty of the coroner to bind over all those witnesses who prove any material fact against the party accused, and not those who are called for the purpose of exculpating him. *Ibid*.
5. However, if the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the bill, and examined before the grand jury. *Ibid*.
6. A prisoner who is tried for manslaughter on the coroner's inquisition may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85. *Regina v. Pool*, 728

#### MARKET OVERT.

A sale of goods, being those in which he usually deals, made to a tradesman in his warehouse or shop, in the city of London, is a sale in market overt, notwithstanding the construction of the premises be such, that a person from the outside cannot see what is going on within. *Lyons v. De Pass*, 68

#### MARRIAGE.

See BIGAMY, 1, 2.

#### MASTER AND SERVANT.

See APPRENTICE.—CARPENTER.—NEGLECT.

#### MEETING, PUBLIC.

See CONSPIRACY.—IMPRISONMENT, 1.—UNLAWFUL ASSEMBLY.

#### MINING-ENGINES, DESTROYING.

1. The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine, for the purpose of working a vein of coal which was on a level with the scaffold:—*Held*, that this scaffold was an "erection used in conducting the business" of a "mine," within the stat. 7 & 8 Geo. 4, c. 80, s. 7, and that the damaging it with intent to destroy it, or to render it

useless, was felony. *Regina v. Whittingham*, 234

2. A coal-mine was worked by a steam-engine which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine:—*Held*, that proof of damaging the drum would not support an indictment which charged the damaging of a steam-engine used in working a mine. *Ibid.*
3. A steam-engine used in draining and working a mine, had been stopped and locked up for the night. The prisoner got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received damage:—*Held*, that this was a damaging of the engine within the stat. 7 & 8 Geo. 4, c. 30, s. 7. *Regina v. Norris*, 241

### MISDEMEANOR.

Every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor. *Regina v. Martin*, 216

### MONEY FOUND ON A PRISONER.

See *TRASON*, 8.

### MONEY HAD AND RECEIVED.

See *ATTORNEY*, 1.—*WITNESS*, 5.

### MURDER.

See *BURGLARY WITH VIOLENCE*. — *DYING DECLARATION*. — *MANSLAUGHTER*. — *PRINCIPALS IN FELONY*. — *SHOOTING*. — *SPECIAL CONSTABLE*. — *SUICIDE*.

1. If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder. *Regina v. Reeves*, 25
2. On a trial for murder, the deposition on oath of the prisoner, taken before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence. *Regina v. Owen*, 238
3. A prisoner was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a tea-spoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died:—*Held*, that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand. *Regina v. Michael*, 856
4. On a charge of child murder, it appeared

that the child must have died before it had an independent circulation:—*Held*, that as the child had never had an independent circulation, the charge of murder could not be sustained. *Regina v. Wright*, 754

5. On an indictment for child murder, no one but the mother can be convicted of a concealment of the birth of the child. *Ib.*

### NEGLIGENCE.

See *BAILMENT*.—*CARRIER*, 1, 2.—*SHIPPING*, 7, 8, 9, 10, 11, 12, 13.—*VERDICT*, 1.

1. The question in what is called a running down case, is, whether the plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the by-laws of the River Thames, at the time when she came in collision with a barge, it was *held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. *Sills v. Brown*, 601
2. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by the collision, is receivable in evidence in the action for damages, if the witness be shown to be beyond the sea. *Ibid.*
3. A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*
4. Evidence of a practice in contravention of a by-law, is not receivable. *Ibid.*
5. The rule of the river is, that, if a light vessel is going free, and a loaded vessel is coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Ibid.*
6. If a servant without his master's knowledge take his master's carriage out of the coach-house, and with it commit an injury, the master is not liable; because he has not in such case entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by entrusting him with it. Therefore, where a servant, having set his master down in Stamford street, was directed by him to put up in Castle street,

Leicester Square; but instead of so doing went to deliver a parcel of his own in the Old Street Road, and in returning along it drove against an old woman and injured her; it was *held*, that the master was responsible for his servant's act. *Sleath v. Wilson*, 607

7. A van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head: this caused the van to move, and thereby a packing case fell out of the van upon the shafts of the gig and broke them:—*Held*, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred. *Lamb v. Lady Elizabeth Palk*, 629
8. In an action for negligence in not properly securing a cow of the defendant in a slaughter-house, the declaration stated, that by means thereof the cow "ran at, butted at, gored, killed and destroyed" a cow of the plaintiff. Plea, a payment of 30s. into court, and that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages:—*Held*, that the defendant could not go into evidence to show that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea. *Lloyd v. Walkey*, 771

#### NEW TRIAL.

See BEGIN, RIGHT TO, 12.

#### NON-PAROCIAL REGISTERS.

1. A list of the non-parochial registers which have been made evidence under the stat. 8 & 4 Vict. c. 92. 798
2. Mode of giving those registers and extracts from them in evidence, in the Courts of Common Law, and at the Sessions. *Ibid.*
3. Places of deposit of the registers of the Jews, the India registers, and the registers of British Embassies and factories abroad. *Ibid.*

#### NOTE, FORGED FOREIGN PLATE.

See FORGERY, 1.

#### NOTICE OF ACTION.

See POUND-KEEPER, 1—3.

A private person, who gives another into custody on a charge of having committed an offence against the stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act), is not entitled to notice of action under the 75th section of that act, as that section only applies to constables and other officers, and persons of that kind. *Brooker v. Field*, 68

#### NOTICE OF TRIAL.

See TRAVERSE, 1.

#### NOTICE TO PRODUCE.

1. A notice to produce a letter from the defendant to the plaintiff, was served on the plaintiff's attorney at a quarter before nine on the night before the trial. It was a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject:—*Held*, that the notice to produce was served too late. *Holt v. Miers*, 191
2. A cause was tried at the assizes on a Monday, the commission-day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorney on whom the notice to produce was served, and also the party who was his client, lived in the assize town:—*Held*, that the service of the notice to produce was not too late, and that the question in such cases is, whether, under all the circumstances, reasonable notice has been given. *Firkin v. Edwards*, 478
3. In a town cause, a notice to produce a paper that would be in the hands of the opposite attorney, was served at 8 p. m. on the evening before the trial, at his office, on one of his clerks, who had the management of the cause:—*Held*, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents. *Gibbons v. Powell*, 634
4. Where none of the parties lived in the assize town, the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and offered the expenses of going to fetch it. The defendant's attorney said, that that was of no use, as the paper was not in existence:—*Held*, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objections as to the lateness of the service of the notice to produce. *Foster v. Pointer*, 718

#### NOTICE TO QUIT.

See LANDLORD AND TENANT, 3, 5, 11.

#### NUISANCE.

A party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, and the tenant quitted as soon

as he could obtain other premises:—*Held*, that he was not liable to rent for the period between the time of the occurrence of the nuisance and that at which he quitted the premises. *Cowie v. Goodwin*, 878

OPENING SPEECH.

See COUNSEL.

ORDER OF COURT OF CHANCERY.

See EVIDENCE, 8.

PARENT AND CHILD.

See CHILDREN.

PARISH.

A house is properly described as "in the parish of Birmingham," although, for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish. *Regina v. Howell*, 437

PARISH HOUSE.

See EJECTMENT, 4, 5.

PARTICULARS OF DEMAND.

A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party: they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff for procuring a charter for a vessel called the W:—" *Held*, sufficient. *Burnett v. Bouch*, 620

PARTNERS.

See BILL OF EXCHANGE, 7.—COMPANY.—CONTRACT, 2.—WITNESS, 4.

PATENT.

1. To an action for the infringement of a patent for certain improvements in a cabriolet, three pleas were pleaded: 1st, the general issue; 2d, that the alleged improvements were not new; and 3d, that the plaintiffs were not the true and first inventors of the improvements;—*Held*, that on this state of the pleadings it could not be contended that the patent was illegal, as being a monopoly. *Gillett v. Wilby*, 884
2. *Held*, also, that though all the improvements claimed must be shown to be new, yet it need not be shown that the defendant's cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action. *Ibid.*
3. *Held*, also, that the validity of the patent might be considered as having come in question under the 2d plea, so as to entitle the plaintiff to a certificate to that effect under the 3d section of the stat. 5 & 6 Will. 4, c. 88. *Ibid.*

PAYMENT.

See CORPORATION, 4.

PENSION.

See CHELSEA PENSION.

PERJURY.

See TRAVERSE.

1. A. was indicted for perjury, alleged to have been committed on the trial of B for perjury. The indictment against A. averred that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment against B. was afterwards reversed on writ of error:—*Held*, that the reversal of the judgment against B. was no ground of defence for A., as showing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted. *Regina v. Meek*, 518
2. On a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a Chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine the witnesses:—*Held*, a fatal variance, and the judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15. *Regina v. Hewins*, 786
3. Amendments in criminal cases should be made very sparingly; one objection to amending an indictment being, that it is an alteration of a presentment on the oath of the grand jury. *Ibid.*
4. The judges are unwilling to allow the amendment of variances, which might have been avoided by ordinary care. *Ibid.*
5. In an indictment for perjury, charged to have been committed before commissioners to examine witnesses in a chancery suit, it was alleged that a suit was depending, and that a commission was issued for the examination of witnesses, and that interrogatories were exhibited (the 9th of which was set out); and it was averred that "upon the examination of the said J. H. [the defendant] upon the said interrogatories, it became and was material to ascertain the truth of the matters herein-after alleged to have been sworn to, and stated by the said J. H. upon his oath, in answer to the said 9th interrogatory."—Whether this is a sufficient averment of materiality—*Quære?* *Ibid.*

PLATE, FORGED NOTE.

See FORGERY, 1, 9.

PLEA DEMURRED TO.

Where a special plea has been demurred to, the defendant's counsel has no right at

the trial to allude to the statements in it in his address to the jury. *Ingram v. Lawson*, 826

### PLEA IN FELONY.

- 1 A. was indicted for felony in using an instrument to procure abortion, and B. was indicted with him as an accessory before the fact. A. did not appear to take his trial, but B., who was on bail appeared.

*Held*, that, under these circumstances, B. was not compellable to plead to the indictment, and the judge allowed B. to be admitted to bail. *Regina v. Ashmall*, 286

- 2 A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty. *Regina v. Sell*, 846

### PLEADING.

*See* BANKRUPT, 1, 2.—DEMURRAGE.—IMPRISONMENT, 3.—NEGLIGENCE, 8.—PATENT, 1, 3.

1. Where a plaintiff sues on a quantum meruit for work and labour, the defendant may (without pleading a set-off) give in evidence, that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less, because his men had their beer provided for them by the defendant. *Grainger v. Raybould*, 856
2. If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Mason v. Newland*, 575
3. If a defendant does not add the words "by statute" on the margin of the plea of not guilty, he cannot give special matter in evidence to bring himself within an act of Parliament which allows a plea of not guilty; but if it, at the end of the plaintiff's case, appear that the defendant was entitled to notice of action and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Mason v. Newland*, 575
4. A plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount, and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach that the defendant would not deliver the full quantity of potash. The defendant pleaded non assumpsit:—*Held*, that as the defendant had not pleaded that the plaintiff had not delivered best Dutch lead, he could not go into evi-

dence to show that the lead was of inferior quality. *Pegg v. Stead*, 636

5. On a count for a quantum valebant the plaintiff may give evidence of an agreed price for the goods, and the defendant on a plea of non assumpsit may in such a case also go into evidence to induce the jury not to give that price, by showing that the articles delivered were inferior to those that the price was agreed to be paid for. *Ibid.*

6. In an action by a banker as endorsee, against his customer as acceptor of a bill of exchange for £67, the defendant pleaded to the whole declaration a plea of set-off for money had and received. It was proved that the banker had a balance of £37 in his hands belonging to the defendant, for which latter amount the banker refused to honour the defendant's check, alleging that he held the £37 on account of this overdue acceptance:—*Held*, that the issue on the plea of set-off must be found for the plaintiffs, because it was pleaded to the whole declaration, and not pleaded as to £37 only, but that the jury ought to allow the £37 in reduction of the damages. *Barnes v. Butcher*, 725

### PLEADING, FORMS OF.

1. Plea of an easement to repair the banks of a mill-stream, 48, n. *Ibid.*
2. Replication thereto. *Ibid.*
3. Declaration for calls on railway shares, 56, n. *Ibid.*
4. Plea thereto, that the defendant was not a proprietor of shares, *Ibid.*
5. Plea in an action on a bill of exchange by endorsee against acceptor, that the bill was not given for counters to play at an unlawful game, and that the plaintiff knew it, 375, n. *Ibid.*
6. The like plea, stating that the plaintiff gave no consideration instead of averring knowledge, *Ibid.*
7. Replication to the plea No. 5, denying the knowledge, *Ibid.*
8. Replication to the plea No. 6, alleging that the plaintiff gave consideration, *Ibid.*
9. Declaration for not taking proper care of goods lent, 383
10. Plea by a person who had caused cattle to be impounded, justifying the impounding on a taking damage feasant, 576, n. *Ibid.*
11. Plea in the same case by another defendant, justifying as pound-keeper, *Ibid.*
12. Declaration for dismissing a journeyman carpenter sent into the country to work, and not paying his expenses back according to the usage of the trade, 588
13. Plea thereto, that the plaintiff had misconducted himself, 590, n. *Ibid.*
14. Declaration for negligently managing a carriage, so that it ran against another carriage, from which goods fell on the shafts of a gig and broke them, 629
15. Declaration against a bailee for reward for loss of the goods from negligence, 632

16. Plea thereto by the bailee, that he did not receive the goods to be kept for reward, 682, n.
17. Declaration in special assumpsit, for not delivering prussiate of potash in exchange for Dutch lead, 686
18. Plea to a declaration on a bill of exchange, that the holder agreed not to enforce payment in consideration of the defendant giving up his claim on another person, 686
19. Declaration for not properly securing a cow in a slaughter-house, in consequence of which another cow was killed, 771
20. Statement of future damage, in consequence of an injury done to the plaintiff's apprentice, 63
21. Statement of special damage to a dissenting minister, by his being dismissed from his situation in consequence of slanderous words, 766

For the forms of indictment, see *Indictment, Forms of*.

#### PLEAS.

Certificate for costs under the stat. 4 Anne, c. 16, s. 5. *Read v. Thoyts*, 615

#### POACHING.

See *ASSAULTING A GAMEKEEPER*.

#### POISON, ADMINISTERING.

See *MURDER*, 3.

#### POLICEMAN, ASSAULTING.

See *ASSAULT*, 9.

#### POOR.

See *EJECTMENT*, 4, 5.

#### POSSESSION, ADVERSE.

See *EJECTMENT*, 3, 7.

#### POSTPONING TRIAL.

1. *Semble*, that where there are several indictments against prisoners, on all of which they have been arraigned, the prosecutor having tried some of the indictments, and failed in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session. *Regina v. Fuller*, 85
2. Three prisoners were charged with rape and murder, and being acquitted of the rape, the counsel for the prosecution moved to put off the trial for the murder till it could be ascertained whether the Crown would pardon a person convicted of bigamy, to whom it was alleged that one of the prisoners had made an important statement. The Judge postponed the trial, and would not admit the prisoners to bail. *Regina v. Owen*, 83
3. A true bill was found against several prisoners for a rape. The prisoners had been on bail, and the prosecutrix did not

appear either before the grand jury, or to give evidence on the trial; and an application being made to the Judge to postpone the trial, founded on affidavit, stating, that, in the belief of the deponent, the prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the Judge postponed the trial, and would not admit the prisoners to bail. *Regina v. Gultridge*, 228

4. A. had been committed for more than twenty days on a charge of riot. At the assizes he was indicted for feloniously demolishing a house: A.'s counsel applied to postpone the trial, and to have a statement of the evidence of several witnesses, whose names were on the back of the indictment, but who were not examined before the magistrates. The Judge postponed the trial till the next day, and held that the prisoner was only entitled to a copy of the depositions taken before the magistrates. *Regina v. Howell*, 437
5. B. had been committed for less than twenty days on a charge of riot, and was indicted for felonious demolition. His counsel stated that he had intended to traverse, and was wholly unprepared to try. The Judge postponed the trial for two days, and would not postpone the trial till the next assizes, as the general nature of the charge was not so different that the prisoner must be taken to be wholly ignorant of it. *Ibid*.
6. Before the Spring Assizes, 1840, A. was committed to take his trial for robbing and shooting B. at those assizes. The trial was postponed to the Summer Assizes, on the ground, that B. was too ill from his wounds to be able to attend to give evidence. Before the Summer Assizes B. died, and at those assizes a true bill for the murder of B. was found against A., and application was made on the part of the prosecution to postpone the trial to the next Spring Assizes, on the ground of the illness of a material witness. The Judge granted the application, and held that A. was not entitled to his discharge under the 7th section of the Habeas Corpus Act. *Regina v. Bowen*, 509

#### POUND-KEEPER.

1. A mare was distrained, damage feasant, by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. & B. joined in selling the mare for the keep:—*Held*, in an action of trover by the owner of the mare against A. & B., that if they bona fide and honestly intended to sell the mare under the provisions of the stat. 5 & 6 Will. 4, c. 69, s. 4 (the cruelty to animals' act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the Judge would not



nonsuit, but left it to the jury to say whether the defendants meant bona fide to act upon the provisions of that statute, and that if they did the defendants were entitled to their verdict. *Mason v. Newland*, 575

2. If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. *Ibid.*
3. If a defendant does not add the words "by statute" on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of Parliament, which allows a plea of not guilty; but if at the end of the plaintiff's case it appear that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Ibid.*
4. *Seemle*, that under the 4th section of the stat. 5 & 6 Will. 4, c. 59, the person who is bound to supply food to impounded cattle is the distrainer or person at whose suit they are impounded, and not the pound-keeper; but if the pound-keeper supplies the food at the request of the distrainer, or the distrainer joins with the pound-keeper in a subsequent sale of the cattle under this act, the pound-keeper and the distrainer are for this purpose to be considered as one. *Ibid.*
5. *Seemle*, that the 4th section of this statute excludes any right in the owner of the cattle to supply them with food while in the pound. Under the provisions of this statute the distrainer who supplies the food, may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food, if the owner of the cattle was willing to supply the food himself. *Ibid.*
6. If cattle be sold under this provision of the stat. 5 & 6 Will. 4, c. 59, the distrainer can only get the single value of the food, and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food, and the expenses of the sale, is to be returned to the owner of the cattle. *Ibid.*
7. The 5th section of the stat. 5 & 6 Will. 4, c. 59, does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle without being liable to an action for doing so. *Ibid.*
8. Forms of pleas by a person causing cattle to be impounded, and by the pound-keeper. *Ibid.*

#### POWER OF ATTORNEY.

*See EVIDENCE*, 2, 3.

#### PRACTICE.

*See BEGIN, RIGHT TO.—COUNSEL.—EJECTMENT, 1, 2.—EXAMINATION OF WITNESSES.—NOTICE TO PRODUCE.—POSTPONING TRIAL.—TREASON.—TRIAL.—WITNESS, 1.*

A man was indicted for shooting at his wife with intent to murder her, &c. Previous to the commencement of his trial, he applied to the judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests: the counsel for the prosecution stated that he should not call her; and the judge told the prisoner that, although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution to negative the supposition that he was insane; and his lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence was an incorrect one, and, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity. *Regina v. Pearce*, 667

#### PRECEDENCE OF SERJEANTS AT LAW, 371, n. (a).

#### PRETENCES.

*See FALSE PRETENCES.*

#### PREVIOUS CONVICTION.

In order to prove the identity of a prisoner who is named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates: it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate, *Regina v. Croft*, 219

#### PRINCIPAL AND ACCESSARY.

*See ACCESSARY AFTER THE FACT.—ACCESSARY BEFORE THE FACT.—PRINCIPALS IN FELONY.—RECEIVERS.*

#### PRINCIPAL AND AGENT.

*See AGENT'S COMMISSION.*

#### PRINCIPALS IN FELONY.

1. All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution,

and also all those who are present when a felony is committed, and abet the doing of it, are principals in the felony. *Regina v. Howell*, 487

2. Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. *Ibid.*

# PROMOTIONS.

188, 371, 717.

# PUBLIC MEETING.

*See* CONSPIRACY.—IMPRISONMENT.—UNLAWFUL ASSEMBLY.

# PURCHASER.

*See* EJECTMENT, 3.

# QUAKER,

*See* GRAND JURY, 2.

# QUANTUM MERUIT.

*See* PLEADING, 1.

# QUANTUM VALEBANT.

*See* PLEADING, 4, 5.

# QUARTER SESSIONS.

Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is for the quarter sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, and then to adjourn to a future day. 792

# QUEEN'S COUNSEL.

*See* COUNSEL, 4.

# QUIT, NOTICE TO.

*See* LANDLORD AND TENANT, 8, 5, 11.

# RAILWAY.

*See* COMPANY.

# RAPE.

*See* ABUSING FEMALE CHILDREN.—ASSAULT.—REPLY.

1. In a case of rape, since the passing of the statute 9 Geo. 4, c. 81, s. 18, the only question for the jury is, whether the private parts of the man did or did not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought

that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c., discussed before judges and juries. Therefore, though it appear from the evidence, beyond all possibility of doubt, that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape.

*Regina v. Allen*, 81

2. A boy under 14 years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty.

*Regina v. Jordan*, 118

3. To constitute penetration on a charge of this offence, the parts of the male must be inserted in those of the female; *but, as matter of law*, it is not essential that the hymen should be ruptured. *Ibid.*

4. In a case of rape, if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to the rupture of the hymen. *Regina v. Hughes*, 752

5. If on a trial of an indictment for a rape, it appear that the prisoner was under 14 years of age at the time he committed the offence, he must be acquitted of the rape, but the jury may convict him of an assault under the stat. 1 Vict. c. 85, s. 11. *Regina v. Brimlow*, 866

6. On the trial of an indictment for a rape, it appeared that the person alleged to have been ravished (but who was since dead), had come home evidently suffering from recent violence. It was proved that on her return home she made a statement as to the injury she had received, and named the persons who had committed it:—*Held*, that the particulars of this statement could not be given in evidence, as independent evidence, to show who were the persons who committed the offence, and that statements of this kind were only admissible to confirm the evidence of the prosecutrix, by showing that she made a recent complaint of the injury she had received. *Regina v. Megson*, 420

7. In a case of rape, if it were proved on the part of the prosecution that the party alleged to have been ravished has been kept out of the way by the prisoner, the judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence is received as confirmatory evidence only. *Regina v. Guttridge*, 471

8. A prisoner was convicted on an indictment for a rape, which charged that the prisoner, "in and upon E. F.," "feloniously and violently did make [omitting the words 'an assault,'] and her, the said E. F., then and there and against her will

violently and feloniously did ravish and carnally know; against the form of the statute, &c.:—*Held*, that the omission of the words "an assault," was no ground for arresting the judgment. *Regina v. Allen*, 521

9. If in a case of rape the jury are satisfied that non-resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of persons attacking her she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoner of the capital charge; but if they think from the whole of the circumstances that, although when the prosecutrix was first laid hold of it was against her will, yet that she did not resist afterwards because she in some degree consented to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only. *Regina v. Hallett*, 748
10. A witness at the trial gave evidence which was different from her deposition before the magistrate. The deposition was signed by a mark, which she denied to be hers. Neither the magistrate nor his clerk were at the trial; but a constable proved that he was at the examination, and heard her deposition read over to her, and saw her with a pen in her hand, but did not see her make her mark. He also proved the magistrate's signature, and after reading the deposition (which preceded his own which he had signed) he stated that he believed that that was the deposition which was read over to the witness:—*Held*, that this deposition might be read to the witness by the officer of the court for the judge to examine her upon it. *Ibid*.

#### REASONABLE TIME.

See GUARANTEE.

#### RECEIPT.

See CHELSEA PENSION.—STAMP, 1.

#### RECEIVERS.

1. Three persons were charged with a larceny, and two others as accessories in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony in separately receiving a portion of the stolen goods. The principals were acquitted:—*Held*, that the receivers might be convicted on the last two counts of the indictment. *Regina v. Fulham*, 280
2. An indictment stated that a certain evil-disposed person stole certain goods; that L. C. incited him to do so; that E. C. did the same; that E. M. received a portion of the property knowing it to have been stolen;

it also charged A. A. and the before-mentioned E. C. as receivers. All the prisoners having been found guilty by the jury, the conviction was held good against all except L. C. who was merely charged as accessory before the fact, and judgment was given upon the charges of receiving only. *Regina v. Caspar*, 289

3. An ostler assisted in removing from a wagon, which stopped at the inn where he was employed, a quantity of hay which had been taken by the wagoner from his master's stables and put into the wagon, such hay not being allowed for the horses on the journey:—*Held*, that the ostler was properly indicted for receiving, because, as the hay was not allowed by the master for the horses, the moment it was removed by the wagoner from the stable to the wagon animo furandi, the larceny was complete. *Regina v. Gruncell*, 365

#### REGISTERS.

See NON-PAROCHIAL REGISTERS.

#### REPAIR.

See LANDLORD AND TENANT, 6, 8.

#### REPLY.

See EJECTMENT, 2.

- A. was charged with feloniously carnally knowing and abusing a girl under ten.
- B. was charged with being present, aiding and abetting. A.'s counsel called no witnesses. B., who had no counsel, called a witness to prove an alibi for A.:—*Held*, that this evidence was in effect evidence for A., and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was summum jus, and ought to be exercised with great forbearance. *Regina v. Jordan*, 118

#### RETRACTING PLEA.

See PLEAS IN FLEET, 3.

#### RIOT.

See CONSPIRACY.—DEMOLISHING HOUSES.—UNLAWFUL ASSEMBLY.—TREASON, 1.

#### RIOTERS, DEMOLITION OF HOUSES BY.

See DEMOLISHING HOUSES.

#### ROBBERY.

A. and B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all

the judges, that in order to convict B., the indictment should have been framed on the stat. 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina v. Henry*, 809

ROMAN CATHOLIC MARRIAGE.

*See* BIGAMY, 1, 2.

SCHOOL.

In an action for a quarter's salary, for taking away a child from a school without a quarter's notice, evidence was given on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed, on the part of the defendant, to call a witness to prove that she had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—*Held*, that this evidence was not admissible; but that the witness might be asked, whether she had ever received any prospectus when her children came home for the holidays. *Delamotte v. Lane*, 261

SECONDARY EVIDENCE.

*See* EVIDENCE, 1, 2, 8.—NOTICE TO PRODUCE.

SECRETING A WILL.

*See* WILL, SECRETING.

SEDITIONOUS LIBEL.

*See* LIBEL, 8, 4.

SERJEANTS AT LAW, PRECEDENCE OF, 871 (n).

SERVANT.

*See* APPRENTICE, 1. — CARPENTER. — CONTRACT, 1. — NEGLIGENCE.

SERVICES.

*See* CONTRACT, 1.

SET-OFF.

*See* PLEADING, 1, 6.

SHAREHOLDER.

*See* COMPANY. — WITNESS, 4.

SHERIFF.

*See* BILL OF SALE.

1. In an action against a sheriff for removing goods taken under a f. fa. without paying a year's rent, which was due to  
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the landlord, the tenant against whom the execution issued is a competent witness for the plaintiff. *Read v. Thoyts*, 515

2. In such an action the defendant pleaded that no rent was in arrear, and that the sheriff had no notice that any rent was in arrear, thus admitting the execution and the taking by the defendant. It was proved that the goods were actually taken by M., and had never been taken except on that occasion:—*Held*, that as there had been no other seizure, this sufficiently showed M. to have acted by the authority of the defendant, without proof of any warrant. *Ibid*.

8. In such an action there was in addition to the special count, a count in trover to which the defendant pleaded not guilty, and that the plaintiff was not possessed; and the plaintiff in addition to the proof that a year's rent was due, gave in evidence an absolute bill of sale, by which the tenant, before any rent had become due, assigned all his goods (including those taken in the f. fa.) to the plaintiff for a debt, the tenant remaining in possession of the goods:—*Held*, that there being no evidence on the latter count to connect the sheriff with the taking of the goods, the plaintiff must fail on that count; but that if the jury thought the bill of sale void, as against the execution creditor, they might find for the plaintiff on the first count for the amount of the year's rent; and the jury having found for the plaintiff on the first count, and for the defendant on the second count, the judge would not certify under the stat. 4 Anne, c. 16, s. 5, to exempt the defendant from costs on the pleas pleaded by him to the first count of the declaration. *Ibid*.

SHIPPING.

*See* DEMURRAGE.

1. *Semble*, that the broker's commission on the freight of ships is five per cent., unless there be a special agreement on the ship he chartered upon a tender. *Brown v. Nairne*, 204

2. The usage is, when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charter-party is effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. *Burnett v. Bouch*, 620

8. If a broker be authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for

- that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other. *Burnett v. Bouch*, 620
4. A., a broker, introduced a merchant and a ship-owner together to treat for a charter-party; they finally made the charter-party through B., another broker. In an action by A. for his commission, the particulars of demand were "for commission due to the plaintiff for procuring a charter for a vessel called the W.;"—*Held*, sufficient. *Ibid.*
  5. In an action for a libel upon a ship imputing unseaworthiness, the plaintiff may give evidence of special damage, although he has not avowed it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. *Ingram v. Lawson*, 328
  6. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was *held*, that in the estimate of damages the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. *Ibid.*
  7. In an action against the proprietors of a steam vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. *Muddle v. Stride*, 380
  8. *Whether*, in such a case, on the arrival, and detention by foul weather of the vessel at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them—*Quere*. *Ibid.*
  9. The question in what is called a running down case is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains, *not* to the amount of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the by-laws of the River Thames, at the time when she came in collision with a barge, it was *held*, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. *Sills v. Brown*, 601
  10. The deposition of a witness taken before the coroner in an inquiry, touching the death of a person killed by the collision, is receivable in evidence in an action for damages, if the witness be shown to be beyond the sea. *Ibid.*
  11. A nautical witness cannot be asked, whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. *Ibid.*
  12. Evidence of a practice in contravention of a by-law is not receivable. *Ibid.*
  13. The rule of the river is, that if a light vessel is going free, and a loaded vessel is coming close-hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Ibid.*
- ### SHOOTING.
- See ATTEMPTING TO DISCHARGE LOADED ARMS.*
1. Whether on a count charging a shooting with intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued—*Quere*. But if it be necessary that the jury should be satisfied of the intent, the circumstance that it would have been a case of murder if death had ensued, would of itself be a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. *Regina v. Jones*, 258
  2. A. was night-poaching in a wood belonging to B., and B. came up to A., and presented a pistol at him, saying, "Damn you, surrender;" A. said, "Now, don't you," and raised an air-gun, and discharged it, and wounded B. *Seemle*, that if B. had died, it would not have been a case of murder. *Ibid.*
- ### SHOP.
- See LARCENY IN A SHOP.*
- ### SOLICITOR'S BILL.
- See COMPANY, 4.*
- ### SPECIAL CONSTABLE.
1. If persons duly called upon by the magistrates to serve as special constables refuse to do so, the magistrates ought to cause them to be indicted. *Regina v. Vincent*, 91
  2. A special constable duly appointed under the stat. 1 & 2 Will. 4, c. 41, is appointed for an indefinite time, and remains a con-

stable till his services are either determined or suspended under the 9th section of that statute, and, being so appointed under that statute, he has all the authority of an ordinary constable until his services are either determined or suspended. *Regina v. Porter*, 778

### STAMP.

See LANDLORD AND TENANT, 4.

1. A paper in the following form, signed by the party, "Memorandum, 30th April, 1836, Settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for, (signed) J. T.;" stamped with an agreement stamp, is receivable in evidence without a receipt stamp. *Tebbutt v. Ambler*, 60
2. A promissory note was endorsed as follows;—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of, &c., and order the within-named T. F. H. [the maker of the note] to pay him the amount thereof, and all interest in respect thereof. (Signed) H. O. R.:"—*Held*, that this endorsement did not require a stamp. *Richards v. Frankum*, 221
3. An I O U, which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relate to an amount under £20. *Evans v. Philipotts*, 270

### STATUTE OF FRAUDS.

See GOODS SOLD.

### STATUTE OF LIMITATIONS.

See LIMITATIONS.

### STATUTE, PLEA BY.

See PLEADING, 2, 3.

### STEAM-ENGINES USED IN MINES, DESTROYING.

See MINING-ENGINES.

### STOLEN GOODS.

See MARKET OVERT.

### SUBSCRIBING WITNESS.

See ATTESTATION.—WITNESS, 2, 3.

### SUGAR.

The object of the legislature in passing the stat. 8 & 4 Will. 4, c. 58, was to insure that double-refined sugar should be pure sugar; and, though it says that the single-refined sugar from which it is made must be of a uniform whiteness throughout, that must be taken to mean of a uniform whiteness according to the subject-matter;

and does not mean that every loaf or lump must be free from all discoloration. By that statute standard samples must be provided for the purpose of comparing double refined sugar with them; and these standard samples must be made from single-refined sugar of a uniform whiteness throughout, and double-refined sugar entered for the bounty, if it be not of a quality equal to the standard sample, may be seized:—But there is not, in point of law, any right to seize such sugar on account of a discoloration which prevents it from being of a uniform whiteness, if it be in fact equal in quality to the standard sample, and the discoloration does not arise from impurities. *Wackerbath v. Rich*, 699

### SUICIDE.

A person cannot be tried for inciting another to commit suicide, although that other commit the suicide. *Regina v. Ledington*, 79

### THREATENING TO ACCUSE, OBTAINING MONEY BY.

A. & B. were indicted for the offence of robbery. The jury found that A. took the property of the prosecutor from him by violence, and that B. was present during part of the time, and that he was a party with A. to a design to bring the prosecutor to the place where he was robbed by A., and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the taking of the property from the prosecutor by violence:—*Held*, by all the Judges, that in order to convict B., the indictment should have been framed on the statute 1 Vict. c. 87, s. 4, and that he could not since the passing of that statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Regina v. Henry*, 809

### THREATENING TO LAY AN INFORMATION, OBTAINING MONEY BY.

A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not, in fact, sold any spirits; but he gave A. the money to prevent an information:—*Held*, that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out. *Regina v. Best*, 868

### TIME, REASONABLE.

See GUARANTEE.

### TRADE, USAGE OF.

See AGENT'S COMMISSION.—AUCTIONEER'S

COMMISSION.—BROKEN'S COMMISSION.—  
CARPENTER.—COLLIERS.

### TRAVERSE.

See POSTPONING TRIAL, 4, 5.

1. A. was indicted at the assizes for perjury; he had neither been in custody nor on bail. After the bill was found, A.'s counsel applied to have the case tried at the same assizes at which the bill was found. The counsel for the prosecution objected, and stated that no notice had been given by the defendant to the prosecutor of his intention to try at these assizes, except the present application:—*Held*, that the prosecutor could not be compelled to try at these assizes, and the case therefore stood over to the next assizes. *Regina v. Trenfield*, 284
2. If a person be indicted for a misdemeanor, and it be a different misdemeanor from that for which he has been committed or held to bail, he is entitled to traverse, although he has been committed or bailed more than twenty days. *Regina v. Howell*, 437

### TREASON.

See CONSPIRACY.

1. To constitute the treason of levying war against her majesty within the realm, there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; and if a person act as the leader of an armed body who enter a town, and their object be neither to take the town nor attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanor, is not high treason. *Regina v. Frost*, 129
2. In a case of high treason the prisoner is not bound of necessity to show what was the object or meaning of the acts done. The offence charged must be made out by those who make the charge. *Ibid.*
3. The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it be made appear to the court that the money forms no part of the proof against him. *Id.* 181
4. Counsel may be assigned for a prisoner charged with high treason upon an application made to the clerk of the crown during an adjournment of the commission between the finding of the indictment and the arraignment, or the prisoner will be allowed, if he wishes it, to delay naming his counsel till he is brought up to be tried. *Id.* 182
5. Prisoners charged with high treason will be allowed copies of the depositions against them on the terms prescribed by the stat. 6 & 7 Will. 4, c. 114, s. 8. *Ibid.*

6. A person charged with high treason cannot be allowed by the court before which he is tried to have two attorneys unless they be partners. *Ibid.*
7. The court before whom a prisoner is charged with high treason will not order that papers taken from his house should be restored to him, neither will they order that he shall be furnished with copies of them. *Id.* 133
8. The only counsel in a case of high treason who are recognised by the court are the two counsel who are assigned by the court, and the court will not take notice of any assistant counsel. *Id.* 134
9. In a case of treason where the prisoner's counsel asked that the names of the jurors should be taken from a ballot-box instead of being called over in the order in which they stood in the panel, which was alphabetical, and this proposition was acquiesced in by the attorney-general, the court allowed the names of the jurors to be taken from a ballot-box; but if the attorney-general had objected, the court would not have granted the application. *Id.* 135
10. The provisions of the stat. 6 Geo. 4, c. 50, s. 29, with respect to challenging of jurors by the crown, is a mere re-enactment of the law on this subject as it was before the passing of that statute. *Id.* 136
11. The challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *Id.* 137
12. In charging a jury with a prisoner in a case of high treason, it is not necessary to read the whole of the indictment at length to the jury, unless the prisoner or his counsel wish it; it is sufficient for the clerk of the crown to state the substance of it. *Id.* 138
13. During a trial for high treason, which was expected to last several days, the court ordered that the prisoner's attorney should have access to him every day after the rising of the court, till 10 p. m., and before the sitting of the court from 7 a. m., although it was stated by the governor of the prison that the prison was not open for any other purpose till half-past 7 a. m., and was shut for the night at 9 p. m. *Ibid.*
14. In a case of high treason a witness was described in the list of witnesses as "S. S., of the parish of St. W., in the borough of N., in the county of M., labourer." N. was a place with 6,000 inhabitants, and formed only a part of the parish of St. W., which was a large parish extending beyond the borough of N.:—*Held*, sufficient, and that it was neither a misdescription nor too general. *Id.* 147

15. In a case of high treason or conspiracy the prosecutor may either prove the conspiracy which renders the acts of the co-conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy; therefore, in a case of high treason, where it appeared that a party met, which was joined by the prisoner on the next day, the counsel for the prosecution was allowed to ask what directions one of the party gave on the day of their meeting as to where they were to go, and for what purpose. *Regina v. Frost*, 149
16. On a trial for high treason a witness was described in the list of witnesses as "of Cross-y-Cylog, in the parish of L." The witness stated that he lived near Cross-y-Cylog (which means Cross-of-the-Cock), and that there were two public-houses, each so called, and that his house was between them and sixty yards from each. It was also proved that there was a cluster of houses at this place, and that a witness had directed invoices to one of them as Cross-y-Cylog:—*Held*, that the witness was not properly described. *Id.* 150
17. In a case of high treason a witness was described in the list of witnesses as "M. J., of P., in the parish of St. W., in the county of M., sometimes abiding at the house of his son J. J., in the parish of B., in the said county." The witness occupied a house at P., in the parish of St. W., in which his wife resided, he going to work with his son and returning to his house at P. about three days in every two months. The son's house was in the parish of M. and not in the parish of B.:—*Held*, that if the witness had been described as of P., in the parish of St. W., that would have been sufficient, but that, as the latter part of the description was incorrect, it vitiated the whole. *Id.* 151
18. In a case of high treason evidence had been given for the prosecution that an armed party attacked the W. hotel, in which the magistrates and troops were stationed. To show that the intention of the party was not treasonable, but was merely to procure the release of certain prisoners, a witness was called to prove that on the party arriving at the hotel gate, they were asked by a special constable what they wanted, when one of them answered, "Surrender up your prisoners." It was proposed to call evidence in reply to show that that was not said at the hotel gate:—*Held*, that this was properly evidence in reply. *Id.* 159
19. In a case of high treason, where the Crown gave evidence in reply, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented on the evidence in reply also before the second counsel for the prisoner addressed the jury. *Id.* 160
20. On a trial for high treason it was objected, after the jury had been charged with the prisoner, but before the first witness was examined, that the prisoner had had no list of witnesses delivered to him under the stat. 7 Anne, c. 21. It appeared that the indictment was found on the 11th of December, and that on the 12th of December a copy of it and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and that on the 17th of December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of December. The objection to the delivery of the list of witnesses was, that the copy of the indictment and the lists of jurors and witnesses should have been all delivered at the same time simul et scilicet:—*Held*, by a majority of the Judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time, and the Judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial in order to give time for a proper delivery of the list. *Id.* 162
21. If, in a case of high treason, a point be reserved for the opinion of the fifteen Judges, their Lordships, if the point be argued, will only hear one counsel on each side; and as the counsel are in the nature of amici curiæ, their Lordships will hear counsel who were not assigned at the trial. *Id.* 165
22. If cases be reserved for two different prisoners on the same point, and both are argued, the Judges will hear each case quite separately, unless the counsel consent to some other arrangement. *Ibid.*
23. On a trial for high treason any objection to the description of the witness in the list of witnesses must be taken on the voire dire, and comes too late after the witness is sworn in chief. *Id.* 183
24. If, in an indictment for treason, it be stated as an overt act that the prisoner discharged at the Sovereign a pistol loaded with powder and a certain bullet, and thereby made a direct attempt on the life of the Sovereign: the jury must be satisfied that the pistol was a loaded pistol: that is, that there was something in it beyond the powder and wadding; but it seems it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet. *Regina v. Oxford*, 525
25. If to such a charge the defence set up be insanity, the question for the jury will be whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing: or, in other words, whether he was under the influence of a diseased mind, and was



really unconscious at the time he was committing the act that it was a crime.

*Regina v. Oxford*, 525

26. If the jury in such a case are of opinion that the prisoner did not in fact do all that the law deems essential to constitute the offence charged, they must find him not guilty generally; and the Court have no power to order his detention under the 39 & 40 Geo. 3, c. 94, a. 2, although the jury should be clearly of opinion that the prisoner was in fact insane, such a state of circumstances appearing to be *casus omissus* in the act. *Ibid.*

### TRIAL.

*See TRAVERSE.*

1. A defendant, who surrenders to take his trial on a charge of misdemeanor, need not stand at the bar to be tried, but may be allowed a place at the table of the Court. *Regina v. Lovett*, 462
2. A person who surrenders to take his trial on a charge of felony at the assizes, must be tried at the bar of the Court, and cannot take his trial in any other part of the Court, even with the consent of the prosecutor. *Regina v. St. George*, 483

### TRIAL, POSTPONING.

*See BAIL, 1.—POSTPONING TRIAL.*

### TROVER.

*See LIEN.*

### UNDERLETTING.

*See LANDLORD AND TENANT, 1.*

### UNITY OF POSSESSION.

*See EASEMENT, 1.*

### UNLAWFUL ASSEMBLY.

*See CONSPIRACY.*

1. Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. *Regina v. Vincent*, 91
2. Any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly, and it is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has

occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. *Regina v. Neale*, 431

3. The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. *Ibid.*

### USAGE OF TRADE.

*See AGENT'S COMMISSION.—AUCTIONEER'S COMMISSION.—BROKER'S COMMISSION.—CARPENTER.—COLLIERS.*

### USE AND OCCUPATION.

*See LANDLORD AND TENANT, 1, 2.*

### VARIANCE.

*See AMENDMENT.—COIN, 2.*

### VENUE.

*See PARISH.*

At the Central Criminal Court a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of W." The prosecutor stated that the correct name of the parish was *St. Mary W.* In the statute 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act), s. 2, this parish is called "the parish of W.:"—*Held*, sufficient. *Regina v. St. John*, 40

### VERDICT.

1. In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500—the jury gave a verdict for £250 only, and on being asked how they made up their verdict, replied that in their opinion there were faults on both sides:—*Held*, that notwithstanding this the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering. *Raisin v. Mitchell*, 613
2. The plaintiff is to prove his case to the satisfaction of the jury; and if he leaves it doubtful either from the circumstances which surround it or from the character of his witness, the defendant is entitled to the verdict. *Long v. Hitchcock*, 619

### WARRANTY.

*See BEGIN, RIGHT to, 6.*

### WILL.

*See ATTESTATION, 2.—WILL, SECRETING.*

WILL, SECRETING.

1. *Seemle*, that in an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 22, for destroying or concealing a will for any fraudulent purpose, the purpose ought to be stated in the indictment. *Regina v. Morris*, 89
2. If a defendant concealed a will, and the money which ought, by the will, to have gone to A. and B., and with it paid the debts of the husband of the next of kin to whom he was a creditor, this would be a fraudulent purpose within the stat. 7 & 8 Geo. 4, c. 29, s. 21. *Ibid.*

WITNESS.

*See* ACCESSARY BEFORE THE FACT, 8.—EVIDENCE, 6.—SHERIFF, 1.—TREASON, 14, 16, 17, 23.

1. The calling of a witness, whose name is on the back of the indictment for the other side, to cross-examine, is by no means of course. It is discretionary even in felony, but it is a discretion always exercised, and it seems that the same discretion may well be exercised in misdemeanor. *Regina v. Vincent*, 91
2. A subscribing witness who resides in Dublin is out of the jurisdiction of the courts of this country so as to let in proof of his handwriting, the same as if he were dead. *Doe d. Counsell v. Caperton*, 112
3. If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if non est factum be pleaded, call the subscribing witness, and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness. *Cronk v. Frith*, 197

4. A butcher sued three of the directors of a Zoological Society for goods supplied for the animals. For the defence a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants:—*Held*, that the witness was not competent without being released by all the three defendants, but that he would be so, if released by all three defendants, without being released by the other shareholders. *Betts v. Jones*, 199
5. A., an attorney, caused B. to be subpoenaed as a witness in a cause in which A. was attorney, and B., before he went to the assizes, asked A. who was to pay him? and A. said he would do so. After the assizes, at which B. attended and was examined, A.'s clerk, by the direction of A., gave B. an I O U for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party after the costs in the cause had been taxed:—*Held*, that B. might recover the amount from A. on a declaration containing counts for money had and received, and on an account stated. *Evans v. Philippotts*, 270

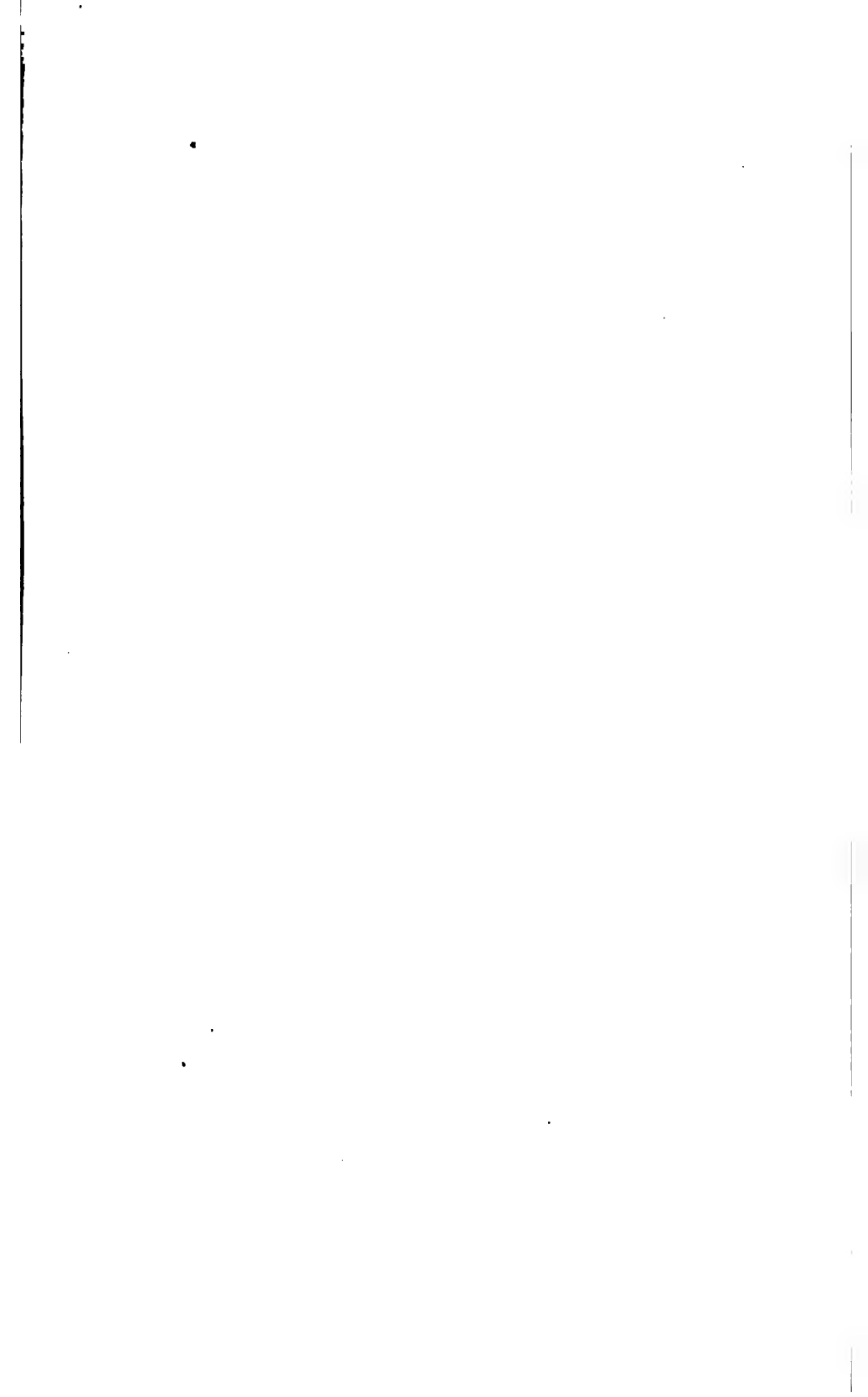
WOUNDING.

*See* ASSAULT, 6, 10, 11, 12, 18.—ATTEMPTING TO DISCHARGE LOADED ARMS.—SHOOTING.

On a charge of feloniously cutting with intent to do grievous bodily harm, it is immaterial whether, if death had ensued, the crime would have been murder or manslaughter. *Regina v. Nicholls*, 267

WRESTLING.

*See* FIGHTING.



**REPORTS**  
**OF**  
**CASES IN BANKRUPTCY,**  
**ARGUED AND DETERMINED**  
**IN**  
**THE COURT OF REVIEW,**  
**AND ON**  
**Appeal before the Lord Chancellor.**

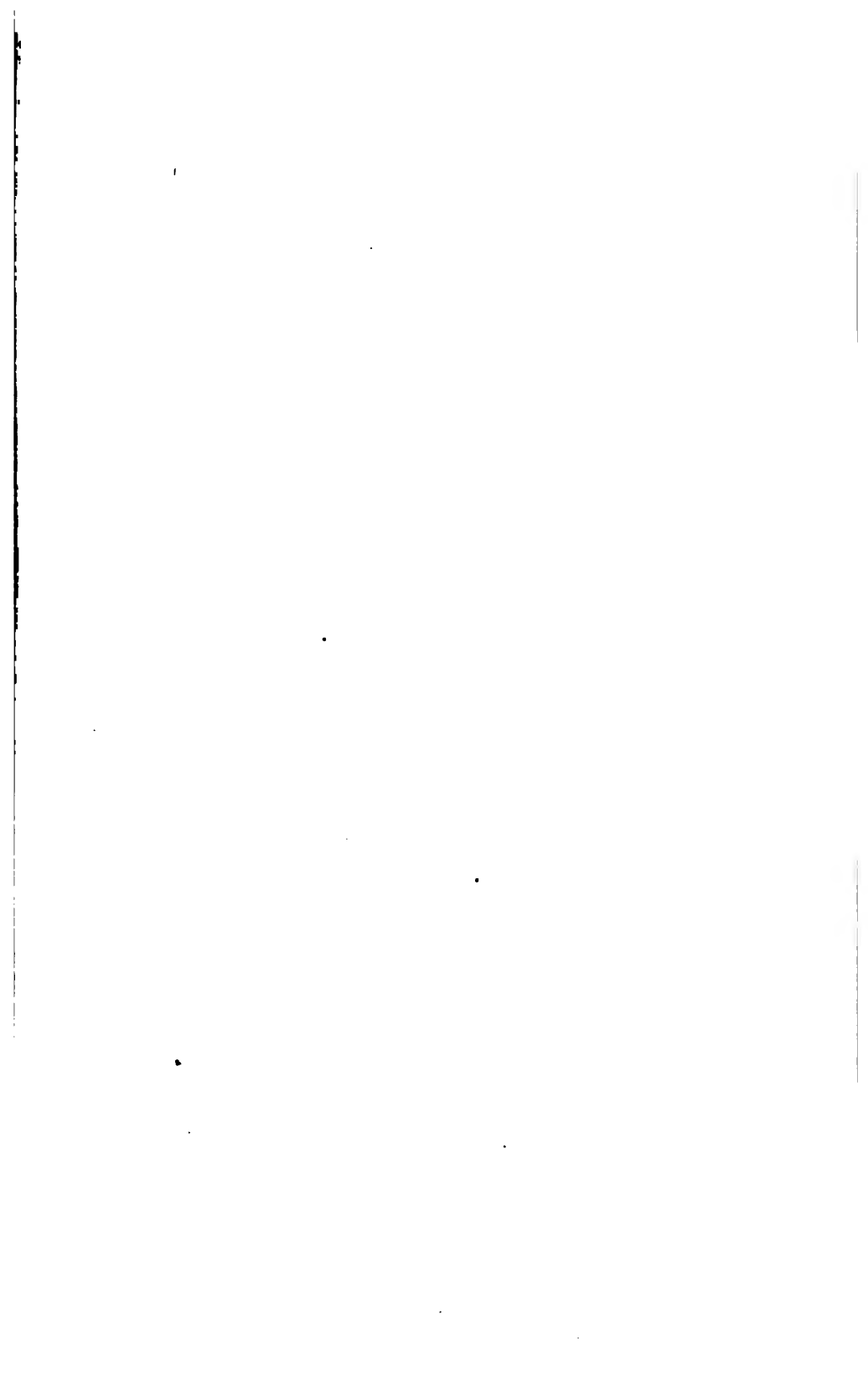
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# A T A B L E

OF

## THE NAMES, OF CASES

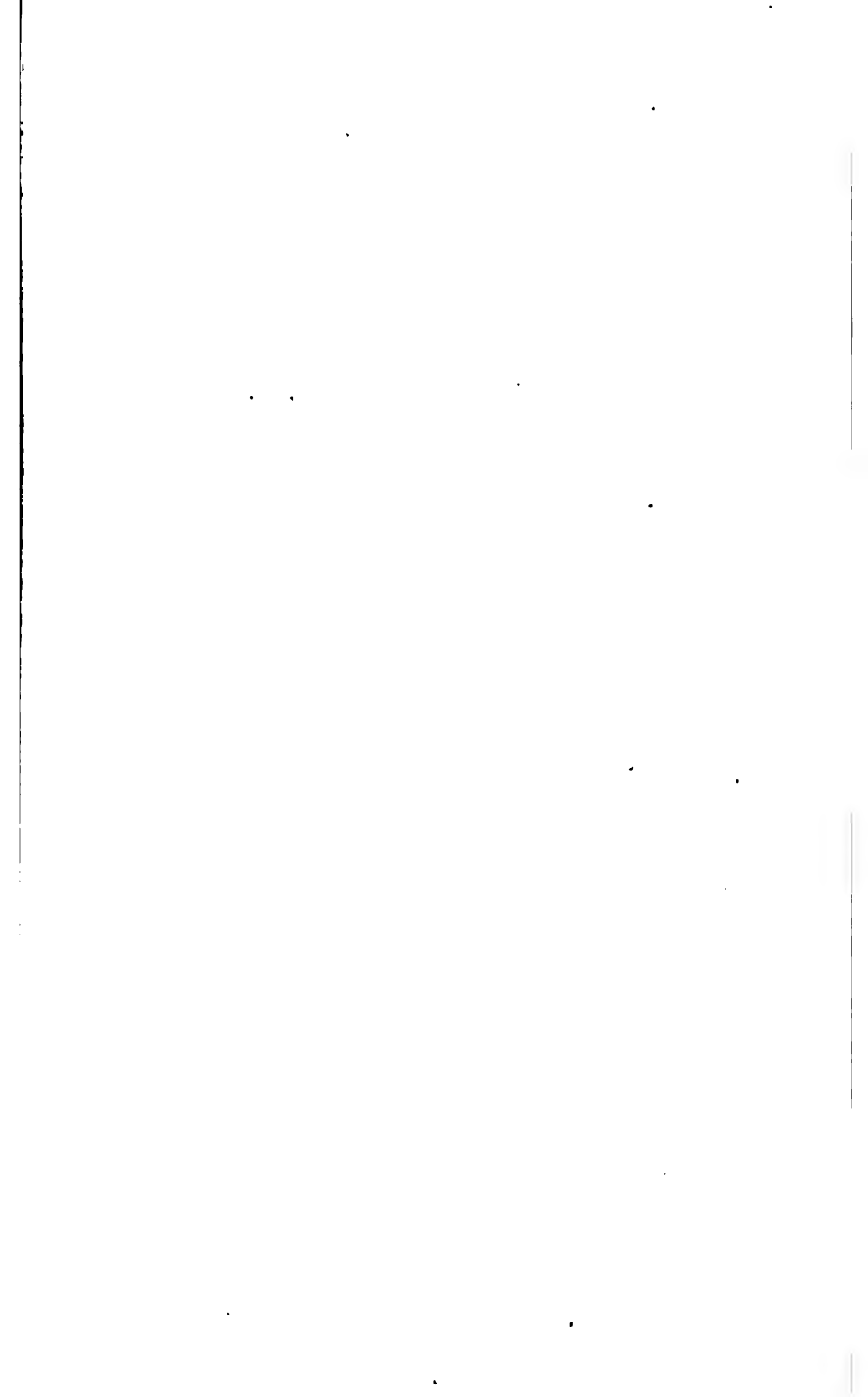
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**JUDGES**  
**OF**  
**THE COURT OF REVIEW,**

DURING THE PERIOD OF THE REPORTS CONTAINED IN THIS VOLUME.

Sir THOMAS ERSKINE, Chief Judge.

Sir J. CROSS, Judge.

Sir G. ROSE, Judge.

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**MEMORANDA.**

On the 23d April, 1835, Lord *Lyndhurst* resigned the Great Seal, which was thereupon put into commission, and on the following day delivered to the Right Hon. Sir *Charles Christopher Pepys*, Knt., Master of the Rolls, the Right Hon. Sir *Lancelot Shadwell*, Knt., Vice-Chancellor, and the Right Hon. Sir *John Bernard Bosanquet*, Knt., one of the Judges of the Court of Common Pleas, as Lords Commissioners.

In Hilary Term, 1836, the Lords Commissioners resigned the custody of the Great Seal, which was thereupon delivered to the Right Hon. Sir *Charles Christopher Pepys*, who was appointed Lord High Chancellor of England, and raised to the peerage by the title of Baron *Cottenham*, of Cottenham, in the county of Cambridge.

*Henry Bickersteth*, Esq., one of his majesty's counsel, was appointed Master of the Rolls, in the place of Sir *Charles Christopher Pepys*, and was also raised to the peerage, by the title of Baron *Langdale*, of Langdale, in the county of Westmoreland.

Their lordships took their seats in their respective courts on Tuesday, the 19th January, 1836.



# CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

## *The Court of Review, &c.*

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**Ex parte WILLIAM LIVING.**—In the matter of JOHN TOMBS and THOMAS TOMBS.—p. 1.

A legal mortgagee is not entitled to the rents of the mortgaged premises, until he enters; and the commissioner's order for the sale of the property is not equivalent for this purpose.

THIS was the petition of a legal mortgagee, for liberty to bid at the sale of the mortgaged property, and to receive the rents and profits which had already become due, or would fall due previous to the sale.

On the 21st February, 1834, the bankrupts being then indebted to the petitioner in the sum of 2263*l.* 6*s.* 3*d.*, executed a mortgage to him of several leasehold houses for securing the payment of that sum, subject, however, as to part of the property which was comprised in one of the leases, to a lien of Warburton & Co., for the sum of 500*l.*, and to a certain under-lease thereof granted by the bankrupts to one George Vicatt; and subject also, as to other parts of the property, which were comprised in another of the indentures of lease, to a prior mortgage to one W. Teape, as well as to an under-lease to the wardens of St. Saviour's, Southwark.

On the 26th January, 1835, a fiat issued against the bankrupts, when the whole of the principal, with an arrear of interest, was due to the petitioner on the mortgage; and on the 12th March following, the commissioner, after certifying that 2323*l.* 9*s.* was then due to the petitioner on the mortgage, ordered the interest of the petitioner in that portion of the property on which there was no previous encumbrance, to be sold; and that out of the moneys arising from the sale, as well as out of the residue of the proceeds of the sale of the property mortgaged to H. Teape, after the satisfaction of H. Teape's mortgage, there should be paid to the petitioner what the commissioner had so found due to him.

It appeared, that rents to a considerable amount became due on the 25th March, from the tenants of the mortgaged property; which the petitioner contended ought to be applied in payment or reduction of the interest due upon the mortgages, in the first place, and then in liquidation of the principal due thereon respectively, as far as the same would extend.

Mr. *Moore*, in support of the petition.

Mr. *Monteath*, *contra*. This being the case of a legal mortgage, the mortgagee is not entitled to the rents and profits before he makes an entry. He has not done this, nor has he given any notice to the tenants. The mere order of sale by the commissioner gives him no right to receive the rents, for such order is not equivalent to an entry for the forfeiture

The court said there was no doubt, that in ordinary cases, an entry on the mortgaged premises was necessary to entitle the mortgagee to demand the rents, and that the order of the commissioner for the sale of the property was not equivalent for this purpose. Supposing no bankruptcy had intervened, and the parties had agreed between themselves for a sale, the mortgagee would in that case not be entitled to the rents until he had entered. An equitable mortgagee cannot enter on the premises, and is therefore obliged to apply for the interposition of this court to direct a sale; and he is held to be entitled to the rents from the time of the order for sale, because he might then have a receiver appointed the moment he asked it; and the order of sale, therefore, is considered as equivalent to the appointment of a receiver. But a legal mortgagee can enter, if he chooses, immediately on the forfeiture, and must stand on his legal right; he has already sufficient advantages over the other creditors.

Order made for leave to bid, but refused as to the rents.

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**Ex parte WILLIAM BARRINGTON the younger.**—In the matter of **WILLIAM BARRINGTON the elder.**—p. 3.

Notwithstanding a trader take the benefit of the insolvent act, and the debt of a creditor be duly inserted in the schedule, the debt is still a good petitioning creditor's debt to support a subsequent fiat.

THIS was an original petition to the Lords' Commissioners of the Great Seal, praying for an order to annul the fiat, on the ground that there was not a good petitioning creditor's debt. It appeared, that in the year 1829, the bankrupt took the benefit of the insolvent debtors' act, 7 Geo. 4, c. 16; when he owed a debt to one John Lowe, whose name was inserted in the schedule, but who died before the notice was sent to him which is required by the 42d section of that act, leaving E. L. Sidebotham and another person his executors. In February, 1833, the executors issued a fiat against the bankrupt on the debt included in the schedule delivered into the Insolvent Court. At a sale of the bankrupt's estate under the fiat, the petitioner was declared the purchaser of some land which formed a portion of the bankrupt's property; but he objected to the title, and refused to complete the purchase. On a petition, however, that was presented by the assignee to the Court of Review, the petitioner was ordered to complete the purchase; (a) which decision was afterwards confirmed on appeal to the lords' commissioners. (b) The question was, whether the debt of the petitioning creditors was sufficient to support the fiat.

Mr. *Jacob*, and Mr. *Bethell*, in support of the petition. The present case is distinguishable from that of *Jellis v. Mountford*, 4 B. & Ald. 256, (6 E. C. L. R. 420,) which may be cited by the other side, and in which it was held, that a creditor of an insolvent trader may issue a commission against him, after his discharge under the insolvent act, notwithstanding the creditor's debt was included in the schedule. But that case was decided under the 53 Geo. 3, c. 102, which differs from the last insolvent act of 7 Geo. 4, c. 16. If the present fiat is allowed to stand, the con-

(a) See *Ex parte Sidebotham*, 3 Dea. & Ch. 818.

(b) See *Ex parte Barrington*, 4 Dea. & Ch. 461.

sequence will be, that the old debts, from which the bankrupt was exonerated by his discharge under the insolvent act, will be revived, and proveable against his estate. That the old creditors are not entitled to a dividend *pàri passu* with the new creditors, appears manifest from the case of *Barton v. Tattersall*, 1 Russ. & M. 237. There a person had taken the benefit of the insolvent act on two different occasions; first in 1814, and then in 1820; he died in 1826, leaving assets more than sufficient for payment of all the debts which he had contracted subsequent to the second insolvency; and the court decided, that the assets should be applied, first, in payment of those subsequent debts; secondly, of the debts under the second insolvency; and lastly, of the debts under the first insolvency. If it should be objected, that the petitioner in this case has not a sufficient interest to entitle him to petition to annul the fiat, the answer is, that he is aggrieved by having an estate forced on him as a purchaser, to which he insists the assignees can make no title; and it is settled in *Ex parte Lane*, Mont. 12, that any injured party may petition to supersede. The 13th section of the insolvent act, 7 Geo. 4, c. 57, provides, that notwithstanding the insolvency, a commission of bankrupt may be taken out within two months. The inference is, therefore, that after that period a commission cannot be issued, and that the assignment under the insolvency must stand good. If that is the construction of the insolvent act, what property can be affected by the fiat? If there is no estate on which it can operate, it is a nullity, as in the case of a third commission being issued against a bankrupt; *Fowler v. Coster*, 10 B. & C. 427, (21 E. C. L. R. 104.) There can be no good petitioning creditor's debt, unless an action at law can be brought for the recovery of it; and the language of the bond given by the petitioning creditor implies, that his debt is one which would support an action at law. A mere equitable debt will not sustain a fiat. The insolvent act declares that all future estate is to vest in the assignees under the insolvency; but if a subsequent fiat is permitted to operate on the insolvent's estate, that declaration is of no effect. The real object of a fiat is to give execution to those creditors, who, if a fiat had not issued, could by legal or equitable remedies have compelled payment.

Mr. *Swanston*, Mr. *Teed*, and Mr. *J. Russell*, for the assignee. The petitioner in this case cannot be heard to invalidate the fiat. He is not a creditor of the bankrupt, but merely a purchaser of land under the fiat, and he now applies to annul the fiat, because he dislikes his purchase. With respect to the arguments founded on the bankrupt's discharge under the insolvent debtors' act, 7 Geo. 4, c. 57, it is clear that that statute did not intend to exclude the right of a creditor to issue a commission of bankruptcy against the insolvent. For the 61st section, in enumerating the suits and executions, which the bankrupt is protected from, specifies any writ of *feri facias*, or *elegit*, on a judgment—any action on a new promise, or on any statute or recognisance, but makes no mention of a commission of bankrupt. The rule in the construction of the statutes must therefore prevail in this instance, namely, *expressio unius est exclusio alterius*. Then as to the debt of the petitioning creditor being inserted in the insolvent's schedule, this is not enough to bind the creditor; for the 7 Geo. 4, c. 57, s. 42, requires notice to be given to the creditors of the insolvent's intention to take the benefit of the act. Here, neither the petitioning creditors, nor their testator, had any such notice; notwithstanding an affidavit made in the Insolvent

Court states that the notice was served personally on John Lowe on the 9th January, 1830, the very day on which the executors were able to produce a certificate that Mr. Lowe was buried. The affidavit, also, is not signed (a) by the deponent, by whom it purports to have been made. [Lord Commissioner SHADWELL. By the 42d section of the Insolvent Act, notice is to be given, as the court shall direct. Is there any general rule of the Insolvent Court requiring an affidavit?] There is. The service of the notice is, indeed, the main protection of the insolvent against the claims of the creditor. But in the present case, if the petitioning creditor had brought an action against the bankrupt, and the latter had moved to stay proceedings by reason of his discharge under the insolvent debtors' act, the court could make no order, inasmuch as the bankrupt could not prove the service of the notice upon the creditor. The case of *Jellis v. Mountford*, 4 B. & Ald. 256, (6 E. C. L. R. 420.) is conclusive in favour of the validity of the present fiat; for no material difference exists between the then insolvent act, and that which is now in force. And with respect to *Fowler v. Coster*, and that class of cases, which decide that the lord chancellor has no power to issue a second commission, before the bankrupt has obtained his certificate under the first, they were all overruled by Lord BROUGHAM in *Ex parte Welch*, Mont. 276.

Mr. Jacob, in reply. It has been contended by the other side, that the petitioner in this case has no interest, that can enable him to apply to annul the fiat. But the order made against him by the Court of Review, for the specific performance of an agreement to purchase under a fiat,—supposing it to be invalid,—is sufficient to give him a *locus standi* in court, for the purpose of setting it aside. It is admitted, that the petitioning creditors in this case had no notice within the terms of the 42d section of the insolvent act; but that is a question for the Insolvent Court, which may, if it please, on that ground revoke the insolvent's discharge. The creditor cannot avail himself of the objection in another court. Suppose, an order of the Court of Chancery was given in evidence on a trial at law, and it was objected that the adverse clerk in court had not been served with a subpoena to hear judgment, there being no affidavit of such service,—would that nullify the order, or render it inadmissible in evidence? Clearly not; it must be regularly set aside, before it can be impeached in any other court.

Lord Commissioner SHADWELL.—The question we have to determine in this case is, whether a fiat can be supported against a party, which is issued after he has obtained his discharge under the insolvent debtors' act, the debt of the petitioning creditors having been included in the insolvent's schedule. It has been insisted, that after such insertion of the debt and name of the creditor in the schedule, the debt is gone and destroyed for all purposes whatever. The question entirely depends upon the construction of the insolvent act, 7 Geo. 4, c. 57. Now, on looking into the act, the first thing that strikes one is, that the legislature has nowhere in positive terms declared the debt to be extinguished for all purposes, nor that no commission shall be afterwards issued; on the contrary, the 13th and 14th sections of the act expressly contemplate the taking out a commission of bankrupt. For the 13th section declares,

(a) This turned out to be the fact. For on Lord Commissioner Shadwell sending for the original affidavit from the Insolvent Debtors' Court, it appeared to have been sworn at Manchester, before an official person, but without any signature of the deponent.

“that the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy, from the time of filing such petition.” And the 14th section directs, that where the assignment to the provisional assignee of the Insolvent Court shall become void by reason of the insolvent being declared bankrupt, within the period limited by the act, the assignment and schedule shall nevertheless be filed, and the court proceed to adjudicate. These sections must be taken to apply to cases, where the act of bankruptcy has been committed, before the party has petitioned to take the benefit of the act. Then the 14th section goes on to provide, that if, after the execution of such assignment by the insolvent, he shall obtain his certificate under any such commission of bankrupt, the right and interest of the provisional assignee in any property, real or personal, whatsoever, “remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him,” shall be the same as if the assignment had been valid at the time of the execution thereof. It is perfectly plain, therefore, as it appears to me, that the legislature contemplated that a remedy might be had for the payment of debts by means of a commission of bankruptcy, notwithstanding the discharge of the party under that act.

The 11th section of the act directs, that the insolvent shall, at the time of subscribing his petition, execute a conveyance and assignment to the provisional assignee of all his right and interest in all his real and personal estate, and of all future estate and effects, which the prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge, in pursuance of the act. This section, therefore, provides for one species of future estate, namely, such as may come to the insolvent after the execution of the conveyance, and before the operation of his final discharge, leaving property afterwards acquired open to the operation of a subsequent clause.

The 46th section enacts, that upon the insolvent swearing to the truth of his schedule, and executing such warrant of attorney as is directed by the act, the court may adjudge that he shall be discharged from custody, at such time as the court shall direct, as to the several debts due at the time of filing his petition to the several persons named in his schedule as creditors. That section seems to point to this, that the insolvent shall be discharged from prison, and that his person shall be protected as to the debts therein mentioned.

The 57th section enacts, that before any adjudication shall be made, the court shall require the insolvent to execute a warrant of attorney to authorize the entering up of a judgment against him in the name of the assignee, for the amount of the debts stated in the schedule; and if at any time it shall appear that the insolvent is of ability to pay such debts, or that he is dead, leaving assets for that purpose, the court may permit execution to be taken out upon such judgment for such sum as the court shall order, to be distributed rateably amongst his creditors, as in the case of a dividend; and such further proceedings may be had upon such judgment, from time to time, until the whole of the debts shall be fully paid and satisfied. The debts here alluded to, are the debts specified in



the insolvent's schedule; which, therefore, in the contemplation of the statute, still exist, notwithstanding his discharge.

The 58th section provides, that where the insolvent shall, after his discharge, become entitled to property, which cannot be taken in execution under the judgment, and the insolvent refuses to convey it to the assignee, the assignee may apply to the court; which may order the insolvent to be imprisoned until he does convey it.

Now, it is very remarkable, that the legislature should contemplate a proceeding for the satisfaction of the insolvent's debts, by a legal process against his future property, and yet provide for the recovery of it in this vague and collateral manner. If the insolvent become subsequently entitled to stock, there is nothing to prevent that from vesting in his assignees, the same as any other chattel; for that is expressly provided for by the 59th section. The legislature, therefore, could never mean that property subsequently acquired by the insolvent should not be liable to the payment of his debts; notwithstanding the provisions of the 61st section, which I shall come to presently.

The 60th section of the act declares, that no person who shall have become entitled to the benefit of the act, shall at any time thereafter be imprisoned, by reason of the judgment so as aforesaid entered up against him, or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or by reason of any judgment, decree, or order for payment of the same; but that upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or by reason of any such debt, &c., it shall and may be lawful for any judge of the court, from which any process shall have issued in respect thereof, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody; unless it shall appear to the judge, that such adjudication as aforesaid was made without due notice (where notice is by the act required) being given to or acknowledged by the plaintiff, or being by him dispensed with by the acceptance of a dividend under the act, or otherwise; and the judge has also a discretionary power to order costs to be paid to the prisoner, which are incurred on such occasion. This section plainly confines the benefit to the exemption of the insolvent's person from arrest.

Then the 61st section enacts, that after any person shall become entitled to the benefit of the act, no writ of fieri facias, or elegit, shall issue on any judgment obtained against him, for any debt or sum of money to which he shall have so become entitled, nor in any action upon any new contract, or security for payment thereof, except upon the judgment entered up against the insolvent according to the act; and that if any suit or action should be brought, or any scire facias be issued against such person, his heirs, executors, or administrators, for any such debt or sum of money, &c., it shall be lawful for him or them to plead generally that such person was duly discharged according to the act, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may show the defendant not to be entitled to the benefit of the act, or that he was not duly discharged according to the provisions thereof, in the same manner as the plaintiff might have replied, in case the defendant had pleaded specially.

Now, it appears to me, from reading this last section, that it only applies to legal proceedings; for though the word "suit" might, without any thing further, mean a suit in equity, yet an action at law is also denominated a suit; and when the section provides that the party may "reply generally," it could not contemplate a suit in equity, to which the expression would be inapplicable. But the whole language of the statute evidently points to this, that notwithstanding the discharge of the insolvent, the debt was intended to exist, and continue still a legal debt, until satisfaction by payment; and, consequently, it is one sufficient to support a fiat in bankruptcy.

I think it unnecessary to refer to the case of *Jellis v. Mountford*, 4 B. & Ald. 256, (6 E. C. L. R. 420,) as that was decided under a different act of parliament; but it is a complete authority for the decision of the present case, so far as the reasoning in regard to the operation of the then act is applicable to that which is now in force.

Upon the whole of the case, therefore, my opinion is, that the fiat is valid, and that the petition ought to be dismissed with costs.

LORD COMMISSIONER BOSANQUET.—I am also of opinion that this petition must be dismissed. I shall not go into the first question, namely, whether the debt of the petitioning creditor was sufficiently described in the insolvent's schedule; for my opinion proceeds on the same grounds as have been stated by my brother lord commissioner. It has been laid down, however, by several judges, that the clause in the act relating to description is to be construed liberally. It has been contended, that the notice required by the act of parliament to be given by the insolvent was insufficient; and four or five cases were cited in support of that position. I think it unnecessary, however, to consider that question; because, even admitting the sufficiency of the notice, and that the description of the debt in the insolvent's schedule is correct, I think there is a sufficient debt remaining due to the petitioning creditors to support the fiat. That it was a good debt owing to their testator, John Lowe, at the time of the bankrupt taking the benefit of the insolvent act, there is no doubt whatever; and the question is, whether that debt has been discharged by the provisions of the 7 Geo. 4, c. 57. Now, what is the benefit to which the insolvent is entitled under the provisions of this act? By the 46th section it is declared, that upon the insolvent doing certain things therein specified, the court may adjudge "that such prisoner shall be *discharged from custody*, as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition." What that section provides, therefore, is, that the insolvent shall be discharged from *arrest*; not that he shall be discharged from his *debts*. Then, if we look to the 60th and 61st sections of the act, the same construction applies to them. Thus, the 60th section enacts, that no person, who shall become entitled to the benefit of the act, shall at any time thereafter be *imprisoned*; but that upon every *arrest or detainer in prison*, a judge may *release such prisoner from custody*. And the 61st section enables the insolvent, in case of any suit or action being brought against him, to plead generally, "that he was duly *discharged* according to this act by the order of adjudication." The question then arises, what is that discharge? Does the act intend to discharge him from the *debt*? If so, it is very inaccurately worded; for it was easy to have said, "shall be discharged from the debt." That the statute contemplated the issuing of a commission of bankruptcy

after the discharge of the insolvent, plainly appears from the language of the 13th and 14th sections. A question similar to the present was decided in the case already referred to of *Jellis v. Mountford*, 4 B. & Ald. 256, (6 E. C. L. R. 420;) which, though it did not turn on the construction of the last insolvent act, arose out of an act *in pari materia*, namely, the 53 Geo. 3, c. 102, which contained expressions much stronger in favour of the absolute discharge of the insolvent, than the present act contains; and in that case, the Court of King's Bench held, that the debt was not discharged, but was still capable of supporting a commission. One of the judges there observes, that although the insolvent debtor's act may be a bar to an action, yet the creditor is not thereby deprived of all legal remedy. There are some words introduced into the last act, which are not in the former: thus, in the 61st section it is declared, that the insolvent shall be discharged from "any new contract;" which seems to imply that the old debt must still exist, as a consideration for such new contract. It seems to me, as Lord TENTERDEN remarked in *Jellis v. Mountford*, that "if the legislature had intended to extinguish the debt, one word would have been sufficient; but no such word is found in the act of Parliament. On the contrary, for all purposes of obtaining relief and ultimate payment, in common with the rest of the creditors, the debt is still recognised as in existence." I think, therefore, that the debt in the present instance is a good debt to support the fiat.

Petition dismissed with costs.

Ex parte HARE and others.—In the matter of WILLIAM FEAR and HENRY COWARD; and in the matter of JAMES COWARD.—p. 16.

H. takes a house in his own name, and puts his own furniture therein, for the use of the firm of H. and J.; the rent and other expenses are paid by the partnership, the apprentices are boarded and lodged there, and the house is occupied entirely for the purposes of the trade; J. living in the house, and H. himself residing elsewhere: *Held*, that the furniture must be considered as in the reputed ownership of H. and J., and as forming part of the joint capital and stock of the partnership.

THIS was the petition of the assignees of Fear and Coward for the delivering up of household furniture and other effects claimed by them as belonging to the bankrupt, Henry Coward, under the following circumstances:—

Some time previous to the 10th August, 1833, Henry Coward, James Coward, and one Richard Moore, carried on the business of linen-drappers in partnership, at No. 20, Bond Street, Bath, under the firm of Cowards and Moore. Henry Coward also carried on the business of an upholsterer at Bath, in copartnership with William Fear, under the firm of Fear and Co., from January, 1832, till the 4th December, 1833. On the 10th August, 1833, the copartnership between Cowards and Moore was dissolved by mutual consent, as far as regarded Moore, and thenceforth Henry Coward and James Coward carried on the business in copartnership till the time of their bankruptcy. On the 4th December, 1833, a joint fiat in bankruptcy was issued against William Fear and Henry Coward, under which they were duly declared bankrupt, and the petitioners were chosen assignees.

On the 10th December, 1833, a separate fiat was issued against James

Coward, under which he was also duly declared a bankrupt; upon which his assignees possessed themselves of certain household furniture, linen, and china, found in the house, No. 20, Bond Street, Bath, to the value of 308*l.* 18*s.*, insisting that the same was not distributable among the separate creditors of Henry Coward. The petitioners, on the contrary, contended, that the whole of these effects were the *bonâ fide* property of Henry Coward, and that the same never formed, nor were considered part of the partnership property of either of the firms of Cowards and Moore, or Henry Coward and James Coward.

The prayer was, that the assignees of James Coward might be ordered to deliver up to the petitioners the household furniture, linen, and china, or to pay to them the proceeds thereof, for distribution among the separate creditors of Henry Coward; and that the costs of this application might be paid by the assignees of James Coward.

In support of the claim of the petitioners, it was sworn by Henry Coward, that he bought the furniture with his own money, in 1824, and kept it at his then dwelling-house in Bath, until 1832, when he removed it to the house in Bond Street, which he took himself, and for which he was alone rated to the poor-rate; that the name of "H. Coward" appeared singly on the outside of the house until February, 1833, when the letter "H" was struck out, and the letter "s" added to the word "Coward;" that he daily took his meals there, and occasionally slept there; and that it was well known throughout Bath, that the furniture appertaining to the house belonged to himself.

On behalf of the respondents, it was sworn by James Coward, that although the lease was taken in the name of Henry Coward, it was really taken by him for the use of the partnership of Cowards and Moore, and that half the rent and the expenses of the house were paid by the firm of Cowards and Moore, until the 10th August, 1833; when James Coward, who had previously lived with Henry Coward at another house in Bath, removed to the house in Bond Street; that from that period all the expenses of housekeeping were paid by the partnership, and the apprentices were boarded and lodged there, and that part of the stock in trade was kept in the two drawing-rooms; that on the dissolution of the partnership between Cowards and Moore, it was provided by a clause in the articles of dissolution, that all the furniture, goods, linen, and other effects which had been supplied to Moore from the business, for the use of the house, should be considered to belong to the continuing partnership between H. and J. Coward; that Henry Coward did not sleep in the house after June, 1832; and that James Coward continued in possession of the furniture and effects until December, 1833, when he became a bankrupt. It was sworn also by Moore, that when he entered into partnership with Henry Coward, it was agreed between him and Henry Coward, that Moore should buy the furniture of Henry Coward, but that no valuation was made of it, nor was the purchase completed. And it was sworn by the collector of the poor-rate, that in the year 1833, the house was rated, generally, in the name of "Coward."

The affidavits in reply stated, that after the removal of the furniture from Henry Coward's former residence, and before the dissolution of the partnership of Cowards and Moore, Henry Coward often slept in the house in Bond Street, to which the furniture was removed; and that

James Coward, in his examination before the commissioners, stated that the furniture was the property of Henry Coward.

Mr. Swunston, and Mr. Ayrton, in support of the petition. This is entirely a question of reputed ownership, and we contend that Henry Coward was the real owner of this property, there being no suggestion that it was reputed to be the separate property of James Coward. It will be absurd to contend, as the respondents must do in this case, that the mere circumstance of placing goods and chattels belonging to A., in premises occupied by A. and B., is sufficient to give a reputation of ownership to B. Even supposing that James Coward had the furniture in his possession, the case does not come within the 72d section of the bankrupt act; for he was *not the reputed owner*; and that section, however beneficial it may be in some cases, ought not to be applied to any that do not come within the very words of it; *Greening v. Clark*, 4 B. & C. 316, (10 E. C. L. R. 341.) In *Storer v. Hunter*, 3 B. & C. 376, (10 E. C. L. R. 115—118,) Lord TENTERDEN says, that if the possession of things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind of any cautious person, that the person in possession is the owner. In the present case, if James Coward had any interest in this furniture, it could only be as tenant in common with Henry Coward; and it was said by Lord HARDWICKE, in the case of *Ex parte Flynn*, 1 Atk. 185, that the possession of one of several tenants in common is not evidence of a separate property in himself, the possession of one being the possession of all. An important distinction is drawn by Mr. Justice BAYLEY, in *Lingard v. Messiter*, 1 B. & C. 308, (8 E. C. L. R. 83,) as to the operation of the clause relating to the order and disposition of property in the possession of the bankrupt at the time of his bankruptcy. He says, "There are two classes of cases, where property demised to the bankrupt has been held to pass to his assignees, under the statute 21 Jac. 1, c. 19; the first is, where the bankrupt has once been the owner, the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner, and has continued in possession till the time of the act of bankruptcy, the presumption is, that he has then continued in possession in the character of owner; and, therefore, proof of those facts is *primâ facie* evidence that the bankrupt is both reputed and real owner. In the latter case, the mere possession of the things demised may not of itself be sufficient to show that the bankrupt was the reputed owner of them; and it may then be necessary for the assignees to establish that fact by other circumstances." Mr. Justice HOLROYD, also, in the same case, thus expresses himself: "The property in this case was demised to a person who had been the owner, and continued in his possession till the time of his act of bankruptcy. If it had been demised to a person who never had been the owner, and he afterwards became bankrupt, the mere possession might not be sufficient to show that he was either the real or reputed owner. The same distinction is taken by this court in *Ex parte Wiggins*, 2 Deac. & Chit. 270, in which the chief judge says, "Inasmuch as there has been no proof in this case, that the horse was ever the property of the bankrupts, slight circumstances will be sufficient to show that it did not really belong to them." And Sir J. CROSS also observes, "No one witness has

been called on the part of the assignees, to say, that he ever gave the bankrupts credit, as being the owners of the horse." There are also various other cases, in which the mere possession of property does not carry with it the reputation of ownership, as in the case of ready furnished lodgings; which is an instance put by Mr. Justice ASHURST, in *Walker v. Burnell*, 1 Doug. 317. And Mr. Justice BULLER, in the same case, says, "Possession of goods exposed for sale in a shop may be within the statute; but the possession of furniture in a house is no more evidence of a right to that furniture, than of a right to the house."

Mr. *Spence*, and Mr. *Bellamy*, for the respondents. Where the property of one of two partners is in their joint possession, it must be considered as in the order and disposition of each of the partners. [Sir J. CROSS. Has it ever been decided, that where the separate property of one partner happens to be in the possession of the two, it is to be considered the property of the partnership, when the property itself does not consist of stock in trade?] [Sir G. ROSE. The question is, whether by the mode of dealing, as between themselves, the furniture is not to be considered in this particular instance as the goods and chattels of the partnership.] Here there was an express stipulation, in the articles of dissolution of the partnership of Cowards and Moore, that all the furniture and other effects, which had been supplied to Moore, should be considered as belonging to the continuing partnership between H. and J. Coward. It cannot be denied, that the furniture was used by James Coward for the purposes of the partnership. But whether it was in the reputed ownership of James Coward, or considered to be the joint property of Henry Coward and James Coward, the petition must be in either case dismissed.

Mr. *Swanston*, in reply. The clause in the articles of dissolution, relied on by the other side, as to the furniture supplied to Moore, cannot be intended to relate to the bulk of the furniture in the house, which was originally the property of Henry Coward. The clause in the bankrupt act relating to reputed ownership, it is admitted on all hands, is a harsh law, and one which ought not to be extended. The state of circumstances on which the statute is to operate is, when the property is left in the entire order and disposition of the bankrupt at the time of the act of bankruptcy. The respondents must therefore show, that at the time of the act of bankruptcy of James Coward, the furniture was reputed to be his separate property. They are bound to show, also, what the state of circumstances was, when Henry Coward committed an act of bankruptcy. But this is altogether a case in which the statute does not apply; for in no instance has it been determined, that property belonging to one of two parties, because it happens to be in the joint possession of the two, is to be considered in the order and disposition of the other partner. There are only two questions in this case for the consideration of the court,—the real ownership of the property, and the reputed ownership. Either the goods were the real property of Henry Coward, or the reputed property of H. and J. Coward. [ERSKINE, C. J. In *Ex parte Hunter*, 2 Rose, 382, where two of three partners claimed an exclusive interest in the property of the partnership, alleging that the third was only entitled to a small share of the profits, not of the capital, Lord ELDON observed, "There is scarcely a partnership, in which the members of it are not entitled in different interests; and yet, upon a bankruptcy, their creditors take it as the promiscuous joint property of them all. It may be, perhaps, difficult to say, how the rule obtained at

first; but it is now too well established to be controverted." That seems to be the point to which you should apply your argument.] I do not question the propriety of the decision in that case; which did not, however, depend so much upon bankruptcy, as upon contract. [ERSKINE, C. J. It was there decided, that as between the partnership and the creditors, the property in dispute was to be considered as partnership property.] I submit, that that case has no application to the present; for there is no suggestion here, that the furniture was partnership property, but the property of one of the partners. Lord ELDON never said in that case, that the property had become the property of the three partners. [ERSKINE, C. J. He held, that the creditors of the partnership were to take it as the property of the three.] I do not deny, that if one of several partners has property, which, by agreement, is to be used for the purposes of the partnership, it must in that case be taken to be in the order and disposition of all the partners. But that is not the present case. [Sir G. ROSE. From the mode of dealing of the members of a partnership, a chattel, or even real property, may be taken to be the property of the partnership.] [Sir J. CROSS. There may possibly be a distinction in this case, that the property here was not stock in trade.] In all the cases, where the property of one of several partners has been held to belong to the partnership, it has been on the ground of contract. As to the statement of part of the stock in trade being deposited in the drawing-rooms, what evidence is there that the tables and chairs in those rooms were considered to be the property of the partners? But the question of reputed ownership cannot be entered into, without referring to the time of the act of bankruptcy; and here no evidence of that kind has been given. No such result, as is contended for by the respondents in this case, could possibly arise, without a contract; and there is no suggestion here that the property of one partner was by contract to be considered as partnership property, and for partnership purposes.

ERSKINE, C. J.—It seems agreed on all hands, that, as between the partners themselves, this furniture would, but for the bankruptcy, have belonged to Henry Coward. But the question of property in this case, is not a question between partners in a state of solvency, but one between the creditors of one bankrupt partner, and the creditors of the other bankrupt partner. Then, was the furniture here in the reputed ownership of Henry Coward?—or was it reputed to be the joint property of the partnership? The house in which it was deposited, it is very true, was taken by Henry Coward, but the rent and other expenses were paid by the firm. The furniture was put into the house by Henry Coward, but the house, together with the furniture, was occupied for partnership purposes. The apprentices were boarded and lodged in the house, and indeed in every other respect the house appears to have been in the joint occupation of the partnership, for the purposes of their trade. The drawing-rooms were used as show-rooms; and Moore, as long as he continued a partner in the concern, resided in the house. It appears to me, that by the arrangements made between these parties, the furniture must be considered as part of the joint capital and stock of the two partners, and must be distributed between the joint creditors of Henry and James Coward. I therefore think the assignees of Fear and H. Coward have not made out their case, and that this petition must be dismissed.

Sir J. CROSS.—This case depends upon a nice question of fact, which

has not been distinctly proved. It was stated, first, that this house was taken and furnished by one of the partners, and was lent by him to the others, for the purposes of the partnership. If the furniture had been really lent by one partner to the other, and that circumstance had been satisfactorily established in evidence, it might have made some distinction in the case. But upon what express terms the furniture was so lent, does not in any way appear; it might probably be supplied by him as part of his capital in the business. But in whatever manner it got into the house, it does not appear that Henry Coward had any right to remove the furniture, if he had wished to do so. It was used in common by all the partners; and when Moore goes out of the partnership, every thing remains as before, with only one exception, namely, that the addition which Moore had made to the furniture should be considered as belonging to the continuing partnership between H. and J. Coward. This, therefore, became partnership property, independently of the operation of the statute; but I think the whole of the furniture was in the reputed ownership of H. and J. Coward.

Sir J. ROSE concurred.

Petition dismissed.

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Ex parte JOHN LEE BENHAM and Others.—In the matter of CHARLES BRAMWELL.—p. 26.

A commissioner finds that *one* of two assignees retained in his hands a sum of money for a certain period, without paying it into the hands of the bankers chosen by the creditors, and then charges *both* assignees with interest thereon at 20*l.* per cent. per annum, under the 6 G. 4, c. 16, s. 104:—*Held*, that the commissioner had no right to charge *both* assignees for the retainer of *one*, unless he found that the other assignee "*knowingly permitted*" the retainer; nor was the commissioner justified in charging even the one who retained the money, unless he found that it was *culpably* retained by him.

Where the accounts of the assignees have been audited by the commissioner, in which certain items have been allowed, the accounts cannot be reopened for the purpose of disallowing those items, without an order of the court.

Where the solicitors to the commission received from the assignees the amount of their bill of costs, which had been *bonâ fide* incurred, for defending a suit in Chancery brought against the assignees; and the major part of the creditors and the official assignee applied for an order on the solicitors to refund the amount, on the ground that the commissioner had certified that the suit was improvidently defended, and that he had disallowed the amount of the costs in the assignees' accounts; the petition was dismissed with costs, except as against the official assignee.

Where petitioners come voluntarily before the court, to enforce an illegal order made by a commissioner, they will not be protected by such order from having their petition dismissed with costs.

THIS was the petition of the major part in number and value of the creditors who had proved under the commission, and the official assignee; praying that the creditors' assignee, and the solicitor to the commission, might be directed to pay certain sums of money to the official assignee, pursuant to an order of Mr. Commissioner Fane, which was made under the following circumstances.

The commission issued on the 15th of April, 1826; under which John Wheeler and Henry Butler were chosen assignees, who appointed Messrs. Mayhew and Johnston solicitors to the commission. In July, 1830, J. Wheeler, one of the assignees, became bankrupt, and subsequently left England, and continued to reside abroad. On the 23d Sep-



tember, 1831, the other assignee, H. Butler, attended a meeting of the commissioners for the purpose of auditing the assignees' accounts; when the same were duly audited by the commissioners, who found that there was then a balance of 625*l.* 16*s.* in the hands of the assignees. The account rendered by Butler at this audit meeting contained an item of 27*l.* 1*s.* for taxed Chancery costs to December, 1828, and another item of 50*l.* 9*s.* 6*d.* for other taxed Chancery costs.

On the 11th February, 1833, the petitioner, Whitmore, was appointed official assignee; when Mr. Commissioner *Fane*, to whom the commission had been transferred under the provisions of the Bankruptcy Court act, ordered the existing assignees to pay and deliver over all moneys, books, papers, and effects in their possession to the official assignee; in consequence of which order a sum of 168*l.* 9*s.* 11*d.* was, on the 22d July, 1823, paid by Messrs. Mayhew and Johnston, the solicitors, to the official assignee.

On the 8th March, 1834, another audit meeting was held, by adjournment after two previous meetings, before Mr. Commissioner *Fane*; when an account was exhibited by Butler, containing, among other items, a sum of 68*l.* 7*s.* 8*d.* for the amount of the costs of a Chancery suit by the London Dock Company against the assignees, which account was allowed by the commissioner.

On the 8th January, 1835, a third audit meeting was held before Mr. Commissioner *Fane*, who upon that occasion signed the following memorandum, which he ordered to be entered on the proceedings:—

“In the Court of Bankruptcy, &c., 8th January, 1835.

“Memorandum, that I, the undersigned Commissioner of the Court of Bankruptcy, did sit at the time and place above-mentioned, for the purpose of further considering the account of Henry Butler and John Wheeler, assignees of the estate and effects of the above-named Charles Bramwell, when the said Henry Butler appeared before me, and insisted that he and his co-assignee had fully accounted for the said estate. But it appearing to me, that the said Henry Butler retained in his hands the sum of 246*l.* 18*s.* 1*d.* (being the remainder of the sum of 625*l.* 15*s.* 1*d.*, admitted by him to be in his hands on the 23d September, 1831, after deducting the sums of £65 and 313*l.* 17*s.*, claimed to be due to the solicitors for their bills,) from the 23d September, 1831, up to the 23d July, 1833, without paying the same into the hands of the bankers chosen by the creditors, I have charged them with the sum of 90*l.* 10*s.* 7*d.*, being interest at the rate of £20 per cent. per annum upon the said sum of 246*l.* 18*s.* 1*d.* for the period aforesaid. And it appearing to me, that the expenses of a certain interpleading suit in Chancery, to which the said assignees were made defendants, in consequence of a claim made by them to certain wines in the custody of the London Dock Company, were occasioned by the conduct of the said assignees, in refusing to abandon, and yet taking no step to enforce such claim from the year 1826 down to the present time; and it appearing to me, that such expenses ought not, under the circumstances aforesaid, to be allowed as against the estate, I have recharged the said assignees with the sums of 27*l.* 1*s.* and 50*l.* 9*s.* 6*d.*, for which they have taken credit in an account rendered to the commissioners on the 23d day of September, 1831, as payments made to the solicitors for their bills of costs in such suit; and I have also recharged them with the sum of 68*l.* 7*s.* 8*d.*, for which credit is taken in the account (marked B., filed with these proceedings)

f the 6th day of March, 1834, as a payment made to the solicitors, for their further charges in the same suit. And it appearing to me, that there is an overcharge in the sum of 65*l.* charged to the said account (marked B.) of 6*l.* 13*s.* 6*d.*, and an overcharge in the sum of 313*l.* 17*s.* charged to the same account of 12*l.* 8*s.* 10*d.*, and an overcharge in the sum of 14*l.* 5*s.* charged to the same account of 3*l.* 11*s.* 8*d.*, I have further charged the said assignees with the said sums of 6*l.* 13*s.* 6*d.*, 12*l.* 8*s.* 10*d.*, and 3*l.* 11*s.* 8*d.* And I find, that there is now due from the said assignees the sum of 259*l.* 2*s.* 9*d.*; the particulars of which are set forth in the account hereunto annexed, (marked C.;) and I direct the said assignees, and each of them, to pay the said sum to Mr. William Whitmore, the official assignee in this matter.

*R. G. C. Fane, Commissioner."*

In pursuance of this order, the official assignee applied to Mr. Butler for the payment of the sum of 259*l.* 2*s.* 9*d.*, and to Messrs. Mayhew and Johnston for the payment of 168*l.* 12*s.* 2*d.*; who disputed their liability to pay either of these sums.

No dividend had ever been made under the commission; and the only money applicable to a dividend was the sum of 168*l.* 9*s.* 11*d.* paid into the hands of the official assignee, under the order of the commissioner; the remainder of the bankrupt's estate, which was considerable, having been consumed in law expenses.

The petition prayed, that Butler, and Mayhew and Johnston, might be directed to pay to the official assignee the sum of 168*l.* 12*s.* 2*d.*, and that Butler might be also directed to pay the sum of 90*l.* 10*s.* 7*d.*, making together the sum of 259*l.* 2*s.* 9*d.*, so found by the commissioner to be due to the bankrupt's estate; and that the costs of the application might be directed to be paid by the assignee, and the solicitors, personally.

The respondents admitted their liability to repay the sums of 6*l.* 13*s.* 6*d.*, 12*l.* 8*s.* 10*d.*, and 3*l.* 11*s.* 8*d.*, as these sums had been overcharged by mistake, but they contended they were not liable to refund the other sums specified in the commissioner's order.

Mr. *J. Russell*, and Mr. *Bacon*, in support of the petition. As the respondents have not excepted to, or appealed from, the order of the commissioner, it seems to be a matter of course that this court should grant its own order, for the purpose of having that order carried into effect. The respondents all agree, that the balance specified in the commissioner's certificate remains in the hands of Mayhew and Johnston. With regard to the bills already taxed, it is admitted that the court will not review the taxation, or go into the question of *quantum*, but merely deal with such objections as are founded upon principle. The respondents, it is presumed, will contend that the commissioner had no jurisdiction to recharge the assignees with the sums specified in his order, because the former commissioner had allowed these sums on a previous audit. But, unless the court determine that one audit is conclusive, and can never be reopened, the court will correct any error in that audit, which may be injurious to the bankrupt's creditors. The present commissioner is not bound by the mere signatures of the former commissioners to the memorandum of what was then due to the solicitors. In *Ex parte Applegarth*, 2 Deac. & Chit. 101, it was decided, that although an audit-meeting has closed, and the accounts of the assignees are then settled, yet the commissioner, at any future meeting,

has power to examine the assignees as to moneys received before, and not included in, such accounts, and to reinvestigate those accounts generally, if need be. Upon that occasion the chief judge said, that "the duty of commissioners was progressive and continuous, and that the legislature never meant to screen assignees in this wise, and to shut out the power of setting accounts right, upon the disclosure of other prior receipts by agents." [Sir G. ROSE. Supposing the order of the commissioner is correct, how can you enforce your claim against the solicitors? The commissioner's certificate limits the demand expressly, as against the *assignees*.] Upon the general jurisdiction of the court, and the situation in which the solicitor stands as an officer of the court. It appears, too, from Mr. Mayhew's own affidavit, that he acknowledges the sum of 168*l.* 12*s.* 2*d.* to be still in his hands; and therefore the court has power to order him to pay the money to the party entitled to it. The assets of a bankrupt are in the nature of trust-moneys; and if trust-money comes into the hands of another person, he is bound to refund it according to the trusts. He becomes himself a trustee of all assets in his hands, knowing them to be assets. If, in a case of this description, the solicitor was not to be held jointly liable with the assignees, the result would be most detrimental to the administration of justice in bankruptcy. The amount of the debts proved under this commission is only £1500; and yet the bills of costs of Mayhew and Johnston, including the messenger's bill, amount to more than £900. The solicitors ought not to have suffered the assignees to be engaged in a suit in Chancery, without any communication with the commissioner or the creditors; for it was their duty to know the provisions of the bankrupt act in this respect. [ERSKINE, C. J. If the solicitor gives the assignees bad advice, he may be liable to them; but this is not an application by the assignees against the solicitor.] The solicitor is responsible to the creditors, as well as to the assignees.

ERSKINE, C. J.—As to a portion of the prayer of the petition, the court is of opinion, that the petitioners have not made out their complaint, and will therefore relieve the respondents from the necessity of arguing that part of the case. The charge is, on the finding of the commissioner, that the assignees have retained in their hands the sum of 246*l.* 18*s.* 1*d.* from the 23d September, 1831, to the 23d July, 1832. and that they are therefore liable to be charged £20 per cent. on that sum, within the meaning of the 104th section of the bankrupt act; which provides, "that if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ any sum, to the amount of £100 or upwards, part of the estate of the bankrupt, &c., every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of £20 per cent., on all such money, for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed, &c., and the commissioners are hereby required to charge every such assignee in his accounts accordingly." Now, on referring to the order of the commissioner, it appears that he finds that Henry Butler alone had retained in his hands the sum of 246*l.* 18*s.* 1*d.*, while the charge of the £20 per cent. is upon both the assignees. But there is no admission by Butler that it was improperly retained by him in particular; *non constat*, but that it may have been retained by Wheeler, the other assignee, who the petitioner alleges has become

**bankrupt.** Before, therefore, we can be called upon to enforce the order as to the £20 per cent., we must be satisfied that it was properly made. The commissioner could not charge both assignees for the retainer of one, unless he found in the words of the act that that one assignee “knowingly permitted” the other to retain. A further part of the prayer of the petition is, that Butler, and Mayhew, and Johnston, may be directed to pay the sum so charged to the official assignee. But there is nothing on the face of the commissioner’s order to justify the court in enforcing the payment of this money by the solicitors. If the assignee, Butler, was insolvent, then indeed the court might be induced to secure the fund, by making such an order on the solicitors, on a proper petition for that purpose. But, in the present case, there are no grounds for such interference of the court. Therefore, as to the charge of £20 per cent., and that part of the prayer which affects the solicitors, I am of opinion that the petitioners have laid no foundation for their claim.

**Sir J. Cross.**—It is only necessary to refer to the terms of the commissioner’s order, to show that such an order cannot be enforced. He finds that Butler retains the money, and then charges both assignees with the 20l. per cent.; without finding the fact, that the other assignee knowingly permitted Butler to retain the money in his hands. The court does not decide, whether or not the commissioner can charge the assignees in any other way with the £20 per cent.; it only declares, that the charge, as now made, is invalid.

**Sir G. Rose.**—As the petitioners have not sustained the allegation in their petition, as to the charge of £20 per cent., my own opinion is, that that part of their petition ought to be dismissed with costs.

**Mr. Swanston**, for Butler, the solvent assignee. This is a very harsh proceeding against the assignee; who had good reason to think that he had been discharged from all further claims, after his accounts had been passed and audited by the former commissioners. *Ex parte Applegarth*, which has been cited by the other side, has no application to the present case. There the court only decided, that the commissioner had power to examine the assignees, as to the receipt of moneys which had been omitted to be included in their account at the time of the audit, and that he was not prevented from setting the accounts right upon the disclosure of such previous receipts. But here no such omission appears. There is this objection, also, to the present petition. It is an application to the jurisdiction of this court, where there is no necessity to apply for its order. If the assignee had these sums of money in his hands, the commissioner should have made an order of dividend for their distribution amongst the creditors; and if the assignee had refused to act under the order of dividend, it would have been then time enough to come for the order of this court. [**ERSKINE, C. J.**—I suppose what they proceed upon is the 14th section of the bankrupt act, 6 Geo. 4, c. 16, whereby it is provided, that any creditor who shall have proved to the amount of £20 or upwards, if he be dissatisfied with the settlement of the solicitor’s bill by the commissioners, may have the bill settled by a master in Chancery.] The audit of the former commissioners was a final disposition of the question then before them, and not subject to review. [**ERSKINE, C. J.**—You may be relieved from your argument as to the two sums of 50l. 9s. 6d., and 27l. 1s., which were the subjects of the former audit, and which, we think, the commissioner had no jurisdiction to review,

without an order from this court.] Then, with respect to the charge of 68*l.* 7*s.* 8*d.*, we say that this sum had been previously allowed by the commissioner himself; that the account, containing the items of which it was composed, was upon that occasion before him, and was then duly taxed; and that it was not competent for him afterwards to sit as a court of appeal on himself. Mr. *Swanston* was then proceeding to discuss the merits of the case, when he was finally stopped by the court.

Mr. *G. R. Richards*, and Mr. *Bethell*, who appeared for *Mayhew* and *Johnston*, were also stopped by the court.

Mr. *J. Russell*, in reply.—The case of *Ex parte Applegarth* decides that you may insert items in an account, which has been previously audited, if they were omitted in the previous audit. This shows that the commissioner, in the present instance, had power to re-examine the account after the former audit; for if you open the account for one purpose, you may open it for another. It is always competent to the commissioner to rectify any error or mistake that may have crept into the former account. The court has decided, that you may surcharge an account: then, if so, why may you not falsify it? If the court is to neutralize the exertions of the commissioners to save the estates of bankrupts from the ruinous expense occasioned by improvident Chancery suits, the most injurious consequences will follow. In the bills for 50*l.* 9*s.* 6*d.*, and 27*l.* 1*s.*, which it is alleged have been audited, the same thing is charged twice over, as in the instance of the charge for abbreviating pleadings; and this is not the only case of that kind.

With regard to the question of costs, the commissioner has charged the assignees with the £20 per cent.; they refuse to pay the charge; and the commissioner authorizes the petitioners to come here to enforce his order. It is a doctrine quite unheard of, to contend that a party, coming to enforce the judgment of an inferior tribunal, is to be made to pay the costs; and more especially on an occasion of this kind, where the application was directed by the commissioner. The master of the rolls, in a recent case, where it was stated that an application to the court had been directed by a master, allowed the matter to stand over for the purpose of ascertaining that fact, before he would make any order as to the costs.

Mr. *Swanston* observed, that whatever might have been the directions of the commissioner, the petition ought never to have been presented; and that that part of the petition which was dismissed without hearing the respondents, ought, as a matter of course, to be dismissed with costs.

ERSKINE, C. J.—This is a petition presented by certain creditors of the bankrupt, and by the official assignee, praying the court to enforce an order of the commissioner. And if the question depended upon the personal respect which I bear for that commissioner, I should without hesitation confirm the order he has made; but the judgment of this court must not be influenced by any consideration of private feeling. It appears to me, that this order ought not to have been made. The order declares, that the sum of 259*l.* 2*s.* 9*d.* is due from the assignees to the bankrupt's estate, and directs them to pay that sum to the official assignee. The commissioner finds that H. J. Butler, who is one of the assignees, retained in his hands 246*l.* 18*s.* 1*d.* from the 23d September, 1831, to the 23d July, 1833; and he then charges both assignees with £20 per cent. per annum on this sum, under the provision of the 104th section of the 6 Geo. 4, c. 16. With respect to the sum of 90*l.* 10*s.* 9*d.*,

being the amount of this charge of £20 per cent., and which forms part of the sum directed to be paid by *both* the assignees, I have already disposed of this question. It is true, the commissioner finds that the 246*l.* 18*s.* 1*d.* was retained in Butler's hands for nearly two years, but it is not found to have been culpably retained by him. All that the commissioner does, is to find, simply, that Butler retained it in his hands. The next item is 27*l.* 1*s.*, the amount of a bill of costs in a Chancery suit from 1827 to 1828;—the commissioner has disallowed the whole of this sum, on the ground that the assignees improperly defended a suit commenced on a bill of interpleader, in which they would neither abandon nor enforce their claim. But it seems extraordinary, that the creditors should have never made any objection to defending this suit, whilst the proceedings were going on; and it is still more remarkable, that the creditors should now come forward for the first time to impeach this account, which was the subject of the commissioner's audit so long ago as 1831. Then, as to the bill for 50*l.* 9*s.* 6*d.*, it appears that there was an order of the Court of Chancery to bring an action against the assignees, for the purpose of determining the validity of their claim to the wines in the London Docks; and that the dividend was suspended until the action was determined. There is one very short objection, however, to the commissioner's disallowance of these two sums, namely, that the account in which they are both included has been already audited, and ought not therefore to be opened again, with the view of falsifying or surcharging it, without the leave of this court. There might be no end of vexation to assignees, if accounts once audited could be reopened whenever commissioners pleased, without the previous sanction of this court. With respect to the bill for 68*l.* 7*s.* 8*d.*—which was not allowed by the former commissioners, but was brought before Mr. *Fune* himself in July, 1833, and then allowed by him,—I think that after the commissioner had so taxed and allowed it, and the amount had been introduced by the assignees as an item in their accounts, the commissioner ought not afterwards to have disallowed that account, without the like order of this court. And it is further to be observed, that all these sums were disallowed, without any inquiry as to the necessity of defending the suit in Chancery. There are other small items, which are almost too trifling in amount to support a petition of this nature. It seems, however, that the payment of these sums would not have been resisted, if the petition had been confined to them. The mere circumstance, therefore, of the petitioners succeeding as to these sums, which appear to have been overcharged by mistake, is not sufficient, I think, to sustain their present petition; when the respondents were willing to set any errors right. But the petitioners have made the solicitors parties to this petition, and have called on them to repay the sum of 168*l.* 12*s.* 2*d.* It may be, that there are improper items in their bills of costs—it may be, that the assignees should not have defended the suit in Chancery; but that is not enough to render the solicitors liable to refund to the creditors the amount of the costs which they have received, and which have been *bonâ fide* incurred. The solicitors were employed by the assignees; and if any persons were to be liable for instituting or defending improvident suits, it would be the assignees, and not the solicitors; though I think, under the circumstances of this case, the assignees could not be considered liable. As against the solicitors, therefore, this petition must be dismissed with costs; with regard

to the assignees, I confess I was at one time doubtful whether the petition, as to them, should be dismissed with costs; as the petitioners have come here to enforce an order of the commissioner. The general rule is, certainly,—though that rule has exceptions,—that costs are not given on a petition against an order of the commissioners, as against the parties who are made respondents to such a petition, and are compelled to defend the order. But when a petitioner comes voluntarily to enforce such an order, and brings parties unnecessarily before the court, I see no reason why he should not be visited with costs, if unsuccessful, like any other party. The petition must, therefore, be dismissed with costs against all parties, except the official assignee; as he has no interest in the matter, and merely joined in the petition in his official character.

Sir J. Cross.—I should have thought, in this case, that the court would have been bound to act in furtherance of the commissioner's order, if nothing had appeared to show the circumstances under which the order was made. But how does the matter really stand? With respect to the sums of 27*l.* 1*s.*, and 50*l.* 9*s.* 6*d.*, the commissioner says that he has charged the assignees with these sums, because they set up a claim which they neither persevered in nor abandoned. But, with the greatest respect for the commissioner, I do not think that this is a sufficient reason; more especially when he had the sanction of the former commissioners for the allowance of these sums, and they were both the subject of a previous audit. An audit should be treated as a very solemn proceeding. The commissioners are bound to examine the accounts of the assignees, and to administer an oath to them as to their correctness. I can find no reason for differing in opinion with the first commissioners, who allowed these accounts. It does not appear, that any of the creditors complained of the proceedings of the assignees in defending the suit in Chancery; but, on the contrary, they seem to have acquiesced in all that was going on; and now, after the expiration of nine years, they come and say, for the first time, that these costs ought not to have been incurred. I am content, however, to rely on the judgment of the former commissioners. With regard to the solicitors, there is not a shadow of ground for coming before this court to complain against them; nor is there any allegation imputing misconduct to them in the petition. As to them, therefore, there can be no doubt that the petition must be dismissed with costs. And in regard to the assignees, as the petitioners have shown no sufficient grounds that they ought to refund any of the sums stated in the prayer of the petition, I concur in the opinion of his honour the chief judge,—that the petition must also, as against them, be dismissed with costs.

Sir G. Rose.—I should certainly have felt regret, if the court, after a due consideration of the facts of this case, had not been unanimously of opinion, that this petition should, as against all parties but the official assignee, be dismissed with costs. In regard to the official assignee, as he has acted under the directions of the commissioner, I am willing that he be exempted from the payment of costs. But I think it right to observe, that the official assignee is not exempted from costs on any general principle, but merely because in this particular instance it seems right that an exception should be made in his favour. With respect to the question of costs, as applicable to the other parties to this petition, it has been put in the course of the argument, that the certificate of the com-

missioner is to have the same authority as a master's report; but, I confess, I cannot go the length of what has been advanced on this subject by the counsel for the petitioners; for I am clearly of opinion, that the commissioner's certificate is not to be held conclusive on the discretion of the court, in awarding costs against all, or any of the parties to a petition. There is no such principle in regard to a commissioner's certificate; but if there were, this is no regular certificate, but a mere statement of facts; for there was no previous reference to the commissioner; and even taking it to be a regular certificate, what part of this document would protect any party from the payment of costs? Then with respect to the solicitors, what is there in this certificate that justifies the prayer of the petition, that the solicitors should be directed to pay to the official assignee the sum of 168*l.* 12*s.* 2*d.*? No doubt the court has jurisdiction to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat; but I never yet heard—where there is, as in this case, a solvent assignee, who has a claim against the solicitor for moneys in his hands—on what principle third parties, acting in opposition to the assignees, are to bring the solicitor before this court. But viewing the case as against all the respondents, is it too much to say, that commissioners are bound to give the same authority, at least, to a former audit, as to a settled account? Had the commissioner in this case any principle on which he could open the previous audit? An audit is conclusive, until it is regularly opened; and that can only be done by the order of this court. It is new to me, where an action has been brought or defended by assignees, that the commissioner has more than a ministerial duty to perform, and to act on an investigation into their receipts and payments. If I were a commissioner, I should not consider the question as more than one of receipt and expenditure as between trustee and estate, except in a very gross case; and even then, I would refer the matter to the decision of this court; for the expenses of a useless suit form but an indirect test of the damage to the estate, and the allowance or disallowance of them is a question for another tribunal. There are other modes of looking into such an account, that might possibly be more convenient than the examination of it by the commissioner; such as a reference of it to the registrar of this court, or directing an inquiry before a master. But were I even called on to say, that the commissioner had not a ministerial duty merely, and might decide on the propriety of prosecuting or defending an action by the assignees, I find nothing in the certificate to justify the order he has made; and it is a principle, that the court will not act on evidence out of the certificate. It is impossible to say, that any part of the prayer of this petition is tenable; and I should be laying down a faulty principle, if I were to hold, that the mere certificate of the commissioner is sufficient to protect any party from paying costs.

Petition dismissed with costs, as against all the petitioners, except the official assignee.

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In the matter of WILLIAM SUTTON.—p. 43.

Where both the quorum commissioners are unable to attend to open the fiat, the court cannot make an order that the other three commissioners may open it; but the proper course is to annul the fiat, and take out a new one.



A FIAT was directed to commissioners at Birmingham, containing a quorum clause as to two of the commissioners, one of whom was appointed to be one of those named to execute it.

Mr. *Wright* applied to the court for an order that the other three commissioners might proceed to open the fiat, on the ground that the two quorum commissioners were in London, and were likely to remain there.

The court said, that they had no authority to alter the directions of the fiat, which expressly stated that one of the two quorum commissioners must act in the execution of it; but that the proper course to pursue was, to annul this fiat, and take out a new one directed to other commissioners.

Ex parte JAMES MARTIN.—In the matter of JAMES KENTON.

—p. 44.

A commission issued against the bankrupt in 1823, under which a creditor omitted to prove his debt, being informed there were no assets. A subsequent fiat was issued against the bankrupt in 1834, who had not then obtained his certificate under the former commission, when the court ordered the commission to be impounded. A petition by the creditor, praying that the commission might be delivered out of the office, to enable him to go in under it, and prove his debt, was dismissed with costs.

IN this case a commission had issued against the bankrupt on the 28th June, 1823, under which only one creditor, who was appointed assignee, had proved any debt; and the bankrupt had never passed his last examination, nor obtained his certificate; nor had any dividend been declared of his estate. The creditor who had proved was a person of the name of Sheers, who chose himself sole assignee, and who afterwards became a bankrupt, and went to reside in America. On the 9th May, 1832, a fiat was issued against the bankrupt, Kenton, who had for some time previously carried on the business of a linen-draper, in High Street, Poplar. On the 25th April, 1834, the assignees of Sheers, and two of the creditors who had omitted to prove under the former commission against Kenton, presented a petition to rescind the fiat; when the court ordered that the former commission, and all the proceedings under it, should be impounded. (a) The present petitioner stated, that he was a creditor of the bankrupt at the time of the issuing of the commission, but did not prove his debt, having been informed by the assignee that there were no assets; and that the official assignee under the fiat had realized a considerable sum. The object of the present petition was for an order, that the former commission and proceedings might be delivered out to such person as the court should appoint, to enable the commissioners to hold a meeting for the choice of a fresh assignee, and the proof of debts. The petitioner accounted for his delay in presenting this petition, by stating that he was ignorant of the issuing of the fiat, or that the bankrupt had entered into business again after the issuing of the former commission.

Mr. *Swanston*, for the petition, referred to the former petition of *Ex parte Devas*.

Mr. *Bethell*, contra, objected that the petitioners under the former petition were not served with this.

The court said, that such omission was fatal to the present application and refused to hear the petition.

(a) See *Ex parte Devas*, 4 Deac. & Chit. 366; 1 Mont. & A. 430.

The matter was again brought before the court this day, (July 23, 1835,) when

Mr. *Swanston*, and Mr. *J. Russell*, appeared in support of the petition; and urged, that as the validity of the first commission was not disputed, and the petitioner was ignorant of the issuing of the present fiat, he was, as a matter of course, entitled to the order now sought by this petition.

Mr. *Keene*, contra, was stopped by the court.

ERSKINE, C. J.—So far from thinking this a matter of course, I think it one of the most unfounded applications that was ever brought before this court. The first commission issued so far back as June, 1823, and the petitioner suffered Sheers to prove the only debt under the commission, without making any attempt to prove himself; and even when Sheers becomes bankrupt, and goes to America, the petitioner never comes forward as a creditor, but lies by for twelve years, and lets the bankrupt carry on a fresh trade, in the course of which he obtains fresh credit. And now, when the bankrupt has, by his subsequent trading, realized some property, the petitioner wants to get it out of the hands of the new creditors, whose subsequent dealings with the bankrupt were alone the cause of his acquiring it. The petitioner all this time permits the first commission to lie dead, and now seeks to revive it, to the prejudice of more worthy claimants. There is no reason or equity for the present application. If there should be any surplus under the fiat now working, it will be then time enough for the petitioner to come to this court.

Sir J. Cross.—The fiat now in operation issued two years ago, and even then the petitioner did not put in any claim; probably because he thought there was no foundation for it. At all events, the petitioner's debt is twelve years old, and during all that time he has been utterly inactive in making any claim, either under the commission, or the fiat. As the petitioner did not choose to come in as a creditor under the former commission, he must be taken to have abandoned his debt, if debt he ever had. It would be most unjust to the creditors who have proved their debts under the fiat, if we were to grant the prayer of this petition.

Sir G. Rose.—When the court made the former order for the commission to be impounded, it amounted to a virtual superseding of it. On that occasion the court did every thing short of superseding, in order that it might not interfere with the working of the present fiat. The petitioner in this case does not even show that there is any property under the former commission which would be sufficient to pay the expenses of a new assignment, or of this petition; and he now comes here with an application to get an assignee elected under the former commission, for the purpose of overreaching the title of the assignees under the subsequent fiat. It would really be monstrous to make any order under this petition. The court can find the means of making the present fiat available for the petitioner, if he has any just claim still against the bankrupt.

Petition dismissed with costs.

## Ex parte SIMPSON.—In the matter of MABERLY.—p. 47.

On the 3d of January, the petitioner pays a sum of money to the bankrupt's agent at Edinburgh, for the purpose of being remitted to London to retire a bill; on the 4th of January, the agent receives notice that his principal had stopped payment on the 2d of January; and he did not, therefore, remit the money to London. On the 6th of January, the petitioner requires the agent to return the money, which he declines. On the 26th of January, a fiat is issued against the principal; and the assignees, in stating an account with the agent, allow £2000 to remain in his hands on account of a counter-claim he had against the bankrupt, and receive a balance from the agent:

*Held*, (Erskine, C. J., *dissent*.) that under these circumstances the presumption was, that the assignees had received the money so paid to the bankrupt's agent, which, having been paid on a trust, and for a particular purpose which had failed, the assignees were bound to restore to the petitioner, unless they could prove that the money never actually came to their hands.

THIS was the petition of a creditor, for the restitution of money, which had been deposited with the agent of the bankrupt at Edinburgh for a particular purpose. The leading facts are the same as those in *Ex parte Cunningham*, 3 Deac. & Chit. 58, except that in this case it did not appear that there were any proceedings in the Scotch courts affecting the fund in question. The petitioner, on the 3d of January, 1832, paid the sum of 450*l.* 11*s.* to Blyth, the bankrupt's agent at Edinburgh—whether in notes, or cash, did not precisely appear—for the purpose of being remitted to London, to retire an acceptance of the petitioner, then lying at the banking-house of Smith, Payne, and Smiths. The petitioner, at this time, had no notice of any act of bankruptcy having been committed by Maberly. On the 4th of January Blyth received a letter from Maberly, stating that he had stopped payment on the 2d of January. Blyth, therefore, did not remit the money to London to retire the bill; but the petitioner was obliged to take the bill up himself, by making a fresh remittance to Smith & Co. for that purpose. On the 6th January, the petitioner required Blyth to return him the £450, as having been deposited with him for a purpose which had never been fulfilled; to which requisition the petitioner received the following answer from Blyth's law agents:—

“Mr. Blyth has received your letter. He cannot commit himself in any respect, as Mr. Maberly's agent, without instructions from London. In the mean time, we have given directions to keep every thing entire, and to make no remittances to London, or elsewhere, until he and the creditors are further advised on the subject of your, and similar claims.”

The petition alleged, that the assignees had received, and still retained, the £450, claiming it as part of the bankrupt's estate, and prayed that they might be ordered to repay it to the petitioner.

The official assignee denied that the £450 had been paid over by Blyth to the assignees; but stated that £2000 and upwards had been allowed by the assignees to remain in Blyth's hands, on account of a counter-claim he had against Maberly. And it also appeared from the affidavits in answer to the petition, that, on the 3d and 4th of January, Blyth, before he received Maberly's letter announcing his failure, made payments on behalf of Maberly, amounting to £1311; and that the particular notes, if notes they were, composing the £450, could not be traced.

Mr. *J. Russell*, and Mr. *Bethell*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *Montagu*, *contra*. This case is distinguishable from that of *Ex parte Cunningham*. In that case the notes were identified: here there is no identification of notes, or any thing else, that was paid to Blyth by the petitioner. In the former case, there were legal proceedings in Scotland establishing the rights of the different parties. In this case, there were no such proceedings in the Scotch courts.

The true principle, then, on which this case ought to be determined, is, what were the claims of the petitioner against Maberly on the 4th of January? All that was done by the petitioner was to pay to Blyth a certain sum of money, with instructions to take up a bill; and it does not appear, that there was any subsequent application of the money for that purpose. In what manner this sum of £450 was paid to Blyth, whether in notes or cash, nowhere appears; but, however that might be, no other relation than that of debtor and creditor was constituted between those parties. Suppose the transaction, instead of being with Maberly's agent at Edinburgh, had taken place with Maberly himself in London, Maberly would have been the mere debtor of the petitioner. It is true, that the receipt of the money by him would have imposed on him the obligation of applying it for the purpose of taking up the bill; but if he had misapplied it, the petitioner would have had no remedy but that of proof. For where a party pays a sum of money into a banker's, for the purpose of taking up a bill that will fall due the following day, which the banker omits to do, and then becomes bankrupt; it is clear, the amount can only be proved under his commission. It has been decided, that payments made to a trader, after he has stopped payment, are not recoverable, unless they are revoked before the bankruptcy; *Ex parte McGhee*. The date of the fiat in this case is the 26th January, and must be taken also to be the date of the act of bankruptcy, in the absence of all other evidence as to that fact. [Sir J. Cross. It is stated in the petition, that Maberly had stopped payment, and had absented himself from his banking-house, and refused to be seen by his creditors from the 2d January.] Those facts are not alleged as an act of bankruptcy. The money, it appears, was paid to Blyth in a gross sum on the 3d January, long before the issuing of the fiat. It would have been different, if the petitioner had delivered to Blyth a bill of exchange, a particular bank-note, or money sealed up in a bag; for any one of these could have been identified. But, in this case, there was to be an application of a sum of money generally, not of any particular coin. [Sir J. Cross. Allow me to remind you, that, on the very day when this money was deposited with Blyth, Maberly had ceased to carry on that business, which was the very object and inducement of the money being paid to Blyth.] The petitioner has therefore a right of action against Blyth for the amount of the money so paid in; but, even if he has the same right against Maberly, a right of action is in bankruptcy only tantamount to proof. [ERSKINE, C. J. You put it on the ground of contract; but here the petitioner denies all contract.] Still, the petitioner is bound to show, that the money came to the hands of Maberly, or his assignees. Now, it appears that Blyth, after he received this money from the petitioner, paid away more than £1300 of moneys he had then in his hands on account of Maberly; and, *non constat*, that this sum of 450*l.* 1*s.* was not part of the money so paid away. [ERSKINE, C. J. Does it appear, in any statement of account between Blyth and the assignees, that on the 2d of January Blyth had

moneys of Maberly in his hands to such an amount as would have rendered it unnecessary to resort to this £450, in paying out the £1300?] That does not appear. No agency can be revoked, until the notice of revocation reaches the agent. If notice had been given by Maberly to Blyth, that he was no longer to be his agent, would this notice have a retrospective effect?

ERSKINE, C. J.—I observe, that the order of the Court of Session directs, that Blyth shall pay over to the assignees, not only all the notes, but also all the moneys in his hands, as agent for Maberly.

Mr. *J. Russell*. It is alleged in one of the affidavits made on behalf of the petitioner, that, on the settlement of accounts between Blyth and the assignees, the sum of 450*l.* 11*s.* was an item in that account.

Sir G. ROSE, at this stage of the proceedings, proposed that it should be referred to the registrar to inquire, whether the balance, which Blyth admitted to be due from him to Maberly's estate, comprised any, and what portion, of the 450*l.* 11*s.* paid to him by the petitioner.

Mr. *Swanston*, and Mr. *Montagu*, declined acceding to this proposal, on the part of the assignees. The real question which the court has now to decide is, whether money paid into a banking-house after it has stopped payment, but before its actual bankruptcy, can, or cannot, be retained by the assignees. We contend, that the money so paid in is clearly distributable amongst the creditors, unless it is reclaimed by the party before the bankruptcy.

Mr. *J. Russell* was not called on to reply.

ERSKINE, C. J.—The majority of the court is of opinion, that the petitioner is entitled to the order he seeks. I confess, that I am not of that opinion. But as this is a question of fact, and not one of law, I think it unnecessary to call on the petitioner's counsel for his reply; which, if it had been merely a question of law, I should of course have been anxious to hear. (His honour here stated the facts of the case from the petition, and proceeded as follows:—) Now, if this sum of 450*l.* 11*s.*, which was paid to Blyth by the petitioner, had been traced to the hands of the assignees, I should then have been clearly of opinion, that the assignees would have been responsible for the amount. But the difficulty I feel in the case is this:—what proof is there that this money ever got to the hands of the assignees? Whether this sum was paid to Blyth in notes, or cash, does not appear; but it is proved, that, after it was received by him, he paid away £1311 in the ordinary course of business, before he had notice of Maberly's failure; and Douglas in his affidavit says, that he cannot ascertain whether the £450 was paid out of Blyth's hands, or remained in them. There is no evidence, as it seems to me, that this sum continued in Blyth's hands at the time of instituting the suit in the Scotch court. With regard to the process of multiplepoinding in that court—in which it is said, that Blyth admitted a balance in his hands as forming part of Maberly's estate—if I could necessarily infer, that the sum of 450*l.* 11*s.* formed a part of this balance, I should then say, that the petitioner was entitled to the relief he asks. But my mind is far from satisfied on that point. In the former cases that occurred in this bankruptcy, the court proceeded on the ground, that the money was paid to Blyth in certain notes,—that at the time of the interdict in the Scotch court, Blyth admitted these notes to be in his hands,—and that the assignees intervened, and got a decree in their favour. But, in the present case, I cannot find any admission of Blyth, in the proceedings in

the Scotch courts, that he had this money in his hands at the time of those proceedings, nor do the assignees admit that it was so. For these reasons, I am sorry that I cannot concur with the rest of the court in the order.

Sir J. Cross.—The present case appears to me to be one in which the burden lies on the assignees to prove that the petitioner is not entitled to the relief he seeks by this petition. They ought either to show that the money never came to their hands—or that, if it did, they are entitled to retain it.

The assignees contend, first, that notwithstanding the money may be traced to their possession, the petitioner has no claim to it; but that they are entitled to retain it as part of the bankrupt's estate. But I think such a petition cannot be maintained; and that the owner of the money had a right to call it back, as having been paid under a mistake, namely, that Maberly continued to carry on the business of a banker in London, and that Blyth was his agent; whereas Maberly had then ceased to be a banker, and, consequently, could have no authorized agent to receive payments for him in that character. The money being paid under this mistake, therefore, there is no doubt that the petitioner could compel Blyth to refund it; and if the assignees have got possession of the money, they are equally liable to the petitioner.

But the assignees contend, secondly, that the money never came to their hands at all, and that the petitioner has failed in his proof of this fact. An important question here occurs—upon whom does the burden of proof lie, to show what became of the money which the petitioner paid to Blyth? A court of law, in determining on which party lies the burden of proof, invariably looks to that party who was in possession of the facts. Now, who was in possession of the facts in the present case? The assignees: they could, therefore, easily disprove the allegation in the petition, if there was no foundation for it. The petitioner has proved a payment to Blyth on the 3d of January—that Maberly stopped payment the day before—and that the petitioner, a day or two afterwards, applied to Blyth to return him the money, and was refused, and it does not appear what has become of it. The assignees then step forward, and take to every thing in Blyth's hands in *statu quo*, saying, we will keep this property, unless any one can prove a better right to it. They are in possession of the bankrupt's books, and of the accounts rendered by his agents, and they are in communication with his agents and his clerks; it therefore lies upon them to show, that this sum of £450 was not included in the property, of which they thus possessed themselves. It has been relied on by the counsel for the assignees, as the strong-hold of their defence to this petition, that money can have no earmark; and that, as in this case the petitioner's money has been mixed with other moneys in his hands, it follows that the petitioner cannot identify the sum he paid to Blyth; and a case has been put of a deposit made of 500 pounds of quicksilver, which has been mixed by the depositary with 1000 pounds belonging to another man. It is true that the owner could not in such case identify the atoms; but he would have a right to the definite quantity; and a delivery to him of 500 pounds of the mass would be a good delivery of what was deposited. It is, therefore, no answer, to say that the petitioner's money has been mixed with other moneys. Supposing a tender had been made to him of the amount deposited, in other money equally good, could he have brought

an action for the specific coin deposited? Certainly not. Besides, that argument is founded on the fact of the money having been mixed with other money; but the assignees have not proved this fact, which, even if proved, would not avail them. Then, as to identifying the money paid to Blyth, there is all the identity which the nature of the case admits of. If Blyth had paid away the £1300, and there had remained only in his hands a general balance of £450, he might very properly have given back this latter sum to the petitioner, as the petitioner's own money. There is no doubt, that the books of the bank, which are now in the possession of the assignees, will show what was the amount of the balance in the hands of Blyth on the 4th of January, when he received information that Maberly had stopped payment. The presumption is, that there was then a much larger balance in his hands than the sum of £450, and that the estate of the bankrupt is the richer by the amount of this sum. The assignees have not denied this fact; and they are therefore bound to refund the £450, as the money of the petitioner.

Sir G. ROSE.—As the inquiry proposed has been declined by the assignees, we must do the best we can in determining this case; which involves a question of fact, as to which there is certainly some difficulty in arriving at a conclusion. But as the question is here, not as to the personal liability of the assignees, but one between the alleged owner of this property and the estate,—if there is any doubt as to the real state of the facts of the case, the petitioner should have the benefit of that doubt. The question depends on whether Blyth placed this sum of £450 *in medio*, and whether it afterwards passed to the assignees with other moneys, by virtue of the order of the Scotch court. I cannot help saying, that I think the assignees have acted prudently in declining the proposed inquiry; for, in my mind, it would have been a useless expense to the estate. It is clear, that on the 3d and 4th of January, the £450 was still in Blyth's possession; for the answer given by his law agent to the application of the petitioner of the 6th of January, leaves it impossible to say that it did not then form part of the balance in his hands. The next question that arises is, did, or did not, this sum pass to the possession of the assignees? The petitioner expressly alleges that it did so come to their possession; and the assignees have not satisfied me that the contrary was the fact. This being the state of the case, the court can have no difficulty in deciding that the £450 was clothed with a trust; for it was paid to Blyth, for the express purpose of being appropriated to take up a bill of exchange; for which purpose it was never in fact appropriated. The petitioner, therefore, is entitled to call on the assignees to refund it.

Ordered as prayed, but without costs.

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Ex parte BURDEKIN.—In the matter of WILLIAM HANKES and JOSEPH HANKES.—p. 57.

The court will not annul a separate fiat, to give effect to a subsequent joint one, on the ground that the only witness who could prove the act of bankruptcy is kept out of the way,—nor will they, for such cause, make an order for the inspection of the proceedings under the separate fiat,—but will merely enlarge the time for opening the joint fiat.

In this case, a separate fiat had issued against William Hanks, under which he was adjudged a bankrupt. A joint fiat was afterwards issued

The matter was again brought before the court this day, (July 23, 1835,) when

Mr. *Swanston*, and Mr. *J. Russell*, appeared in support of the petition; and urged, that as the validity of the first commission was not disputed, and the petitioner was ignorant of the issuing of the present fiat, he was, as a matter of course, entitled to the order now sought by this petition.

Mr. *Keene*, contra, was stopped by the court.

ERSKINE, C. J.—So far from thinking this a matter of course, I think it one of the most unfounded applications that was ever brought before this court. The first commission issued so far back as June, 1823, and the petitioner suffered Sheers to prove the only debt under the commission, without making any attempt to prove himself; and even when Sheers becomes bankrupt, and goes to America, the petitioner never comes forward as a creditor, but lies by for twelve years, and lets the bankrupt carry on a fresh trade, in the course of which he obtains fresh credit. And now, when the bankrupt has, by his subsequent trading, realized some property, the petitioner wants to get it out of the hands of the new creditors, whose subsequent dealings with the bankrupt were alone the cause of his acquiring it. The petitioner all this time permits the first commission to lie dead, and now seeks to revive it, to the prejudice of more worthy claimants. There is no reason or equity for the present application. If there should be any surplus under the fiat now working, it will be then time enough for the petitioner to come to this court.

Sir J. CROSS.—The fiat now in operation issued two years ago, and even then the petitioner did not put in any claim; probably because he thought there was no foundation for it. At all events, the petitioner's debt is twelve years old, and during all that time he has been utterly inactive in making any claim, either under the commission, or the fiat. As the petitioner did not choose to come in as a creditor under the former commission, he must be taken to have abandoned his debt, if debt he ever had. It would be most unjust to the creditors who have proved their debts under the fiat, if we were to grant the prayer of this petition.

Sir G. ROSE.—When the court made the former order for the commission to be impounded, it amounted to a virtual superseding of it. On that occasion the court did every thing short of superseding, in order that it might not interfere with the working of the present fiat. The petitioner in this case does not even show that there is any property under the former commission which would be sufficient to pay the expenses of a new assignment, or of this petition; and he now comes here with an application to get an assignee elected under the former commission, for the purpose of overreaching the title of the assignees under the subsequent fiat. It would really be monstrous to make any order under this petition. The court can find the means of making the present fiat available for the petitioner, if he has any just claim still against the bankrupt.

Petition dismissed with costs.



be accurately valued. At the dividend meeting, therefore, the petitioners were admitted to claim £10,000, to cover what might remain due to them after their security was realized. Between the 27th March, 1834, and the 14th of June following, all the remaining sugars • were sold by the petitioners, and the proceeds were applied as on the two former occasions. The total amount of what was applied in payment of the interest accruing subsequent to the fiat, was 844*l.* 16*s.* 11*d.*, which included a sum of £150, the amount of the customary allowance of interest claimed by the purchasers of the sugars who paid cash, instead of availing themselves of the prompt of a month, at which sugars are uniformly sold. The petitioners alleged, that the sales made by them of the sugars were made to the best advantage, and that considerably more had been realized by the delay in selling, than would have been obtained, if the same had been sold at earlier dates; that from the best computation that could be made, if the sugars had been sold at the date of the fiat, they would have left a deficiency of full £15,000, to be proved against the bankrupt's estate; that if sold at the date of the first dividend, the deficiency would have amounted to about £10,000, the sum then admitted as a claim; whereas, the actual deficiency now was only 717*9l.* 7*s.* 8*d.*, as already mentioned. The petitioners had subsequently applied to prove this balance; but the assignees objected to that proof, on the ground the petitioners were not entitled to interest subsequent to the date of the fiat, and that the whole of the gross proceeds realized by them upon the sugars ought to have been applied in liquidation of the principal. The commissioners allowed this objection, and refused to permit the petitioners to prove for more than the balance of their debt, after deducting the sum of 844*l.* 16*s.* 11*d.*, which had been applied towards the payment of the interest.

The prayer was, that it might be declared that the petitioners, by virtue of their aforesaid deposit, were entitled to interest upon their debt subsequent to the date of the fiat, and to apply the proceeds of the sale of their securities, first, in payment of such interest, and then in liquidation of the principal, and to prove for the residue; or, if the court should think that the petitioners were not so entitled, then that they might be declared entitled to prove at least the sum of £150, the amount which had been allowed by them for discount to the purchasers paying cash, and that the petitioners might have their costs out of the estate.

Mr. *Swanston*, and Mr. *Montagu*, in support of the petition. The question in this case is, whether the petitioners had a right to apply the proceeds of the sale of the sugars in reduction of the interest accruing subsequent to the bankruptcy. This point seems to have been already decided by the recent case of *Ex parte Rumsbottom*, 4 Deac. & Chit. 198, 2 Mont. & A. 79, where it was held, that a mortgagee is entitled to apply the rents and profits of the mortgaged estate, in reduction of the interest accruing subsequent to the order of sale. It is admitted, that interest cannot be proved which accrues subsequent to the fiat. But a mortgagee, like any other creditor holding a security for two debts, the one proveable, and the other not proveable, has a right to avail himself to the full extent of his security, by applying the proceeds in payment of the unproveable debt, and proving for the other. If in the present case the sugars had been sufficient in value to have covered the whole debt and interest, it cannot be denied, that the petitioners would have been entitled to apply them in payment of the interest

Mr. *Swanston*, and Mr. *Montagu*, contra. This case is distinguishable from that of *Ex parte Cunningham*. In that case the notes were identified: here there is no identification of notes, or any thing else, that was paid to Blyth by the petitioner. In the former case, there were legal proceedings in Scotland establishing the rights of the different parties. In this case, there were no such proceedings in the Scotch courts.

The true principle, then, on which this case ought to be determined, is, what were the claims of the petitioner against Maberly on the 4th of January? All that was done by the petitioner was to pay to Blyth a certain sum of money, with instructions to take up a bill; and it does not appear, that there was any subsequent application of the money for that purpose. In what manner this sum of £450 was paid to Blyth, whether in notes or cash, nowhere appears; but, however that might be, no other relation than that of debtor and creditor was constituted between those parties. Suppose the transaction, instead of being with Maberly's agent at Edinburgh, had taken place with Maberly himself in London, Maberly would have been the mere debtor of the petitioner. It is true, that the receipt of the money by him would have imposed on him the obligation of applying it for the purpose of taking up the bill; but if he had misapplied it, the petitioner would have had no remedy but that of proof. For where a party pays a sum of money into a banker's, for the purpose of taking up a bill that will fall due the following day, which the banker omits to do, and then becomes bankrupt; it is clear, the amount can only be proved under his commission. It has been decided, that payments made to a trader, after he has stopped payment, are not recoverable, unless they are revoked before the bankruptcy; *Ex parte McGhee*. The date of the fiat in this case is the 26th January, and must be taken also to be the date of the act of bankruptcy, in the absence of all other evidence as to that fact. [Sir J. Cross. It is stated in the petition, that Maberly had stopped payment, and had absented himself from his banking-house, and refused to be seen by his creditors from the 2d January.] Those facts are not alleged as an act of bankruptcy. The money, it appears, was paid to Blyth in a gross sum on the 3d January, long before the issuing of the fiat. It would have been different, if the petitioner had delivered to Blyth a bill of exchange, a particular bank-note, or money sealed up in a bag; for any one of these could have been identified. But, in this case, there was to be an application of a sum of money generally, not of any particular coin. [Sir J. Cross. Allow me to remind you, that, on the very day when this money was deposited with Blyth, Maberly had ceased to carry on that business, which was the very object and inducement of the money being paid to Blyth.] The petitioner has therefore a right of action against Blyth for the amount of the money so paid in; but, even if he has the same right against Maberly, a right of action is in bankruptcy only tantamount to proof. [ERSKINE, C. J. You put it on the ground of contract; but here the petitioner denies all contract.] Still, the petitioner is bound to show, that the money came to the hands of Maberly, or his assignees. Now, it appears that Blyth, after he received this money from the petitioner, paid away more than £1300 of moneys he had then in his hands on account of Maberly; and, *non constat*, that this sum of 450*l.* 1*l.*s. was not part of the money so paid away. [ERSKINE, C. J. Does it appear, in any statement of account between Blyth and the assignees, that on the 2d of January Blyth had

This was a convenient course of proceeding, and does not seem to be repugnant to any general principle of law or equity. There is, it is true, a general rule in bankruptcy, that no interest is allowed after the fiat, except in the case of a surplus, even on securities carrying interest; and this rule is acted on, whenever mortgagees come to this court for assistance. But, in the present case, the petitioners did not require the aid of this court in directing a sale: for they had a pledge, which they had a right to sell whenever they thought proper. They have acted *bonâ fide* throughout the whole transaction, and there is no reason why the Court of Bankruptcy should step in and deprive them of a right, which is not inconsistent with any rule of law or equity. The case would be different, if they could not have sold without an order of this court. My decision is founded on the peculiar circumstances of this particular case, fortified by the general rule, that where a pledge of goods is deposited with a party to secure debts generally, and some of those debts are proveable, and some are not, the proceeds of the goods may be applied in payment of the debts not proveable, and the creditor be admitted to prove the full amount of the other against the bankrupt's estate.

Sir J. Cross.—These petitioners may be considered as having a security for a debt, part of which, namely, the whole amount of the principal, and all interest due before the fiat, is proveable; and the other part, consisting of interest accruing since the fiat, is not proveable; and they apply the proceeds of the security in discharge of that portion of the debt which is incapable of proof. There is nothing in the judgment of the court on the present occasion, that breaks in upon the general rule in bankruptcy, that the calculation of interest stops at the date of the fiat; for the circumstances of this case take it out of the general rule. How stands this case? The factors, who might have sold whenever they chose, delayed the sale at the request of their principal, on account of the unsteadiness of the market; and when he becomes bankrupt, they, for the like cause, defer the sale at the request of the assignees. Before the bankruptcy, there could be no question that the petitioners would have been entitled to interest on their debt during this delay; and ought it not to be presumed, that when the assignees requested further delay, it was to be subject to the same condition? For it would have been a most preposterous request, to ask the petitioners to postpone the sale, and to lose the interest on £40,000, with a still further risk of a fall in the market. But now, after the estate has been benefited by the compliance of the petitioners with the assignees' request, they come and say to the petitioners, you are to bear all the loss arising from the postponement of the sale,—a most unjust and unreasonable proposition. It appears to me to have been clearly the intention of the parties, that the petitioners were to deduct their interest out of the proceeds of the sugars up to the time of sale; and therefore the petitioners are entitled to the order they ask.

Sir G. Rose.—There is no difficulty in disposing of the case on this petition. It is clear, that the petitioners might have sold the sugars, without the interposition of this court, in accordance with the contract they had entered into with their principal; and the contract still subsisting at the time of the bankruptcy, it must be presumed, from the conduct of the assignees, that they consented to be bound by it. The rule, that the computation of interest in general stops at the date of the fiat, I apprehend, is nothing more than a convenient rule of practice, inde-

the Scotch courts, that he had this money in his hands at the time of those proceedings, nor do the assignees admit that it was so. For these reasons, I am sorry that I cannot concur with the rest of the court in the order.

Sir J. CROSS.—The present case appears to me to be one in which the burden lies on the assignees to prove that the petitioner is not entitled to the relief he seeks by this petition. They ought either to show that the money never came to their hands—or that, if it did, they are entitled to retain it.

The assignees contend, first, that notwithstanding the money may be traced to their possession, the petitioner has no claim to it; but that they are entitled to retain it as part of the bankrupt's estate. But I think such a petition cannot be maintained; and that the owner of the money had a right to call it back, as having been paid under a mistake, namely, that Maberly continued to carry on the business of a banker in London, and that Blyth was his agent; whereas Maberly had then ceased to be a banker, and, consequently, could have no authorized agent to receive payments for him in that character. The money being paid under this mistake, therefore, there is no doubt that the petitioner could compel Blyth to refund it; and if the assignees have got possession of the money, they are equally liable to the petitioner.

But the assignees contend, secondly, that the money never came to their hands at all, and that the petitioner has failed in his proof of this fact. An important question here occurs—upon whom does the burden of proof lie, to show what became of the money which the petitioner paid to Blyth? A court of law, in determining on which party lies the burden of proof, invariably looks to that party who was in possession of the facts. Now, who was in possession of the facts in the present case? The assignees: they could, therefore, easily disprove the allegation in the petition, if there was no foundation for it. The petitioner has proved a payment to Blyth on the 3d of January—that Maberly stopped payment the day before—and that the petitioner, a day or two afterwards, applied to Blyth to return him the money, and was refused, and it does not appear what has become of it. The assignees then step forward, and take to every thing in Blyth's hands in *statu quo*, saying, we will keep this property, unless any one can prove a better right to it. They are in possession of the bankrupt's books, and of the accounts rendered by his agents, and they are in communication with his agents and his clerks; it therefore lies upon them to show, that this sum of £450 was not included in the property, of which they thus possessed themselves. It has been relied on by the counsel for the assignees, as the strong-hold of their defence to this petition, that money can have no earmark; and that, as in this case the petitioner's money has been mixed with other moneys in his hands, it follows that the petitioner cannot identify the sum he paid to Blyth; and a case has been put of a deposit made of 500 pounds of quicksilver, which has been mixed by the depository with 1000 pounds belonging to another man. It is true that the owner could not in such case identify the atoms; but he would have a right to the definite quantity; and a delivery to him of 500 pounds of the mass would be a good delivery of what was deposited. It is, therefore, no answer, to say that the petitioner's money has been mixed with other moneys. Supposing a tender had been made to him of the amount deposited, in other money equally good, could he have brought

to the assignees, I confess I was at one time doubtful whether the petition, as to them, should be dismissed with costs; as the petitioners have come here to enforce an order of the commissioner. The general rule is, certainly,—though that rule has exceptions,—that costs are not given on a petition against an order of the commissioners, as against the parties who are made respondents to such a petition, and are compelled to defend the order. But when a petitioner comes voluntarily to enforce such an order, and brings parties unnecessarily before the court, I see no reason why he should not be visited with costs, if unsuccessful, like any other party. The petition must, therefore, be dismissed with costs against all parties, except the official assignee; as he has no interest in the matter, and merely joined in the petition in his official character.

Sir J. CROSS.—I should have thought, in this case, that the court would have been bound to act in furtherance of the commissioner's order, if nothing had appeared to show the circumstances under which the order was made. But how does the matter really stand? With respect to the sums of 27*l.* 1*s.*, and 50*l.* 9*s.* 6*d.*, the commissioner says that he has charged the assignees with these sums, because they set up a claim which they neither persevered in nor abandoned. But, with the greatest respect for the commissioner, I do not think that this is a sufficient reason; more especially when he had the sanction of the former commissioners for the allowance of these sums, and they were both the subject of a previous audit. An audit should be treated as a very solemn proceeding. The commissioners are bound to examine the accounts of the assignees, and to administer an oath to them as to their correctness. I can find no reason for differing in opinion with the first commissioners, who allowed these accounts. It does not appear, that any of the creditors complained of the proceedings of the assignees in defending the suit in Chancery; but, on the contrary, they seem to have acquiesced in all that was going on; and now, after the expiration of nine years, they come and say, for the first time, that these costs ought not to have been incurred. I am content, however, to rely on the judgment of the former commissioners. With regard to the solicitors, there is not a shadow of ground for coming before this court to complain against them; nor is there any allegation imputing misconduct to them in the petition. As to them, therefore, there can be no doubt that the petition must be dismissed with costs. And in regard to the assignees, as the petitioners have shown no sufficient grounds that they ought to refund any of the sums stated in the prayer of the petition, I concur in the opinion of his honour the chief judge,—that the petition must also, as against them, be dismissed with costs.

Sir G. ROSE.—I should certainly have felt regret, if the court, after a due consideration of the facts of this case, had not been unanimously of opinion, that this petition should, as against all parties but the official assignee, be dismissed with costs. In regard to the official assignee, as he has acted under the directions of the commissioner, I am willing that he be exempted from the payment of costs. But I think it right to observe, that the official assignee is not exempted from costs on any general principle, but merely because in this particular instance it seems right that an exception should be made in his favour. With respect to the question of costs, as applicable to the other parties to this petition, it has been put in the course of the argument, that the certificate of the com-

missioner is to have the same authority as a master's report; but, I confess, I cannot go the length of what has been advanced on this subject by the counsel for the petitioners; for I am clearly of opinion, that the commissioner's certificate is not to be held conclusive on the discretion of the court, in awarding costs against all, or any of the parties to a petition. There is no such principle in regard to a commissioner's certificate; but if there were, this is no regular certificate, but a mere statement of facts; for there was no previous reference to the commissioner; and even taking it to be a regular certificate, what part of this document would protect any party from the payment of costs? Then with respect to the solicitors, what is there in this certificate that justifies the prayer of the petition, that the solicitors should be directed to pay to the official assignee the sum of 168*l.* 12*s.* 2*d.*? No doubt the court has jurisdiction to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat; but I never yet heard—where there is, as in this case, a solvent assignee, who has a claim against the solicitor for moneys in his hands—on what principle third parties, acting in opposition to the assignees, are to bring the solicitor before this court. But viewing the case as against all the respondents, is it too much to say, that commissioners are bound to give the same authority, at least, to a former audit, as to a settled account? Had the commissioner in this case any principle on which he could open the previous audit? An audit is conclusive, until it is regularly opened; and that can only be done by the order of this court. It is new to me, where an action has been brought or defended by assignees, that the commissioner has more than a ministerial duty to perform, and to act on an investigation into their receipts and payments. If I were a commissioner, I should not consider the question as more than one of receipt and expenditure as between trustee and estate, except in a very gross case; and even then, I would refer the matter to the decision of this court; for the expenses of a useless suit form but an indirect test of the damage to the estate, and the allowance or disallowance of them is a question for another tribunal. There are other modes of looking into such an account, that might possibly be more convenient than the examination of it by the commissioner; such as a reference of it to the registrar of this court, or directing an inquiry before a master. But were I even called on to say, that the commissioner had not a ministerial duty merely, and might decide on the propriety of prosecuting or defending an action by the assignees, I find nothing in the certificate to justify the order he has made; and it is a principle, that the court will not act on evidence out of the certificate. It is impossible to say, that any part of the prayer of this petition is tenable; and I should be laying down a faulty principle, if I were to hold, that the mere certificate of the commissioner is sufficient to protect any party from paying costs.

Petition dismissed with costs, as against all the petitioners, except the official assignee.

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In the matter of WILLIAM SUTTON.—p. 43.

Where both the quorum commissioners are unable to attend to open the fiat, the court cannot make an order that the other three commissioners may open it; but the proper course is to annul the fiat, and take out a new one.

A FIAT was directed to commissioners at Birmingham, containing a quorum clause as to two of the commissioners, one of whom was appointed to be one of those named to execute it.

Mr. *Wright* applied to the court for an order that the other three commissioners might proceed to open the fiat, on the ground that the two quorum commissioners were in London, and were likely to remain there.

The court said, that they had no authority to alter the directions of the fiat, which expressly stated that one of the two quorum commissioners must act in the execution of it; but that the proper course to pursue was, to annul this fiat, and take out a new one directed to other commissioners.

Ex parte JAMES MARTIN.—In the matter of JAMES KENTON.

—p. 44.

A commission issued against the bankrupt in 1823, under which a creditor omitted to prove his debt, being informed there were no assets. A subsequent fiat was issued against the bankrupt in 1834, who had not then obtained his certificate under the former commission, when the court ordered the commission to be impounded. A petition by the creditor, praying that the commission might be delivered out of the office, to enable him to go in under it, and prove his debt, was dismissed with costs.

IN this case a commission had issued against the bankrupt on the 28th June, 1823, under which only one creditor, who was appointed assignee, had proved any debt; and the bankrupt had never passed his last examination, nor obtained his certificate; nor had any dividend been declared of his estate. The creditor who had proved was a person of the name of *Sheers*, who chose himself sole assignee, and who afterwards became a bankrupt, and went to reside in America. On the 9th May, 1832, a fiat was issued against the bankrupt, *Kenton*, who had for some time previously carried on the business of a linen-draper, in High Street, Poplar. On the 25th April, 1834, the assignees of *Sheers*, and two of the creditors who had omitted to prove under the former commission against *Kenton*, presented a petition to rescind the fiat; when the court ordered that the former commission, and all the proceedings under it, should be impounded. (a) The present petitioner stated, that he was a creditor of the bankrupt at the time of the issuing of the commission, but did not prove his debt, having been informed by the assignee that there were no assets; and that the official assignee under the fiat had realized a considerable sum. The object of the present petition was for an order, that the former commission and proceedings might be delivered out to such person as the court should appoint, to enable the commissioners to hold a meeting for the choice of a fresh assignee, and the proof of debts. The petitioner accounted for his delay in presenting this petition, by stating that he was ignorant of the issuing of the fiat, or that the bankrupt had entered into business again after the issuing of the former commission.

Mr. *Swanston*, for the petition, referred to the former petition of *Ex parte Devas*.

Mr. *Bethell*, contra, objected that the petitioners under the former petition were not served with this.

The court said, that such omission was fatal to the present application and refused to hear the petition.

(a) See *Ex parte Devas*, 4 Deac. & Chit. 366; 1 Mont. & A. 420.

The matter was again brought before the court this day, (July 23, 1835,) when

Mr. *Swanston*, and Mr. *J. Russell*, appeared in support of the petition; and urged, that as the validity of the first commission was not disputed, and the petitioner was ignorant of the issuing of the present fiat, he was, as a matter of course, entitled to the order now sought by this petition.

Mr. *Keene*, contra, was stopped by the court.

ERSKINE, C. J.—So far from thinking this a matter of course, I think it one of the most unfounded applications that was ever brought before this court. The first commission issued so far back as June, 1823, and the petitioner suffered Sheers to prove the only debt under the commission, without making any attempt to prove himself; and even when Sheers becomes bankrupt, and goes to America, the petitioner never comes forward as a creditor, but lies by for twelve years, and lets the bankrupt carry on a fresh trade, in the course of which he obtains fresh credit. And now, when the bankrupt has, by his subsequent trading, realized some property, the petitioner wants to get it out of the hands of the new creditors, whose subsequent dealings with the bankrupt were alone the cause of his acquiring it. The petitioner all this time permits the first commission to lie dead, and now seeks to revive it, to the prejudice of more worthy claimants. There is no reason or equity for the present application. If there should be any surplus under the fiat now working, it will be then time enough for the petitioner to come to this court.

Sir J. Cross.—The fiat now in operation issued two years ago, and even then the petitioner did not put in any claim; probably because he thought there was no foundation for it. At all events, the petitioner's debt is twelve years old, and during all that time he has been utterly inactive in making any claim, either under the commission, or the fiat. As the petitioner did not choose to come in as a creditor under the former commission, he must be taken to have abandoned his debt, if debt he ever had. It would be most unjust to the creditors who have proved their debts under the fiat, if we were to grant the prayer of this petition.

Sir G. Rose.—When the court made the former order for the commission to be impounded, it amounted to a virtual superseding of it. On that occasion the court did every thing short of superseding, in order that it might not interfere with the working of the present fiat. The petitioner in this case does not even show that there is any property under the former commission which would be sufficient to pay the expenses of a new assignment, or of this petition; and he now comes here with an application to get an assignee elected under the former commission, for the purpose of overreaching the title of the assignees under the subsequent fiat. It would really be monstrous to make any order under this petition. The court can find the means of making the present fiat available for the petitioner, if he has any just claim still against the bankrupt.

Petition dismissed with costs.



has power to examine the assignees as to moneys received before, and not included in, such accounts, and to reinvestigate those accounts generally, if need be. Upon that occasion the chief judge said, that "the duty of commissioners was progressive and continuous, and that the legislature never meant to screen assignees in this wise, and to shut out the power of setting accounts right, upon the disclosure of other prior receipts by agents." [Sir G. Rose. Supposing the order of the commissioner is correct, how can you enforce your claim against the solicitors? The commissioner's certificate limits the demand expressly, as against the *assignees*.] Upon the general jurisdiction of the court, and the situation in which the solicitor stands as an officer of the court. It appears, too, from Mr. Mayhew's own affidavit, that he acknowledges the sum of 168*l.* 12*s.* 2*d.* to be still in his hands; and therefore the court has power to order him to pay the money to the party entitled to it. The assets of a bankrupt are in the nature of trust-moneys; and if trust-money comes into the hands of another person, he is bound to refund it according to the trusts. He becomes himself a trustee of all assets in his hands, knowing them to be assets. If, in a case of this description, the solicitor was not to be held jointly liable with the assignees, the result would be most detrimental to the administration of justice in bankruptcy. The amount of the debts proved under this commission is only £1500; and yet the bills of costs of Mayhew and Johnston, including the messenger's bill, amount to more than £900. The solicitors ought not to have suffered the assignees to be engaged in a suit in Chancery, without any communication with the commissioner or the creditors; for it was their duty to know the provisions of the bankrupt act in this respect. [ERSKINE, C. J. If the solicitor gives the assignees bad advice, he may be liable to them; but this is not an application by the assignees against the solicitor.] The solicitor is responsible to the creditors, as well as to the assignees.

ERSKINE, C. J.—As to a portion of the prayer of the petition, the court is of opinion, that the petitioners have not made out their complaint, and will therefore relieve the respondents from the necessity of arguing that part of the case. The charge is, on the finding of the commissioner, that the assignees have retained in their hands the sum of 246*l.* 18*s.* 1*d.* from the 23d September, 1831, to the 23d July, 1832. and that they are therefore liable to be charged £20 per cent. on that sum, within the meaning of the 104th section of the bankrupt act; which provides, "that if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ any sum, to the amount of £100 or upwards, part of the estate of the bankrupt, &c., every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of £20 per cent., on all such money, for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed, &c., and the commissioners are hereby required to charge every such assignee in his accounts accordingly." Now, on referring to the order of the commissioner, it appears that he finds that Henry Butler alone had retained in his hands the sum of 246*l.* 18*s.* 1*d.*, while the charge of the £20 per cent. is upon both the assignees. But there is no admission by Butler that it was improperly retained by him in particular; *non constat*, but that it may have been retained by Wheeler, the other assignee, who the petitioner alleges has become

bankrupt. Before, therefore, we can be called upon to enforce the order as to the £20 per cent., we must be satisfied that it was properly made. The commissioner could not charge both assignees for the retainer of one, unless he found in the words of the act that that one assignee "knowingly permitted" the other to retain. A further part of the prayer of the petition is, that Butler, and Mayhew, and Johnston, may be directed to pay the sum so charged to the official assignee. But there is nothing on the face of the commissioner's order to justify the court in enforcing the payment of this money by the solicitors. If the assignee, Butler, was insolvent, then indeed the court might be induced to secure the fund, by making such an order on the solicitors, on a proper petition for that purpose. But, in the present case, there are no grounds for such interference of the court. Therefore, as to the charge of £20 per cent., and that part of the prayer which affects the solicitors, I am of opinion that the petitioners have laid no foundation for their claim.

Sir J. Cross.—It is only necessary to refer to the terms of the commissioner's order, to show that such an order cannot be enforced. He finds that Butler retains the money, and then charges both assignees with the 20l. per cent.; without finding the fact, that the other assignee knowingly permitted Butler to retain the money in his hands. The court does not decide, whether or not the commissioner can charge the assignees in any other way with the £20 per cent.; it only declares, that the charge, as now made, is invalid.

Sir G. Rose.—As the petitioners have not sustained the allegation in their petition, as to the charge of £20 per cent., my own opinion is, that that part of their petition ought to be dismissed with costs.

Mr. Swanston, for Butler, the solvent assignee. This is a very harsh proceeding against the assignee; who had good reason to think that he had been discharged from all further claims, after his accounts had been passed and audited by the former commissioners. *Ex parte Applegarth*, which has been cited by the other side, has no application to the present case. There the court only decided, that the commissioner had power to examine the assignees, as to the receipt of moneys which had been omitted to be included in their account at the time of the audit, and that he was not prevented from setting the accounts right upon the disclosure of such previous receipts. But here no such omission appears. There is this objection, also, to the present petition. It is an application to the jurisdiction of this court, where there is no necessity to apply for its order. If the assignee had these sums of money in his hands, the commissioner should have made an order of dividend for their distribution amongst the creditors; and if the assignee had refused to act under the order of dividend, it would have been then time enough to come for the order of this court. [ERSKINE, C. J.—I suppose what they proceed upon is the 14th section of the bankrupt act, 6 Geo. 4, c. 16, whereby it is provided, that any creditor who shall have proved to the amount of £20 or upwards, if he be dissatisfied with the settlement of the solicitor's bill by the commissioners, may have the bill settled by a master in Chancery.] The audit of the former commissioners was a final disposition of the question then before them, and not subject to review. [ERSKINE, C. J.—You may be relieved from your argument as to the two sums of 50l. 9s. 6d., and 27l. 1s., which were the subjects of the former audit, and which, we think, the commissioner had no jurisdiction to review,

without an order from this court.] Then, with respect to the charge of 68*l.* 7*s.* 8*d.*, we say that this sum had been previously allowed by the commissioner himself; that the account, containing the items of which it was composed, was upon that occasion before him, and was then duly taxed; and that it was not competent for him afterwards to sit as a court of appeal on himself. Mr. *Swanston* was then proceeding to discuss the merits of the case, when he was finally stopped by the court.

Mr. *G. R. Richards*, and Mr. *Bethell*, who appeared for *Mayhew* and *Johnston*, were also stopped by the court.

Mr. *J. Russell*, in reply.—The case of *Ex parte Applegarth* decides that you may insert items in an account, which has been previously audited, if they were omitted in the previous audit. This shows that the commissioner, in the present instance, had power to re-examine the account after the former audit; for if you open the account for one purpose, you may open it for another. It is always competent to the commissioner to rectify any error or mistake that may have crept into the former account. The court has decided, that you may surcharge an account: then, if so, why may you not falsify it? If the court is to neutralize the exertions of the commissioners to save the estates of bankrupts from the ruinous expense occasioned by improvident Chancery suits, the most injurious consequences will follow. In the bills for 50*l.* 9*s.* 6*d.*, and 27*l.* 1*s.*, which it is alleged have been audited, the same thing is charged twice over, as in the instance of the charge for abbreviating pleadings; and this is not the only case of that kind.

With regard to the question of costs, the commissioner has charged the assignees with the £20 per cent.; they refuse to pay the charge; and the commissioner authorizes the petitioners to come here to enforce his order. It is a doctrine quite unheard of, to contend that a party, coming to enforce the judgment of an inferior tribunal, is to be made to pay the costs; and more especially on an occasion of this kind, where the application was directed by the commissioner. The master of the rolls, in a recent case, where it was stated that an application to the court had been directed by a master, allowed the matter to stand over for the purpose of ascertaining that fact, before he would make any order as to the costs.

Mr. *Swanston* observed, that whatever might have been the directions of the commissioner, the petition ought never to have been presented; and that that part of the petition which was dismissed without hearing the respondents, ought, as a matter of course, to be dismissed with costs.

ERSKINE, C. J.—This is a petition presented by certain creditors of the bankrupt, and by the official assignee, praying the court to enforce an order of the commissioner. And if the question depended upon the personal respect which I bear for that commissioner, I should without hesitation confirm the order he has made; but the judgment of this court must not be influenced by any consideration of private feeling. It appears to me, that this order ought not to have been made. The order declares, that the sum of 259*l.* 2*s.* 9*d.* is due from the assignees to the bankrupt's estate, and directs them to pay that sum to the official assignee. The commissioner finds that H. J. Butler, who is one of the assignees, retained in his hands 246*l.* 18*s.* 1*d.* from the 23d September, 1831, to the 23d July, 1833; and he then charges both assignees with £20 per cent. per annum on this sum, under the provision of the 104th section of the 6 Geo. 4, c. 16. With respect to the sum of 90*l.* 10*s.* 9*d.*,

being the amount of this charge of £20 per cent., and which forms part of the sum directed to be paid by *both* the assignees, I have already disposed of this question. It is true, the commissioner finds that the 246*l.* 18*s.* 1*d.* was retained in Butler's hands for nearly two years, but it is not found to have been culpably retained by him. All that the commissioner does, is to find, simply, that Butler retained it in his hands. The next item is 27*l.* 1*s.*, the amount of a bill of costs in a Chancery suit from 1827 to 1828;—the commissioner has disallowed the whole of this sum, on the ground that the assignees improperly defended a suit commenced on a bill of interpleader, in which they would neither abandon nor enforce their claim. But it seems extraordinary, that the creditors should have never made any objection to defending this suit, whilst the proceedings were going on; and it is still more remarkable, that the creditors should now come forward for the first time to impeach this account, which was the subject of the commissioner's audit so long ago as 1831. Then, as to the bill for 50*l.* 9*s.* 6*d.*, it appears that there was an order of the Court of Chancery to bring an action against the assignees, for the purpose of determining the validity of their claim to the wines in the London Docks; and that the dividend was suspended until the action was determined. There is one very short objection, however, to the commissioner's disallowance of these two sums, namely, that the account in which they are both included has been already audited, and ought not therefore to be opened again, with the view of falsifying or surcharging it, without the leave of this court. There might be no end of vexation to assignees, if accounts once audited could be reopened whenever commissioners pleased, without the previous sanction of this court. With respect to the bill for 68*l.* 7*s.* 8*d.*—which was not allowed by the former commissioners, but was brought before Mr. Fune himself in July, 1833, and then allowed by him,—I think that after the commissioner had so taxed and allowed it, and the amount had been introduced by the assignees as an item in their accounts, the commissioner ought not afterwards to have disallowed that account, without the like order of this court. And it is further to be observed, that all these sums were disallowed, without any inquiry as to the necessity of defending the suit in Chancery. There are other small items, which are almost too trifling in amount to support a petition of this nature. It seems, however, that the payment of these sums would not have been resisted, if the petition had been confined to them. The mere circumstance, therefore, of the petitioners succeeding as to these sums, which appear to have been overcharged by mistake, is not sufficient, I think, to sustain their present petition; when the respondents were willing to set any errors right. But the petitioners have made the solicitors parties to this petition, and have called on them to repay the sum of 168*l.* 12*s.* 2*d.* It may be, that there are improper items in their bills of costs—it may be, that the assignees should not have defended the suit in Chancery; but that is not enough to render the solicitors liable to refund to the creditors the amount of the costs which they have received, and which have been *bonâ fide* incurred. The solicitors were employed by the assignees; and if any persons were to be liable for instituting or defending improvident suits, it would be the assignees, and not the solicitors; though I think, under the circumstances of this case, the assignees could not be considered liable. As against the solicitors, therefore, this petition must be dismissed with costs; with regard

the costs, unless it turns out that he has been completely in the wrong ; a practice which is founded on the principle, that the court will not deter an innocent bankrupt from here to seek redress. But in the present case, where the opinion of the court was against the bankrupt, and he pressed for further inquiry, he was told that he did it at the peril of costs. If there was any estate in the hands of the assignee, we might, perhaps, have afforded him some relief. But there is no estate ; which, therefore, leaves the court no choice as to the order it must make on this occasion ; for it would be monstrous, that the assignee should be visited personally with the costs of an inquiry, which he was opposed to the prosecution of, and which has terminated in his favour. As an act, therefore, of common justice to the assignee, we must order the bankrupt to pay the costs of the inquiry.

Sir J. CROSS.—There was nothing in this petition, when it came on for hearing some time ago, to induce the court to give costs against the bankrupt. But he pressed for further inquiry, against the opinion of the court, and had notice of the risk he run by taking it. It has been said, that the inquiry became necessary, as it did not seem convenient to the court to take the examination of the witnesses *viva voce*. But I beg it may be understood, that this court is at all times bound, and willing, to take *viva voce* examinations, when they are necessary for the purposes of justice. Unfortunately, there is here no estate, out of which the assignee can recover these additional costs of the proceedings before the registrar ; and therefore the bankrupt must pay the costs of the inquiry.

Sir G. ROSE.—In this case, as far as the abstract proposition goes, I admit that the question was very properly raised on this petition, whether the bankrupt was a *builder*, or not, within the meaning of the 6 Geo. 4, c. 16. It was clear, however, from the bankrupt's own affidavit, that he was a trader, and consequently, as such, liable to a fiat in bankruptcy. The question, on the petitioning creditor's debt, was nothing but a forlorn hope. It was asserted, however, by the bankrupt's counsel, that several affidavits could be answered, if the deponents, and other witnesses, were examined *viva voce* ; upon which it was distinctly intimated, in the opinion I then pronounced, that, if any further inquiry was to take place by means of a *viva voce* examination, it must not only be at the terror of costs, but the bankrupt would be required to give security for them. But, even if nothing had been said on that occasion, it is a common rule of practice, that, when the court expresses a decided opinion on the hearing of a case, and either party presses for a reference in opposition to that opinion, he always takes the inquiry at the peril of costs. The late Master of the Rolls, Sir J. LEACH, when vice-chancellor, would never grant an issue to try any of the requisites to support a commission, except the question as to the validity of the petitioning creditor's debt, and then, only on the petition of the bankrupt ; but, even in that case, he used to say, that the best issue was an action brought by the bankrupt himself. In the present instance, if the bankrupt had brought an action, and had failed in getting a verdict, costs would have followed against him, as a matter of course. And this court ought not to be influenced by the *argumentum ad misericordiam*, and throw the costs, occasioned by the proceedings of the bankrupt, on a fund so inadequate to bear them, that they would eventually fall on the assignee himself.

ERSKINE, C. J.—When this case was before the commissioner, it

appears that the bankrupt's solicitor admitted the validity of the petitioning creditor's debt. This, therefore, is another reason why we should order the bankrupt to pay the costs of this unnecessary inquiry.

The order was, that the petition should be dismissed without costs, but that the bankrupt should pay the costs of the inquiry.

Ex parte WARD.—In the matter of TORIE.—p. 86.

After a petition has been called on, and the hearing postponed to a future day, by consent of both parties; if the petitioner does not then appear to support it, the respondent is entitled to have the petition dismissed, with costs, without an affidavit that he has been served with the petition.

WHEN this petition was called on, no one appeared in support of it; upon which Mr. *Tenant*, for the respondent, moved that the petition should be dismissed, with costs.

Mr. *Swanston*, *amicus Curie*, suggested, that before the respondent could have the petition dismissed, on the ground of the petitioner's non-appearance, he must produce an affidavit, that he had been served with the petition.

It appeared, however, from the registrar's book, that the petition had been called on on a previous day, and that the hearing had been postponed by consent of both parties.

Sir G. ROSE.—If the respondent, on this petition, had now appeared for the first time before the court, he ought certainly to have been provided with an affidavit of service, before he could apply to have the petition dismissed for the default of the petitioner's appearance. But the matter having been already brought on, when both the petitioner and the respondent were before the court, it is sufficient, on the present occasion, to refer to the registrar's book, in order to be satisfied that the respondent has a right to be heard on the matter of this petition.

Petition dismissed, with costs.

Ex parte HALL.—In the matter of IVESON.—p. 87.

Order made to prevent the bankrupt from availing himself of a sequestration, obtained by him before his bankruptcy, of the rents and profits of a rectory.

THIS was the petition of the assignees, praying that the bankrupt, who had not obtained his certificate, might be restrained from receiving the rents and profits of a rectory, against which the bankrupt had obtained a sequestration previous to his bankruptcy, for a debt due to him from the incumbent. The petitioners alleged, that the bankrupt threatened to receive, and appropriate for his own use, the proceeds of the sequestration; and that the assignees were fearful he would do so, before another sequestrator could be appointed in the room of the bankrupt; a proceeding of that nature being attended with much delay and expense.

Mr. *Bethell*, appeared in support of the petition.

Mr. *W. R. Ellis*, for the bankrupt.

The court made the following

Order, that the bankrupt should be restrained from releasing, or doing any other act to discharge the sequestration, and from receiving or demanding any thing under the same; and that he should pay over to his assignees any rents, issues, or profits, that might have been received by him under the sequestration, subsequent to his bankruptcy; with liberty for the assignees to use the name of the bankrupt, if necessary, for any purposes under the existing sequestration.

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In the matter of WALKER.—p. 88.

Where an application is made to rescind an order, on the ground of irregularity, the party ought to state in his notice of motion, what the irregularity is.  
*Quære*, whether such an application should not be by petition.

ON a previous day, a petition by the party against whom this fiat had issued had been presented to annul the fiat, on the ground that he was not a trader within the bankrupt laws; and praying for the interposition of the Great Seal, to prevent the commissioners from proceeding to adjudication. On the hearing of that petition, their lordships ordered, that it should be intimated to the commissioners, that this was a proper case for the party to be attended by his counsel at the opening of the fiat; and that in case the commissioners should find him to be a bankrupt, the advertisement should be stayed, and that the proceedings taken thereunder should be forthwith returned to the lords commissioners.

This was an application made, on motion, supported by affidavits, to rescind that order, on the ground of irregularity, and also to dismiss the petition on which the order was founded, with costs.

Mr. *Swanston*, and Mr. *Anderdon*, appeared in support of the motion, of which due notice, they said, had been given to the party who had obtained the order.

Sir *W. Horne*, and Mr. *Montagu*, contra, took an objection to the form in which this matter was brought before the court, which ought to have been by petition, and not by motion. In some cases, it is true, before the commission has been opened, the lord chancellor has heard a matter on motion; as an application to rectify an error of description,—that the commission might be directed to particular commissioners,—to discharge a prisoner from arrest,—or to amend the minutes of an order. But the general rule is, that the only mode of proceeding in bankruptcy is by petition; *Ex parte Gitton*, Buck, 549; *Re Hardy*, 6 Madd. 252; *Re Morgan*, 1 Rose, 192. Moreover, the notice of motion itself in this case is wrong in point of form; inasmuch as it does not specify in what the irregularity consists, in obtaining the former order,—but merely that the petitioning creditor had caused an affidavit to be filed, in which he stated the grounds of his intended motion.

PER CURIAM.—The usual course of proceeding in bankruptcy is, no doubt, by petition. But the latter objection to this motion is sufficient to prevail. If the party intended to rely on the irregularity of which he complained, he ought to have stated that in his notice of motion.

Motion refused, with costs.

**Ex parte MARY THOMPSON.**—In the matter of **GEORGE WYATT** and **HENRY THOMPSON.**

**Ex parte WILLIAM CATER** and another.—In the same matter.  
—p. 90.

The wife of a bankrupt has a right to a reasonable provision out of the property which she brought her husband on her marriage; and the Court of Review has jurisdiction, on petition in bankruptcy, to order the assignees to make such provision for her, whether the property consists of real or personal estate.

An allowance of £200 a year, out of a net income of £225 a year, was deemed excessive, and reduced to £175 per annum.

THE first petition was presented by the bankrupt's wife, praying to confirm the report of the deputy-registrar, to whom it had been referred by an order of the court, to inquire and state what property the bankrupt, Henry Thompson, was seised, possessed of, or entitled to, in right of his wife, the petitioner, Mary Thompson, at the time of his bankruptcy, and what settlement ought to be made on her in respect thereof. The second petition was presented by the assignees to discharge that order. The order was obtained under the following circumstances.

Edmund Barber, the father of Mary Thompson, by his will, dated the 6th March, 1808, gave and devised to certain trustees all his real estate, upon trust to pay the rents to his wife for her life, and after her death to pay to his daughter, the said Mary Thompson, or otherwise permit her to receive, the rents of his said real estate for her life, for her own use and benefit; and after her death, in trust for such of her children as she should in manner therein directed appoint; and in default of such appointment, in trust for all such children. And the testator also gave all his personal estate to his said trustees, upon similar trusts, and appointed his wife and his trustees executrix and executors of his will.

Mary Thompson was married to the bankrupt, Henry Thompson, in the year 1808; by whom she had afterwards eleven children, who were all living at the date of the petition, and most of whom were under the age of twenty-one years. No settlement was made on her marriage.

The property of the testator consisted of the sum of £2700 secured by mortgage, but which had recently been paid off, and was then invested in the purchase of 2967*l.* 0*s.* 8*d.* 3 per cent. consolidated bank annuities, —and of some estates in the county of Suffolk, which were let to several tenants at various rents, amounting to £158 a year, but which were subject to a deduction for charges of collecting and receiving the same, and for land-tax, repairs, insurance, and other outgoings.

On the 8th December, 1831, a commission of bankruptcy was issued against Wyatt and Thompson.

Besides this property under her father's will, Mary Thompson was also entitled, under the will of her grandfather, George Bitton, to certain freehold, copyhold, and leasehold estates in Suffolk, which were let to different tenants, at rents amounting together to 382*l.* 10*s.* per annum. This last-mentioned property she in conjunction with her husband, in the year 1827, conveyed by deeds of lease, release, and assignment to a trustee, to the use of such persons as she and her husband should jointly appoint; and in default thereof, to the use of Henry Thompson, for his life; and after his death, to the use of Mary Thompson, for her life;



and after the death of the survivor of them, to their children, as therein mentioned.

After the date of the last-mentioned deed, the premises comprised therein were, by indentures of the 4th and 5th October, 1827, duly appointed and conveyed by Henry Thompson and his wife to one Stephen Stanton, by way of mortgage, for securing the repayment of the sum of £5000, which had been lent by him to Henry Thompson, in which security was contained a power for the mortgagee to sell the premises, in case the money should be unpaid.

In consequence of Mary Thompson having so joined in this security, Henry Thompson, by a deed of declaration of trust, dated the 5th October, 1827, and made between himself of the one part, and George Bedford, a trustee named on the part of Mary Thompson, of the other part, did direct and declare, that certain estates of Henry Thompson should be liable for the payment of the said £5000 and interest, in exoneration and discharge of the mortgaged estate, the property of Mary Thompson. And he did thereby covenant, that he would out of his own proper moneys, estate, and effects pay the said £5000 and interest, and save harmless therefrom the estate of Mary Thompson.

After the bankruptcy of Henry Thompson, Stephen Stanton, in exercise of the authority vested in him by the indentures of the 4th and 5th October, 1827, sold the whole of the premises comprised therein for £6620, and after paying the principal, interest, and costs, there remained a balance of 1277*l.* 16*s.* 6*d.*, which was invested in the purchase of 1398*l.* 8*s.* 9*d.* 3 per cent. bank annuities. Henry Thompson being entitled to the dividends of this sum for his life, his interest therein was on the 17th December last sold by auction for the sum of £290, which was paid to the assignees; and at the same time Henry Thompson, and Mary his wife, exercised their joint power of appointment over the said 1398*l.* 8*s.* 9*d.* 3 per cent. consols, in favour of Helen Catharine Thompson, one of their daughters.

The property, on which the sum of £5000 was by the deed or declaration of trust intended to be secured by Henry Thompson, was, previous to his bankruptcy, sold by him; but the sale thereof not having been completed, a suit had since his bankruptcy been instituted by a mortgagee, and was pending in the Court of Chancery, relative to such property, and to the priority of the claims upon it. In the answer put in by Mary Thompson in that suit, she claimed to be entitled to dower, thirds, or freebench, out of the estates so sold by her husband, and to have the said sum of £5000 raised and paid out of the purchase-money, upon the trusts before declared. But doubts were entertained, whether the same was a valid charge on those estates.

Mary Thompson also claimed dower, thirds, or freebench, out of all the estates of which Henry Thompson was seised or entitled to at the time of his bankruptcy; in consequence of which claims, the assignees paid her £50, in respect of one estate which was sold by them.

Before his bankruptcy, Henry Thompson became surety for one George Smallwood, for the payment of an annuity of £112 to Theophilus Thompson, during the lives of four of his daughters, but redeemable on the payment of £1428, and all arrears. By the same deed he entered into a covenant with Theophilus Thompson, that certain houses, on which the said annuity was intended to be chargeable, should be completed by a time therein mentioned. Before any instalment,

however, became due on this arrangement, Henry Thompson became bankrupt; and the houses were not built within the time mentioned.

In consequence of a decision of the Court of Review, that Theophilus Thompson was not entitled to prove any debt against the estate of the bankrupt, Theophilus Thompson commenced an action against him; upon the trial of which a special verdict was returned, for £280 damages, the arrears of the annuity then due,—and for £1220, for the non-erection of the houses within the time stipulated; subject to the opinion of the Court of Common Pleas, whether the plaintiff was barred from recovering those sums, or either of them, by the certificate of Henry Thompson.

The deputy registrar, after stating the above facts in his report, certified, that it was alleged before him, on behalf of Mary Thompson, that the bankrupt was wholly without the means of satisfying any portion of this verdict; and that as he could not (under the existing laws for the relief of insolvent debtors) be discharged from future instalments of the annuity, he must, if the Court of Common Pleas should decide against him on the special verdict, go abroad for the remainder of his life; and that the only means which Mary Thompson and her numerous family had to subsist on, were the trifling and precarious profits arising from a very small brewery at Plymouth, which their eldest son had, by the assistance of his friends, been enabled to take, and the management of which the bankrupt superintended at a weekly salary. That the property which the bankrupt was seised or possessed of, or entitled to, in right of his wife, at the time of his bankruptcy, consisted of the said sum of 2967*l.* 0*s.* 8*d.* 3 per cent. consolidated bank annuities, standing in the names of certain trustees, the dividends on which were 89*l.* 0*s.* 2*d.* a year; of certain estates at Uggheshall and Southwold, in the county of Suffolk, let to tenants at yearly rents, producing together £158, or thereabout; and of the said estates mortgaged to Stephen Stanton. That, upon consideration of the above facts, which (except as to such parts thereof as related to the proceedings at law against the bankrupt, and the present state of his family, which, however, was supported by the affidavit of Mary Thompson) had been admitted by all parties to be correct, the deputy registrar was of opinion, that the dividends on the said sum of 2967*l.* 0*s.* 8*d.* 3 per cent. bank annuities, and the rents of the property devised by the will of the said Edmund Barber, which had accrued due since the bankruptcy, subject to all deductions which had been incurred in collecting and receiving such rents, and all payments and allowances for repairs, taxes, insurance, and otherwise relating to or incidental to the same, and which should accrue due during the joint lives of the bankrupt and his wife, ought to be settled for the benefit of or to be paid to the bankrupt's wife, for her separate use; but without any power for her to anticipate the receipt thereof, and so that the receipt of herself, or such person as she should authorize to receive the same, should be given after the same should have respectively become due.

It was agreed between the parties, that on the hearing of the petition to confirm the report, the assignees might take objections to the report, without a petition to except to it, or filing exceptions.

Mr. *Swanston* appeared in support of the petition to confirm the report.

Mr. *J. Russell*, and Mr. *Stevens*, on behalf of the assignees. The court has no jurisdiction in this case to direct any settlement of the real

estate on the bankrupt's wife. There is a great distinction between the real and the personal estate of the wife; the latter being subject, by the marital right, to be taken under an execution against the husband; but the real estate is not so liable. In *Burdon v. Dean*, 2 Ves. jun. 607, where the question was, what part of the wife's estate should be settled upon her after her husband's bankruptcy, Lord ALVANLEY said, "It is impossible to give her the whole; for that would be to admit, that a married woman is entitled to the whole of her property to her separate use;" and he added, that he doubted whether the rule, as to making a settlement on the wife, under such circumstances, had been extended to a trust of real estate, to which the wife was entitled for life. So, in *Beresford v. Hobson*, 1 Madd. 362, where all the previous cases on this subject are cited, a bill having been filed by the assignees of a bankrupt to recover money, to which the bankrupt was entitled in right of his wife; and the master having approved a settlement of the *whole property* on the wife and children; exceptions were taken to his report, and the exceptions were for this cause allowed; Sir T. PLUMER saying that in no case has the court given the whole to the wife. Sir WILLIAM GRANT, also, recognises the same principle in *Wright v. Morley*, 11 Ves. 21.

Mr. *Swanston*, in reply. In an early case on this subject, *Ex parte Coysegame*, 1 Atk. 192, where an annuity was settled on the wife, which was not more than sufficient to maintain her, Lord HARDWICKE ordered the whole to be paid to her. (a)

The court said, that although the whole of the property specified in the registrar's report ought not to be settled on the wife, yet they thought it but just, as she brought so considerable a fortune to the bankrupt, and had so numerous a family of children to maintain, that a provision of £200 a year should be assigned to her for her maintenance, and accordingly pronounced the following

Order, that the petitioner was entitled to receive the dividends on the sum of 2967*l.* 0*s.* 8*d.*, £3 per cent. annuities, which had become due since the 8th December, 1831, and also the future dividends thereon, during the joint lives of herself and the bankrupt; and that the trustees should pay the same to her for her separate use; and that she was also entitled to receive, from the time and during the period aforesaid, out of the rents of the estates in the report mentioned, so much money as, with the dividends, would make up the sum of £200 a year; which the assignees were directed to pay to her by half-yearly payments; the costs of all parties to be paid out of the surplus rents of the estates.

The assignees now presented a petition for the discharge or reversal of the above order, and praying that the former petition might be reheard.

This petition alleged, that the amount of the rents of the estates mentioned in the report, which had been received by the assignees since the bankruptcy, amounted in the whole to £420; and that the nett amount of the yearly rents, after deducting the expense of collecting the same, and allowances for repairs, taxes, and insurances, would not exceed the yearly sum of £135. That the assignees were advised it was not within the jurisdiction of this court to direct any settlement in favour of the bankrupt's wife out of any property, real or personal,

(a) And see *Oswell v. Probert*, 2 Ves. 680, and 1 Deac. B. L. 373.

which the bankrupt was seised or possessed of in right of his wife; but that she ought to have sought such settlement by bill in equity. That if the matter was within the jurisdiction of the court, yet that the right of the wife to any such settlement or provision did not extend to real estate, in which the bankrupt had a freehold interest in right of his wife, whether such interest was, or was not, an equitable interest merely. That a provision was improperly made by the above order for the wife, partly out of the rents actually paid to the assignees previously to the presenting of her petition. And that the allowance of £200 per annum, from the time of the bankruptcy of her husband, was excessive,—the net annual income arising from the rents and profits of the real estates, and from the dividends of the sum of 2967*l.* 0*s.* 8*d.*, £3 per cent. consolidated annuities, amounting in the whole only to the sum of £225.

Mr. *Stevens*, in support of this last petition. There is no case to be met with in the books, with the exception of *Ex parte Coysegame*, 1 Atk. 192, where the court has, by proceeding on petition, ordered a settlement to be made on the wife; although it is admitted, that it has done so frequently by bill. [ERSKINE, C. J. The Lords Commissioners of the Great Seal have lately held, (a) that where one solitary case has been decided on the same point, this is quite sufficient to give the court jurisdiction over it. Besides, the present petitioners made no objection to the jurisdiction of the court on the former hearing.] Whether a party makes an objection or not, still, if the court has really no jurisdiction to make an order, the order cannot stand. [Sir G. ROSE. The court cannot now permit the assignees to say that the court has no jurisdiction over the matter, when the other party, over whom the court had really no jurisdiction, has submitted to its jurisdiction.] With respect then to the right of the wife to a provision out of the real estate,—what the Master of the Rolls says in *Burden v. Dean*, 2 Ves. jun. 627, which was cited in the former argument, shows that the right was very doubtful. [ERSKINE, C. J., referred to *Griffith's* case, Skin. 110, where the wife being entitled, as one of two coparceners, to an estate of £600 per annum, the court ordered her estate to be so settled, that she might not be induced by her husband to give it to him, to the prejudice of her children.] The only foundation for the claim of the wife in all these cases is, that the party, who claims adverse to her interests, is obliged to resort to a Court of Equity. But in this case the assignees are in possession of the property, and cannot be turned out, except by an action of ejectment brought by the trustee, in whom alone the legal estate is vested. The assignees, therefore, have no object for coming to a Court of Equity. But, with respect to the general right of the wife to a provision, it was doubtful, at one time, whether the equity of the wife to a provision extended to a trust term; although it is now decided that it does, as a trust term of the wife's can be taken in execution for the debt of the husband; but this proceeds on the ground of its being considered merely as personal property. [ERSKINE, C. J. The plain principle is this,—that where a party comes into a Court of Equity for relief, he must himself do equity. There is no difference in this respect, whether the property, which is the subject of controversy, is real or personal estate. In *Lupton v. Tempest*, 2 Vern. 626, it is laid down, that where the husband comes into a Court of Equity for a personal demand in right of his wife, the court may impose terms on him.] But

(a) See *Ex parte Barrington*, 4 Deac. & C. 480.

in *Stanton v. Hall*, 2 Russ. & M. 175, it has been lately held, that the wife had no equity for a settlement out of an annuity; although it was charged on lands devised to trustees upon the following trusts, namely, upon trust to pay the rents and profits to the husband for life, but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife an annuity of £100 during his life, and, after his decease, an annuity of £30 during her widowhood; and notwithstanding, also, the husband had conveyed the fee simple of the devised estates to a mortgagee, and had afterwards taken the benefit of the insolvent debtors' act.

Another objection to the order is, that it applies to rents which had been received by the assignees previous to the wife presenting her petition. But it was too late then for the wife to make any claim to the rents already received by the assignees. Lord ELDON lays it down, in *Murray v. Lord Elibank*, 10 Ves. 90, that "the husband, where he can, is entitled to lay hold of his wife's property, and this court will not interfere; and that previously to a bill, a trustee who has the wife's property, real or personal, may pay the rents and profits, and hand over the personal estate to the husband."

The next objection to the order is, that the allowance directed to be made to the wife is excessive, amounting nearly to the whole income of the estate, which is only £225 per annum; and yet the court has ordered £200 per annum to be paid to her. In *Wright v. Morley*, 11 Ves. 22, Sir WILLIAM GRANT, in observing upon the amount of the provision, to which the wife of a bankrupt was entitled to claim out of her property from the assignees, says, "I should think they dealt fairly, and even favourably towards her, if, out of £260, the produce of the fund, they allowed her to retain £160." In the present case, too, it is to be remembered that a great portion of the husband's estate is subject to dower; which makes against so large an allowance to the wife as £200 out of £225. The case of *Aguilar v. Aguilar*, 5 Madd. 411, shows that, where the wife has a provision out of some specific property, she has no equity against the assignees.

Mr. *Swanston*, and Mr. *Bethell*, appeared in support of the original petition, on behalf of Mrs. Thompson.

Sir G. ROSE.—There are two points involved in this case, according to the argument of the counsel for the assignees; 1st, Whether the former order of this court ought ever to have been made: 2dly, Whether the officer of the court, to whom this matter was referred, has acted in the proper execution of such order of reference. Now, with all due respect to Mr. Gregg, I must take leave to observe, that I do not think that he has properly executed the order, consistently with the intentions of the court. The great point in discussion was as to the *quantum* of the property which ought to be settled on the wife; and he seems to have had this question not sufficiently before his view. I am not aware, however, that there is any rule in these cases for assigning any specific proportion of the property as a provision for the wife; for the creditors may give the whole of it to her, if they think proper to do so, without any interference of this court. As to the rents received by the assignees before the wife presented her petition to this court, and their subsequent possession of the property; this only amounts to a title of the assignees connected with a trust; and any analogy drawn from the possession of the husband, or a mortgagee, does not apply to this case.

ERSKINE, C. J.—The only difficulty which I feel in this case is, as to the amount of the property which the officer has thought proper to assign as a provision for the wife; for, in regard to the general question, I confess that my mind has not been at all shaken by the arguments that have been adduced by the counsel for the assignees. If the husband had sought to get this property into his own possession, he would have been obliged to come to a Court of Equity for its assistance; which would have rendered him no aid, without requiring him to make an equitable provision for his wife; and the assignees of a bankrupt are bound by all the equities by which the bankrupt himself is bound. Now, the assignees being officers of this court, they are liable to the control of the court in all matters relating to the bankrupt's property; and we can exercise a different jurisdiction over them from what we might be able to exercise over a mere trustee. I should therefore deal with this case, as if the husband had come to a Court of Equity to obtain possession of this property, and the wife had claimed a just settlement to be made upon her. As to the argument, that we have no jurisdiction to direct any settlement out of the real estate, I really cannot see any distinction in this respect between real and personal property, in regard to its liability to the claims of the wife. In the case I have already alluded to in Skinner, (a) the claim of the wife was held to extend to real property. Then, as the deputy-registrar has not done wrong in awarding a settlement to the wife out of the real estate, the only question we have to consider, is as to the amount; and I confess, I should have been better satisfied if the income assigned to her had been £175, instead of £200.

Sir J. Cross.—In regard to the question which has been raised, as to the jurisdiction of this court, I think there can be no doubt that, as the respective claims of the wife and the assignees in this case were matters subject to the jurisdiction of the lord chancellor, before the passing of the Bankruptcy Court act, this court has now full power to adjudicate upon those claims. With respect to the *quantum* of the allowance that ought to be made to the wife, it is somewhat difficult to draw any precise line in these cases, as each must depend on its own circumstances. But as it appears, from what Sir WILLIAM GRANT says in *Wright v. Morley*, 11 Ves. 21, that it has not been the custom to give the whole of the income to the wife, I think that the allowance ought to be reduced to the sum that has been mentioned by his honour the chief judge.

Mr. Ellison, on behalf of the trustees, claimed to be allowed their costs, as they had been served with this petition.

The court said, that this must, of course, form part of the order.

Mr. Swanston then suggested to the court, whether there was any necessity for the matter being referred back to Mr. Gregg, when all the evidence was completely before the court. There is no question but that, if the court is dissatisfied with the report of its officer, it can make an order, without any further reference.

The court acquiesced in this suggestion, and pronounced the following Order, that the petition of the assignees should be dismissed, as to such part as sought to set aside the former order: that the allowance of £200 should be reduced to £175; the trustees to take their costs out of the trust fund, the assignees to have theirs out

(a) See ante, p. 391.

of the general estate; those of Mrs. Thompson to come out of the trust fund, and if that prove insufficient to satisfy them, as well as the allowance, then to come out of the general estate.

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In the matter of GRAY.—p. 105.

If the officer of the court, in taxing a bill of costs, disallows charges which are usually allowed, the court will order a retaxation. *Aliter*, where the charges are not usually allowed; unless a special application is made to the court, stating the reasons for enforcing such allowance.

In this case, the court, upon the petition of the bankrupt, had ordered the fiat to be annulled, at the costs of the petitioning creditor. The bill of costs made out by the bankrupt's solicitor amounted to £63, and the deputy registrar had, on taxation, taken off £35 from that amount. Among the charges disallowed was one for a fee to counsel of 1*l.* 3*s.* 6*d.* to peruse and settle the petition.

Mr. *Koe* moved that the deputy-registrar be ordered to review his taxation, on the ground that he had improperly disallowed this, among other charges. Notice had been given of the motion to the petitioning creditor.

The court inquired of Mr. Gregg, the deputy-registrar, what was the practice in this respect; who stated, that it was not usual to allow this fee, except under very special circumstances.

Mr. *Koe*. In the form of a bill of costs, in Archbold's Bankrupt Law, there appears this very item of a fee to counsel for settling the petition.

ERSKINE, C. J.—We must be guided by what our own officer reports to be the practice of the court, and not by Mr. Archbold. The principle on which the court refers a bill back for taxation is this: if the officer has disallowed charges which are usually allowed, then the court will order a retaxation. But if he has only disallowed charges which are not usually allowed, then you should have made a special application to the court, stating your reasons why the charges insisted on ought to have been allowed. There appears to be no good reason for the officer, in this case, reviewing his certificate. We must presume the same was done here as in ordinary cases, until the contrary is shown; and there are many ways of showing, by evidence, what the usual course is, if there has been a departure from the ordinary practice.

The rest of the court concurring,

The motion was refused.

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ANON.—p. 106.

An official assignee ought not, except under very peculiar circumstances, to present a petition to the court, in his own name.

An official assignee presented a petition for an order to divide unclaimed dividends among the bankrupt's creditors.

ERSKINE, C. J.—What interest has the official assignee in the matter? If there are no assignees chosen under the commission, or none now living, you must have a petition of some of the creditors.

Sir G. ROSE.—The court will never entertain a petition of an official assignee, except under very peculiar circumstances.

Petition dismissed.

Ex parte CROSLY.—In the matter of JOHN KIDDER.—p. 107.

Where a creditor enters into an agreement with his debtor to accept a composition on his debt, and to execute a release upon certain conditions, but the debt is never actually released; a subsequent promise of the debtor, either express or implied, will revive the debt.

The examinations of the bankrupt and other persons before the commissioners, may be read in evidence, after notice has been given to the other side of the intention to read them, and may then, in all respects, be treated as affidavits.

THIS was the petition of the executor of an equitable mortgagee, praying for the usual order.

It appeared that the petitioner's testator, Thomas Kidder, in 1813 lent the bankrupt £300; who thereupon gave him a bond for the amount, and deposited certain title-deeds, by way of equitable mortgage, as an additional security. On the 18th of April, 1815, the bankrupt entered into two other bonds to Thomas Kidder, one to secure £1000, and the other for £300; and on the 27th of November, 1815, he executed a legal mortgage to him for £300.

In May, 1816, the bankrupt entered into an agreement of composition with his creditors, in which were contained the following stipulations on the part of the creditors:—"We, the several creditors whose debts are set opposite to our respective names, do hereby agree to accept from John Kidder, at and after the rate of 10s. in the pound upon our respective debts, such composition to be paid us in the proportion following; that is to say, 2s. 6d. in six months, 2s. 6d. in twelve months, 2s. 6d. in eighteen months, and 2s. 6d. in twenty-four months, from the date hereof. And it is hereby agreed, that the four several instalments shall be secured to us by the promissory notes of the said John Kidder. And we do hereby severally agree, that we will receive the said promissory notes in full discharge of our debts; and upon the delivery of the said several promissory notes, we will forthwith execute to John Kidder a release for our debts. And it is hereby agreed, that if all the creditors whose debts exceed £500 do not accede to the arrangement within one month from this time, the whole to be void; and that if John Kidder fail in making good all the said instalments, or any part thereof, that each of the said creditors shall remain a creditor for the full amount of his debt."

Thomas Kidder was a party to this agreement, but never executed the release mentioned in it; having never, in fact, received from the bankrupt any promissory notes, in pursuance of the provisions contained in the agreement. The bankrupt afterwards paid to Thomas Kidder various sums on account of interest due on the bonds, on which were endorsed receipts for the sums so paid. In 1829 Thomas Kidder employed the petitioner to apply to the bankrupt on the subject of the account between them, who, upon that occasion objected to the mode in which the interest was calculated, and sent in another account, in which he debited himself with the full amount of the sums lent.

In 1829, after the stating of this account, Thomas Kidder died, leaving the petitioner his executor.



In March, 1835, a fiat issued against John Kidder.

The petitioner tendered a proof for the whole sums remaining due to his testator, Thomas Kidder; but the composition agreement was set up by the assignees in opposition to such proof; and the commissioner decided that the account should be taken, on the footing of that agreement.

The prayer was, that the account might be taken, on the footing of the original debt, and for the usual order, as to the sale of the securities.

Mr. *Ching*, and Mr. *Koe*, in support of the petition. The composition agreement is altogether invalid; for it says, "we, the several creditors, whose debts are set opposite to our respective names;" and the fact is, that there are no debts whatever set opposite to the names of any of the creditors; the agreement can therefore have no operation in law. But if the agreement is not wholly invalid, it is at least a nullity as to Thomas Kidder; for it is expressly stipulated, that if the bankrupt failed in making good any instalment to a creditor, the latter should remain a creditor for the full amount of his debt; and the bankrupt never gave any promissory notes for the instalments to Thomas Kidder. But even if the composition agreement was valid as against Thomas Kidder, the original debt became subsequently revived by the acknowledgments made by the bankrupt of its existence, and by his making payments on account of the interest due upon it. There is no fraud on the other creditors by Thomas Kidder signing the composition contract; for the stipulation is, that each creditor might sue on his original debt, if the bankrupt made default in any of the instalments. Moreover, the mortgage debt due to Thomas Kidder was not contemplated by the agreement; for that does not provide for any of the securities being given up, which were held by any of the creditors; and it was decided in *Thomas v. Courtney*, 1 B. & Ald. 1, that where an agreement of composition does not contain any stipulation for giving up securities, a creditor may avail himself of any held by him, where the effect of the agreement is not to extinguish the original debt. Mr. J. HOLROYD, in delivering his judgment in that case, says, "There being no express agreement for giving up securities, the question is, whether, from what is stipulated, we can infer that such was the intention of the parties. It is stipulated, that the creditors shall receive the promissory notes of Baker and Son, in full satisfaction of their debts, and shall and will release them from all the debts; but this stipulation by no means implies, that the creditors were to give up such securities as they might hold at the time of the agreement." In the present case, therefore, the mortgages, both legal and equitable, continued good and available securities for the amount of the original debt.

Mr. *Swanston*, for the assignees. The case of *Thomas v. Courtney* is more in favour of the respondents, than of the claim set up by the petitioner; which the court will readily perceive, by referring to the reasons given for the judgment in that case by Mr. J. BAYLEY. The security retained there by the creditor was not the acceptance of the debtor, but the acceptance of a third person, one Colonel Gower; and Mr. J. BAYLEY says, that "if it could have been made out, that Colonel Gower had a remedy over against Baker and Son, that might have varied the case, and brought it within the range of *Stock v. Mawson*, 1 Bos. & P. 286. The principle of that case was, that if Mawson had been suffered to retain in his possession the money which he had raised on the bills given by Stock, he would have got more than eight shillings

in the pound out of Stock's effects, by the amount of those bills which under the agreement Lawson was to restore and to give up to Stock." The decision in *Cockshott v. Bennett*, 2 T. R. 763, was in accordance with this principle, where it was held, that where one of the creditors of an insolvent obtained a bill for the residue of his debt before he executed the composition deed, the bill was void, as well as a subsequent promise to pay it; the latter being without consideration. Thomas Kidder, therefore, on receiving the notes for 10s. in the pound, would have been bound to give up any security he held. [Sir J. CROSS. The important question in this case is, whether, the bankrupt having for a period of nineteen years treated this agreement as void, with respect to Thomas Kidder, his assignees can now set it up as valid.] Mr. *Swanston* then proceeded to read the examinations of the bankrupt and another person before the commissioners, detailing some of the transactions between the bankrupt and Thomas Kidder. Notice had been given to the other side of the intention to read them.

Mr. *Ching* objected to their being read, as inadmissible in evidence.

The court said, it was usual to admit the deposition of the bankrupt, subject to any observations of the party affected by it. With respect to the examinations of other persons before the commissioners, the party intending to read them ought to give notice to the other side, who are then entitled to have copies of the examinations at their own expense. The examination may then be treated as an affidavit, and may be answered by affidavit; or, if considered more expedient, an application may be made for a *viva voce* examination of the party in this court; or, lastly, the party may be again summoned before the commissioners by the other side, and examined further by them, and notice given to read such further examination on the hearing of the petition.

Mr. *Swanston*. Where a creditor is a party to a deed of composition, he must afterwards abide by it, and cannot take any steps to recover the whole debt, if they are inconsistent with the intent and spirit of the deed. If Thomas Kidder was to be permitted to receive more than 10s. in the pound on his debt, it would have been a fraud upon the other creditors, who executed the agreement under the influence of his signature, he being one of the largest creditors. The commissioner has in this case given Thomas Kidder the benefit of the mortgage-money received by him, to the amount of 10s. in the pound; and he is therefore placed in the same situation, as if he had received that sum in common with the other creditors who were parties to the composition.

Mr. *Ching*, in reply. The decision relied on in *Cockshott v. Bennett*, does not apply to the circumstances of the present case; there was here no previous agreement or fraud, on the part of Thomas Kidder, which there was in that case.

*Cur. adv. vult.*

ERSKINE, C. J.—After maturely considering this case, I am of opinion, that the petitioner is entitled to the relief he seeks by this petition. By the terms of the composition agreement between John Kidder and his creditors, he was entitled to a release from them, on payment of the notes agreed to be given by him when he entered into the composition. It appears, however, that no notes were ever delivered to Thomas Kidder; nor did he ever receive any instalments under the composition agreement. The other creditors received their instalments, and executed releases; the bankrupt was therefore absolutely released from all his

debts, except that due to Thomas Kidder; and the reason the latter **did** not receive notes with the other creditors was, no doubt, because he waived them out of kindness to John Kidder. But notwithstanding this waiver of the notes, yet, if Thomas Kidder had received the instalments with the other creditors, John Kidder would have been entitled to a release from him also. No instalment, however, was ever paid to Thomas Kidder. These facts might induce a suspicion, that there was some collusive agreement, at the time of the composition, that Thomas Kidder should be paid his debt in full; but the evidence of the bankrupt rebuts that suspicion. After the composition agreement, it appears that the bankrupt made payments on the original debt to Thomas Kidder; besides which, Crosley made out a statement of the sums then due to Thomas Kidder; when the bankrupt did not object that nothing was owing, but only objected to the mode in which the interest was calculated; thereby acknowledging that the debt was still due. The question then is, upon what terms was all this done? When there is no absolute release of the debt, the case of *Took v. Tuck*, 4 Bing. 224, (13 E. C. L. R. 407,) shows that an agreement may be made to continue the debt. And it is a question of fact for the court to collect, from all the evidence, whether such an agreement in this case was actually made. In the deposition of the bankrupt before the commissioner he states, that it was his intention to pay the whole debt, when able. If this had been the only condition, it might be necessary to show the bankrupt's ability. But when we look further, and find that in the subsequent transactions the bankrupt never sets up any agreement of Thomas Kidder to release the debt, and that he acted on all occasions as if the whole debt was due, it is impossible to help coming to the conclusion, that the bankrupt relinquished the agreement of composition, and consented that Thomas Kidder should continue his creditor on the bond. I therefore think that the petitioner is entitled to prove for the balance of his whole debt, after accounting for the proceeds of the sale of his securities.

Sir J. Cross concurred.

Sir G. Rose.—Inasmuch as the debt existed, not being barred by any release, it appears to me enough to say, that the commissioner was wrong in the view he took of the matter.

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Ex parte MILLINGTON and others.—In the matter of HUDSON.—  
p. 114.

Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the court will not enter into the particulars of the items of the bill.

THIS was a petition of the assignees, praying that the solicitor to the commission might be directed to pay the costs of the taxation of his bill of costs, more than a sixth part having been taken off; and that it might be referred to the proper officer to tax those costs.

Mr. Young, in support of the petition.

Mr. J. Russell, contra, proceeded to make some observations upon the items disallowed, and upon the nature of the account depending between the solicitor and the assignees.

ERSKINE, C. J.—The usual order must be made, when a sixth part is

taken off the solicitor's bill, on taxation. The court does not enter into the particulars of the items, upon an application of this kind.

Ordered as prayed.

**Ex parte BENJAMIN DAVIES and MARTHA his Wife, and THOMAS ISAAC.**—In the matter of **MATTHEW BARNARD HARVEY and JOHN WHITTLE HARVEY.**—p. 115.

The bankrupt, previous to his marriage, entered into a bond, that in case his wife should survive him, and should, within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her £2000. The wife survived the bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so:—*Held*, that the bond was not proveable, either under the first, or the last part of the 56th section of the bankrupt act, inasmuch as the contingency had not happened, and no value could be set upon it.

THIS was a petition to prove a bond against the separate estate of the bankrupt, Matthew Barnard Harvey, under the following circumstances, as stated in the petition.

On the 1st February, 1804, the petitioner, Martha Davies, then Martha Moody, spinster, intermarried with the bankrupt, Matthew Barnard Harvey, and brought him a portion of £2000; who, in consideration of this portion, had previously entered into a bond to trustees in the penal sum of £4000, in order to secure her a provision at his death. This bond was dated 24th November, 1803, and after reciting that the bankrupt had agreed, in consideration of the marriage portion, to leave his intended wife the sum of £2000 in case she should survive him, the condition was, that in case the marriage should take effect, and M. B. Harvey should happen to depart this life before his intended wife, and she should, within two months after his decease, at the costs and charges of his heirs or devisees, relinquish and release, by good and effectual deeds or discharges in law, all the dower and thirds, right and title of dower, thirds, and other estate whatever, which she might have or claim, or be entitled to in or out of the messuages, lands, and tenements, whereof or wherein M. B. Harvey then was, or should or might be, seised in possession of at the time of his decease, (save and except such estate and interest therein as he should think fit to give and devise to her by his last will and testament,) then, if the heirs, executors, or administrators of M. B. Harvey should, within three months next after his decease, well and truly pay unto the said M. Moody, his intended wife, the full sum of £2000, without any deduction for taxes of any sort, or for any other matter or cause, and without fraud or further delay, the obligation was to be void, but otherwise to remain in full force and virtue.

In the year 1809, M. B. Harvey, at the request of his sons, Daniel Whittle Harvey, and the bankrupt, John Whittle Harvey, consented that his name should appear and be made use of as one of the partners of a banking firm, the business of which was, in fact, carried on by D. W. Harvey and J. W. Harvey alone, for their own benefit. In the year 1812, D. W. Harvey retired from this business, which was afterwards carried on by J. W. Harvey, in the joint names of himself and his father, until May, 1814, when a joint commission issued against them. M. B. Harvey's separate estate paid a dividend of 14s. in the pound, in consequence of which he became entitled to the allowance of 7½ per cent. on

the produce of his separate estate; which allowance amounted to £300, but it was never paid to him. In 1815, he obtained his certificate, after which he purchased a messuage at Witham, in Essex, which he sold, in 1819, to a Captain Adams; but the sale was not completed till 1826, by reason of a deposit having been made with a third party of the title-deeds of the property. In the mean time his assignees erroneously received the rents of this property, which they carried to the account of M. B. Harvey's separate estate.

On the 8th March, 1820, M. B. Harvey died, having previously made his will, whereby he made his wife his residuary legatee and sole executrix. Previous to his bankruptcy he had assigned to his wife, for her sole use and benefit, a bond of Messrs. Dyer and Swayne, for securing £2000; which, at a meeting of creditors held 4th December, 1818, the assignees proposed should be given up to the petitioner, according to the intentions of her husband, on the condition that it should be in full satisfaction of all her claims on the bankrupt's estate; but the arrangement was not carried into effect, in consequence of an objection raised by D. W. Harvey, who stated, that he had unsettled claims on the estate of his father. At the same time that M. B. Harvey assigned the bond to his wife, he also gave her £1000 in bank-notes for her separate use; all of which, however, she afterwards gave up voluntarily for the benefit of his creditors.

At a meeting of creditors held on the 3d April, 1822, pursuant to notice in the London Gazette, when the assignees and seven other creditors were present, including D. W. Harvey, it was unanimously resolved, that the assignees should, out of the purchase-money arising from the sale of an estate, called the Heybridge Estate, purchase an annuity for the life of Mrs. Harvey, equal to one-third of the rent of the property, on her releasing her right of dower or freebench thereon; and that the assignees might pay to the personal representative of M. B. Harvey such allowance as he would have been entitled to if living. These resolutions were communicated to Mrs. Harvey in a letter from D. W. Harvey, dated 5th April, 1822, in which he expressed himself as follows:—"I got a creditor to move that the assignees should be authorized to propose to you, that an annuity should be purchased out of the proceeds of the Heybridge Estate for your life, equal to one-third of the clear annual value of that estate, accounting to you for all arrears, up to the period when such annuity shall have been secured; and further, to pay to the legal representative of my father, who is yourself, under his will, so much allowance as he would have been entitled to, were he living. The above purchase to be made upon the express condition, that you relinquish all claims of every kind and sort, whether under the bond, for dower, allowance, or compensation. An annuity of £40 at least must be purchased in the funds for your life, and you ought to have the whole allowance-money, &c. as under:—

" £40 at £8 per cent.	.	.	.	£500
Allowance	.	.	.	300
Arrears of rent	.	.	.	100
Adams & Grimwood	.	.	.	200
				—
				£1100"
				—

Mrs. Harvey expressed herself perfectly satisfied with this arrangement; but it was never carried into effect, although she was always ready and willing to abide by it.

In March, 1823, Mrs. Harvey married the petitioner, Benjamin Davies.

On the 9th March, 1826, the petitioner, Mrs. Davies, met D. W. Harvey on the subject of her claims; when he proposed to her to accept £500 in lieu of all demands; and upon her referring him to his letter of the 5th April, 1822, he said, "Not one farthing more than £500; and if you do not take this, you shall never have one shilling."

One of the assignees having died, D. W. Harvey was, on the 29th April, 1826, appointed an assignee in his room, and was now the sole surviving assignee. No tender of any deed for the release of the dower was ever made to the petitioner, Martha Davies. Both the obligees named in the bond of the 24th November, 1803, were dead, and the petitioner, Thomas Isaac, was the executor of the survivor.

On the 12th of January, 1827, Mr. and Mrs. Davies entered a claim on the proceedings for £2000 in respect of the bond,—£300 in respect of the bankrupt's allowance,—and 185*l.* 12*s.* 6*d.* in respect of the rents received by the assignees; and offered to execute any deed, to be prepared at the expense of the assignees, as a release of all the right of dower and freebench of Mrs. Davies, upon being admitted to prove the debt of £2000, secured by the bond, against the separate estate of M. B. Harvey; when D. W. Harvey urged, that what she had already received under the will of M. B. Harvey ought to be deducted from the proof, and the commissioners were of that opinion. Mrs. Davies admitted, that she had received 501*l.* 11*s.* 6*d.* out of the personal estate of M. B. Harvey; but contended that nothing contained in the bond or condition warranted this deduction. A long negotiation afterwards took place between Mr. and Mrs. Davies and D. W. Harvey, as to her claims on the estate of M. B. Harvey, without any satisfactory conclusion.

On the 6th of November, 1833, Mr. and Mrs. Davies attended a meeting of the commissioners to establish their proof on the bond; when it was, for the first time, objected on the part of D. W. Harvey, that Mrs. Davies ought to have released her right of dower within two months after the death of M. B. Harvey; that there was no debt due on the bond at the time of the bankruptcy of the obligor; and that there was no contingency that could be valued. The commissioners admitted these objections, and decided that the bond could not be proved.

The petition then alleged, that Mrs. Davies, ever since the death of M. B. Harvey, and Mr. Davies, ever since his marriage with her, had always been willing to release the right of dower and freebench of Mrs. Davies; and that they believed, that the separate estate of M. B. Harvey was sufficient for the payment of a dividend on the said debt, without disturbing any dividend already paid.

The prayer was, that Thomas Isaac, as the executor of the surviving obligee in the bond, might prove the sum of £2000 as a debt due to him, on the security of the bond, against the separate estate of M. B. Harvey, without disturbing any former dividend; and that the future dividends, payable on such proofs, might be paid to Benjamin Davies, the said Martha Davies thereby assenting thereto.

Mr. Wood appeared in support of the petition. The petitioner, Mrs. Davies, having brought the bankrupt, M. B. Harvey, a marriage-portion

of 2000*l.*, and having survived him, the bond is now become absolute, and is proveable under his commission, within the provisions of the 6 Geo. 4, c. 16, s. 56; *Ex parte Grundy*, Mont. & M. 293. The conditions of the bond are, if the wife should be living at her husband's death, and release her dower, then the heirs, executors, or administrators of M. B. Harvey should pay her the sum of 2000*l.* The husband is now dead, and the bond is forfeited. The commissioners rejected the proof, because Mrs. Davies had not released her dower; but both she and her present husband have offered to execute any deed for this purpose, to be prepared at the expense of the assignees; and no tender of any release has been ever made to either of them for their execution. It is settled now, not only by *Ex parte Grundy*, but by several other cases, that a bond, payable on a contingency, is proveable, although not forfeited until after the bankruptcy of the obligor; *Ex parte Lewis*, Mont. & M. 426; *Ex parte Myers*, 2 Dea. & C. 251; *Ex parte Tindal*, 1 Deac. & C. 291, 8 Bing. 402, (21 E. C. L. R. 337,) 1 Mont. 375. In the last-mentioned case, the contingency had not happened at the time the party applied to prove. Here it has happened; and it is not necessary, therefore, to set any value on the bond. In *Ex parte Myers*, his honour, the chief judge, in delivering his judgment, says, "it is obvious that it was not the intent of the legislature, to confine parties to matters which were strictly debts, for which an action of debt could be brought; but to let in proof on all kinds of liabilities and dealings, which in equity would end in a debt, on the one hand,—and to release the bankrupt from all manner of claims, on the other." And, in a previous part of his judgment, he says, that he was of opinion, that the second branch of the 56th section, which applies to the right of proof after the contingency has happened, has reference to the same contract as the first.

ERSKINE, C. J.—The difficulty I feel in this case is, that the bond being payable on a condition which has not been fulfilled, namely, upon the release of the wife's right of dower, within two months after the decease of the bankrupt, the petitioners cannot bring themselves within the terms of the 56th section of the 6 Geo. 4, c. 16. There must be a *debt contracted* at the time of the bankruptcy, which the commissioners can set a value on before the happening of the contingency, in order to bring a case within the first part of that section; or the contingency must have happened, to entitle the party to prove under the latter branch of the section. Now, here no value could be set upon the contingency, whether the bankrupt's wife would, or would not, release her dower within two months after the bankrupt's death; and she cannot bring herself within the last part of the section, because one of the contingencies contemplated by the bond has not yet in fact happened,—Mrs. Davies not having yet actually released her dower. The bond, therefore, has not yet become forfeited; and in *Perkins v. Kempland*, 2 Bl. 1106, it was held, that there was no debt proveable until the bond was forfeited. In *Ex parte Grundy*, the covenant was to pay £2000, upon the mere contingency of the bankrupt's wife, or any of their issue, surviving him; and they had survived him, before the application was made to prove. In *Ex parte Tindal*, the bankrupt covenanted to pay £4000 within twelve months after his decease; and although the bankrupt was still living, yet it was held to be a *debt contracted*, on which a value could be set, within the first part of the 56th section. At the

time Mrs. Davies tendered her proof, there was no complete forfeiture of the bond; and the contingency of her releasing her dower was a thing incapable of valuation. I am of opinion, therefore, that the commissioner did right in rejecting the proof.

Sir J. Cross concurred.

Sir G. Rose also concurred, on the ground that Mrs. Davies had not, within two months after the bankrupt's decease, released her right of dower to his heirs or devisees, pursuant to the terms of the condition of the bond.

Petition dismissed.

**Ex parte FREDERICK HILL and others.**—In the matter of **GEORGE BEALE BROWN, EDMOND ROWE DANSON, and CHARLES DUNCAN.**—p. 123.

One of several partners, previous to his marriage, agreed with his intended wife's trustees, that he would assign to them a portion of his capital in the business, to secure to them certain periodical payments of £500, on the trusts of his marriage settlement. In pursuance of this agreement, the partnership open an account in their books with the trustees, in which they place to the credit of the trustees the sum of £3000, and debit their partner with the same sum, giving the trustees notice that they have transferred this sum from their partner's private account. Default having been made in the payments of £500, and the firm having become bankrupt, *Held*, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage.

THIS was a petition of trustees under a marriage settlement, to be permitted to prove the sum of £3000 against the joint estate, under the following circumstances.

Two of the bankrupts, G. B. Brown, and E. R. Danson, had formerly been engaged in partnership with two persons of the names of Willis and Swainson, which partnership was dissolved in the year 1829; when the assets of the partnership were transferred to E. R. Danson, who carried the amount into the new partnership of Brown, Danson, and Duncan. These assets constituted the whole, not only of Danson's capital in the new firm, but the greater part of the entire capital of the three partners. On the 13th of May, 1833, there was standing to the credit of Danson, in his account with the partnership, the balance of £11,000, when the firm was considered to be in good credit.

On the 15th May, 1833, Danson intermarried with Sarah Hill, the daughter of the petitioner, Frederick Hill. In the course of the previous negotiation and treaty for the marriage, Danson, for the purpose of making a proper provision for Sarah Hill, and the issue of the marriage, proposed to pay to the trustees of the settlement then about to be executed by him the sum of £4000, by instalments of £500, the first to be paid at the end of two years from the execution of the settlement, and the remainder annually. And he at the same time represented to the petitioner, that being unwilling to draw out any part of his capital from the partnership, he would, as a collateral security, assign to the trustees a portion of his capital, to the amount of £3000, so that the trustees of the settlement might have the security of the partnership for that sum. This arrangement being acceded to, Brown, Danson, and Co., accordingly opened an account with the petitioners, in which they placed £3000 to their credit, as such trustees, and debited Danson with £3000 on his account with the said partnership, making the following entry in the ledger:



"Frederick Hill, Frederick William Hill, and Frederick Maxwell Danson, (trustees,) appointed by the settlement made previous to the marriage of E. R. Danson, in account with Brown, Danson, and Co.

"Dr. 1833. Cr

May 13th. By amount transferred from Mr. Danson's private account current, per order, £3000"

Entries to the like effect were made in the day-book and journal, with the sanction of all the partners. At this time, there was standing to the credit of E. R. Danson, in the partnership books, the sum of £11,000. Upon these entries being made, Brown, Danson and Co. sent to the petitioners the following letter:

"Cr. Frederick Hill, Frederick William Hill, and Frederick Maxwell Danson, trustees appointed by the settlement made previous to the marriage of Edmond Rowe Danson, in account current with Brown, Danson and Co.

"1833, May 13. By amount transferred from Mr. Danson's private account, per order, £3000

"We, the undersigned, trading under the firm of Brown, Danson and Co., hereby acknowledge ourselves debtors to the trustees appointed by Mr. E. R. Danson's marriage settlement, in the sum of £3000, by virtue of a transfer made in our books by Mr. Edmond Danson to that amount, being part of his capital in our firm this 13th day of May, 1833.

GEO. B. BROWN.

EDM. R. DANSON

CHARLES DUNCAN."

By indenture of settlement, bearing date the 13th of May, 1833, made previous to and in contemplation of the marriage, after reciting, amongst other things, the facts above mentioned, and that for the better securing the payment of the sum of £4000, the said E. R. Danson had already transferred the sum of £3000, part of his capital in his said business, into the names of the petitioners; and that it had been agreed by the parties thereto, that the trustees should continue and be possessed of, and entitled to the sum of £3000, for the purpose aforesaid, and should permit and suffer the same to remain in the hands of E. R. Danson and his partners, until the said sum of £4000 should be fully paid; and that, immediately after such full payment, the trustees should reassign the £3000 to E. R. Danson: Danson covenanted with the trustees, that he would, in the event of the intended marriage being solemnized, well and truly pay to them the said sum of £4000, by the instalments above mentioned. And that if default should be made in payment of any instalment for the space of three months, then the whole of the £4000, or such part thereof as should remain unpaid, should forthwith become due and payable, in the same manner, in all respects, as if the instalments had then become due by effluxion of time. And, that in case of any such default, the instalment, or such part thereof of which such default should be made, should bear interest at the rate of five per cent. from the time at which the same ought to have been paid, until the same should be fully paid and satisfied. And it was thereby declared, that the petitioners should stand possessed of the said sum of £4000, and the other property thereby assigned, upon trust,

to pay the dividends and interest thereof to Sarah Hill, during her life, with remainder to E. R. Danson, for his life; with remainder to such children of the marriage as E. R. Danson and his wife should jointly direct and appoint; and in default of appointment, among such children equally; and in case there should be no child who should live to attain the age of twenty-one years, then upon trust for the said E. R. Danson absolutely.

On the 14th May, 1833, the marriage between E. R. Danson and Sarah Hill, was duly had and solemnized.

On the 17th December, 1834, a joint fiat was issued against Brown, Danson, and Duncan; when their account with the trustees, as appeared in their books, was as follows:—

“Dr. F. Hill, F. W. Hill, and F. M. Danson, in account with Brown, Danson, and Co., Crs.

1833.	£	s.	d.	1833.	£	s.	d.
Dec. 31. To balance	3095	6	10	May 13. By sundries	3000	0	0
				Dec. 31. Do.	95	6	10
					3095	6	10
1834.				1834.			
July 31. To cash	95	6	10	July 1. By balance	3095	6	10
To balance	3142	4	7	By sundries	146	17	9
	3242	4	7		3242	4	7
				By balance	3146	17	9”

No instalment on account of the sum of £4000 was ever paid by the said E. R. Danson to the petitioners, except a sum of £300.

On the 1st May, 1835, the petitioners tendered a proof against the joint estate for the sum of £3000, which was rejected by the commissioners, on the ground that at the time of the marriage, and of the bankruptcy of E. R. Danson, he was not possessed of available capital to that amount in the concern, after the partnership debts were paid,—and that the funds standing to his credit at the time of the marriage had subsequently turned out unavailable, and did not produce or realize the sum for which he had had credit in respect of them.

The petition prayed, that the trustees might be admitted to prove the sum of £3000 and interest, against the joint estate of the bankrupts, and to receive dividends thereon rateably with the other joint creditors; and that the costs of this application might be paid out of the joint estate.

Mr. *Swanston*, in support of the petition, was stopped by the court.

Mr. *Twiss*, and Mr. *Walker*, for the assignees. By the memorandum of the 13th May, 1833, the partnership merely acknowledge that the £3000 is part of Danson's capital in the business; and that they would transfer this portion of his capital, that is, of such available capital as he then had in the business, to the trustees, for the purposes of the settlement. In so extraordinary a case as this, where persons, without any moral obligation for so doing, enter into a contract of this nature, the court ought to be quite satisfied that this was a *bonâ fide* contract. Now, it so happened, that at the time of Danson's marriage he had not one shilling of available capital in the firm; and the partnership was insolvent long before the date of this memorandum. All that the partners seem to have intended was, that the trustees should

stand in the place of Danson, in respect of his capital, to the amount of £3000. The entry in the ledger is consistent with this construction of their intention, as well as their letter of the 13th May, 1833, wherein they acknowledge that the £3000 transferred to the account of the trustees, was *part of Danson's capital* in their firm. If this letter, however, is to be taken to be a promise by two persons to pay the debt of another, then the consideration for the promise is not stated in the agreement, which is, therefore void, on that ground, under the statute of frauds. (a) But the whole of the transaction plainly shows, that nothing was intended beyond a transfer of a portion of such capital, as Danson then had in the concern. Thus, upon reference to the marriage settlement, it recites, that Danson had transferred the sum of £3000, "*part of his capital* in the business, into the names of the trustees." Then, by the terms of the marriage settlement, the transfer of the £3000 was merely to be a security for the payment of the £4000 by instalments, and no instalment was to be payable until two years after the execution of the settlement. But the firm became bankrupt long before the expiration of this period; and, of course, no capital of Danson existed, on which the claim of the trustees could attach. If the partners, instead of transferring a portion of Danson's capital in the partnership books, had assigned an existing debt to the trustees, then, indeed, there would have been something definite and tangible for the trustees to claim. But his capital invested in the business, depended on the account of profit and loss of the partnership, and was liable to all the chances and fluctuations of trade.

ERSKINE, C. J.—The memorandum of the 13th May, 1833, does not state, that the partnership of Brown, Danson & Co. undertook to transfer all such capital as Danson might have in the business, when the first instalment became payable, and default was made in the payment of it; but it is an express acknowledgment, that they then had £3000 belonging to him in their possession, which they had by his order transferred from his account to the account of the trustees; and, on the faith of this actual transfer, the marriage took place. It seems to me, that after this transfer was made, and notice was given of it by the partnership to the trustees, the claim of the latter to the £3000 had nothing whatever to do with the state of accounts between the partners. The letter of the 13th May amounts to a positive agreement, that the firm would be responsible to the trustees for that amount; it was, in fact, an acknowledgment of a present debt, the consideration for which was the intended marriage.

Sir J. CROSS.—This seems to me a perfectly clear case. There was a marriage intended between Danson and his present wife; and the husband promised to give the security of his partners, for the sum he undertook to pay in consideration of the marriage. If the partners had given their joint promissory note to the trustees for the £3000, can there be any doubt that it would have been a good joint debt, proveable against the joint estate? Instead of doing this, however, they for an obvious reason sign a declaration, that they acknowledge themselves debtors to the trustees for the £3000, and that a transfer has been already made to them of that sum in the partnership books. There is not a shadow of doubt in this case, but that the firm of Brown, Danson & Co. has legally

(a) See *Wain v. Warblers*, 5 East, 10; and 1 Dec. B. L. 289.

pledged itself for the payment of £3000, as an actual and existing debt.

Sir J. ROSE concurred.

Order, that the petitioners might go in and prove what was due to them against the joint estate; the costs of all parties to come out of the estate.

**Ex parte BURBRIDGE and EDWARD SCARGILL.—In the matter of JOHN KIDDER.—p. 131.**

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. A proprietor who was already the holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor, up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder: *Held*, on appeal, that this was such a secret trust as was not within the 79th section of the bankrupt act, and that the shares were in the order and disposition of the bankrupt as reputed owner.

THIS was a petition of appeal from the decision of the Court of Review in *Ex parte Watkins*, in the matter of *Kidder*,<sup>(a)</sup> and came before the lords commissioners on the following

**SPECIAL CASE.**

In the year 1827, George Price Watkins was the holder of two shares in the Economic Assurance Company, London, which shares then stood in the books of that company in his name. In June, 1827, he purchased, through the agency and assistance of Lancelot Baugh Allen, who was then one of the directors of the said company, and as such subscribed the certificates after set forth, six other shares in the said company, numbered respectively 73, 128, 170, 171, 168, and 169, at £250 per share.

By the rules and regulations of the Economic Assurance Company, no person (except he be a director, which George Price Watkins was not) is capable of holding in his own name more than two shares. Many persons are, however, beneficially interested in more than two shares, by having the additional shares entered in the books of the company, in the name or names of another person; and many additional shares are so held by different persons.

George Price Watkins requested the bankrupt, John Kidder, to allow two of the said six additional shares to stand in his name in the books of the said company, in trust for him, to which the said John Kidder assented; and two of the said six additional shares, numbered 73 and 128 respectively, were accordingly entered in the books of the said company, in the name of the said John Kidder. G. P. Watkins paid the whole of the purchase-money for the said two shares, numbered 73 and 128, as well as for the other four hereinbefore mentioned, and all expenses attendant on the purchase thereof.

<sup>(a)</sup> See 4 Denc. and C. 87.

The only evidence which the holders of shares have of their right to such shares, besides the entry in the register and books of the company, is a certificate under the hands of three of the trustees of the said company. The certificates of the said two shares, numbered 73 and 128, were as follows:—

*“Economic Life Assurance Society.”*

“This is to certify, that John Kidder, of the Strand, in the county of Middlesex, silversmith, is the holder of one share, numbered as under, of and in the temporary capital of the Economic Life Assurance Society, in London, as appears by the register in the office of the society; and the said John Kidder is entitled to all advantages arising from the said share, subject to the several conditions and stipulations of the agreement of settlement establishing the society. Witness our hands this 27th day of July, 1827.

“No. 73.  
“Entered, JOHN NAYLER,  
Actuary.”

“L. B. ALLEN,  
“THO. FENN,  
“JOHN KNOWLES, } Trustees.”

Immediately after the said two shares, numbered 73 and 128, were entered in the books in the name of the said John Kidder, and on the same day, viz. on the 12th of June, 1827, he duly made, executed, and delivered to G. P. Watkins, a declaration of trust in the following terms:—

“I, John Kidder, of the Strand, in the county of Middlesex, silversmith, do hereby declare that the two shares, numbered 73 and 128, standing in my name in the Economic Assurance Office, were purchased and paid for by George Price Watkins with his own moneys, and for his own and sole benefit; and that my name is only made use of in trust for him, his executors, administrators, and assigns. And I do hereby engage to assign the said shares to him, or to whom he shall appoint, at his expense, whenever required.”

John Kidder, down to the time of the issuing against him of the fiat in bankruptcy hereinafter mentioned, always had the said certificates in his own possession, and always received the dividends on the said two shares, numbered 73 and 128, and was always treated by the company as the real owner thereof. And all notices of meetings, and other transactions of the company, were directed to the said John Kidder, and he attended such meetings of the shareholders, and voted as one of the registered shareholders. It was well known, however, to the said L. B. Allen, who was then a director, and to the said John Nayler, who was then the actuary of the company, that the said two shares, though held by the said John Kidder, were the property of the said G. P. Watkins; but, beyond such knowledge of the said L. B. Allen, and J. Nayler, the company never received any information that the said John Kidder was possessed of the said two shares in trust for the said G. P. Watkins, or otherwise than as the owner thereof.

On the 3d of March, 1834, a fiat in bankruptcy issued against the said John Kidder, under which he was duly declared a bankrupt; and George Burbridge and Edward Scargill were duly chosen assignees.

On the 21st June, 1834, the said G. P. Watkins presented his petition to the Court of Review, praying, that the assignees under the said fiat might join with the directors of the Economic Assurance Office in

assigning to him, or to such person as he should direct, the interest in the said shares.

The assignees under the said fiat claimed such interest, on the ground, that the shares, and all rights to the proceeds thereof, were at the time of the bankruptcy in the possession, order, and disposition of the said John Kidder, as reputed owner thereof. The petition was heard on the 30th July last; when the Court of Review adjudged that the said shares were not in the possession, order, or disposition of the said John Kidder at the time of his bankruptcy, as the reputed owner thereof; and were pleased to order, accordingly, that the prayer of the petition should be granted.

The assignees are advised, and submit, that such order was erroneous, and claim the two shares, as having been in the order or disposition of John Kidder, and whereof he was the reputed owner at the time of his bankruptcy.

The question is, whether they be so entitled, or not.

Settled and approved this 13th March, 1835, by me,

T. ERSKINE.

Mr. *Montagu*, and Mr. *Bethell*, for the appellants. There can be no doubt of the law as applicable to the subject of the present appeal, namely, that on the transfer of a chose in action, notice to the debtor must be given, in order to prevent the operation of the clause of reputed ownership in the bankrupt act; *Ex parte Monro*, Buck, 300; and *Ex parte Colvill*, Mont. 110, which was confirmed on appeal in *Ex parte Tennyson*, 1 Mont. & B. 67. And the reason is, that no false credit may be held out to the world, by a trader appearing to possess the property which he has clandestinely transferred to another person. In the present case, the rules of the Economic Assurance Office, made under the act of Parliament by which the company was constituted, expressly prohibited any person, who was not a director, from holding more than two shares. The question is, therefore, whether that can be done in this case, which the policy of the law says cannot be done; and whether Watkins, by permitting Kidder to hold the shares for him as trustee, was not a party to a fraudulent device to evade the laws and regulations of the company, as settled by the act of Parliament. The points which, it is presumed, will be relied on by the other side, are, first, that no notice was necessary to be given to the officer of the terms on which Kidder held these shares, it being the case of a trust; and, secondly, that if notice was necessary in this case, sufficient notice was given. With respect to the first point, there was some difference of opinion among the judges of the Court of Review; the chief judge and Sir J. Cross holding, that the possession of the shares by the bankrupt was connected with his title as trustee, and was perfectly consistent with such title, and that the property followed the title; while Sir G. Rose said, that he should have some difficulty in holding that the shares were not in the reputed ownership of the bankrupt, if the right of the petitioner depended on the declaration of trust only. It is submitted, that the opinion of Sir G. Rose is the one more consistent with the principles of the bankrupt law. For if a secret declaration of trust were sufficient to protect the owner of property from the consequences of enabling another person to gain a false credit by the possession of it, the provisions of the statute as to reputed ownership would be useless; for whenever a bankrupt obtained credit from the possession of property, a secret trust might be set

up to defeat the claims of those who had dealt with him on the sole credit of his apparent ownership. [Lord Commissioner SHADWELL. I observe that the declaration of trust, as given in the special case, does not mention the *numbers* of the shares which it states to be standing in the name of Kidder. If that is the fact, it amounts to no declaration.] This is not like the case of property lodged in the hands of a banker, or factor; which are trusts in the course of trade, and are exceptions to the general rule. These cases have always been excluded from the operation of the statute, as they create no reputation of ownership, nor is such a possession of property by a trader likely to mislead any man conversant with mercantile affairs; for, as Mr. J. BULLER observes in *Bryson v. Wylie*, 1 Bos. & P. 83, a banker or factor, by the course of trade, must have the goods of other people in their possession, and therefore it does not hold out a false credit to the world. For the same reason, the possession of furniture in a ready-furnished house at a watering-place, or of job-horses, is not within the statute; for the possession in such cases is only equivocal, and too equivocal to create a reputation of ownership. Dict. per EYRE, C. J., in *Lingham v. Biggs*, 1 Bos. & P. 88. Another exception is the case of a trust under a marriage settlement; and the reason is, because it is notorious that the property of *femes covert*s is thus protected; *Jarman v. Woolloton*, 3 T. R. 618; *Ex parte Horwood*, Mont. & M. 169, Mont. 24. But if the provisions of the statute are in all cases to be defeated by a secret trust, the general creditors of a bankrupt would be defrauded of that equitable distribution of his effects, which the legislature intended to secure to them. It is manifest, however, from all the cases, that where the mortgagor of a chattel or a chose in action is left in the possession of it, and becomes bankrupt, the mortgagor has no specific lien on it, as against the bankrupt's assignees; *Ryall v. Rowles*, 1 Ves. 348; *Bryson v. Wylie*, 1 Bos. & P. 83, n.; *Horn v. Baker*, 9 East, 215; *Thackthwaite v. Cock*, 3 Taunt. 487.

The object of the 79th section of the statute, which relates to the case of bankrupt trustees, was totally mistaken by two of the judges of the Court of Review; (a) for the only intention of the legislature in framing that section, was to give that jurisdiction by petition, which before existed only by bill; *Ex parte Hancox*, Mont. 247.

With respect to the sufficiency of the notice, it appears, from the statement of the special case, that notice was withheld from every person connected with the office, except Mr. Allen, the director, and Mr. Naylor, the actuary; and that the bankrupt was always treated by the company as the real owner of the shares, all notices of meetings being directed to him, and he always attending such meetings, and voting as one of the registered shareholders. When a policy of assurance in a public company is assigned to a third person, it has been decided that a notice of

(a) It does not appear that either of the learned judges, to whom allusion is made in the argument, said any thing about the *object* of the 79th section; nor can it be inferred, from the tenor of the language used by them in delivering their judgment, that they had any misapprehension as to its object. The only point raised upon that section in the argument before the Court of Review was, whether the words, "if any bankrupt shall have standing in his name as trustee, any government stock, &c.," were to be confined to cases where the stock or shares are *actually entered* in the books of the company in the bankrupt's name, *as trustee*; and the chief judge and Sir J. Cress thought, that the section was not to be so strictly construed; but that, referring to the language of the 80th section, the statute contemplated that stock, though standing in the name of the bankrupt as apparent owner, might, nevertheless, not be standing in his name in his own right.

such description must be given, that an inquirer at the office may learn in whom the interest in the policy is vested. A mere accidental conversation, in which mention is made of the assignment, but in which the party did not intend to give notice of the assignment, is not sufficient; *Ex parte Carbis*, 1 Mont. & A. 693, n. It is true, that in *Smith v. Smith*, 2 Crompt. & M. 231; 4 Tyr. 52, where a party had taken an assignment of the equitable life-interest of a bankrupt in certain stock standing in the names of three trustees, and in the course of a conversation with one of the trustees, but without any view of giving validity to the security he held, told him that he held the assignment as a security for his advances,—it was decided by the Court of Exchequer, that this statement amounted to sufficient notice. But, as was observed by the chief judge in *Ex parte Carbis*, the only question in *Smith v. Smith* was, whether the communication brought the fact within the personal notice of the trustee. In the present case, the question is, whether notice was given to the office,—that is, such a notice as would put the lender of money on his guard. In *Ex parte Stright*, 2 Deac. & C. 314; Mont. 502, where a party, with whom two policies were deposited as a security, wrote to the secretary of the insurance office, informing him of the fact, and inquiring what sum the office would give, if they were delivered up to be cancelled,—it was held, that the letter amounted to sufficient notice, though it might not have been intended as such; for that the intent was immaterial, if it was clear that notice was in fact given. The question then is, whether the court can collect from the statement in the special case, that the insurance office had here sufficient notice of these shares being the property of Watkins, and not of the bankrupt. By the act of Parliament, constituting the Economic Life Insurance Company, 3 Geo. 4, c. 66, it is enacted, “that the directors shall cause a memorial of the names of the shareholders to be enrolled upon oath.” This provision, therefore, shows the importance of the office having correct and certain knowledge of the persons in whom the shares are really vested.

Mr. *Swanston*, and Mr. *Romilly*, for the respondents. There are two points to be considered in this case: 1st, What were the rights of the parties, supposing no notice was given to the office of the shares being held by Kidder, as trustee for Watkins; and 2dly, Whether notice was not, in fact, given. It is somewhat singular, that in the argument for the appellants, the attention of the court has been called so much more to the 72d, than the 79th section of the bankrupt act. It may, however, be safely assumed that, notwithstanding the provisions of the 72d section, the property, of which a bankrupt is possessed merely in the character of a trustee, does not pass to his assignees. And the object of the 79th section is, not to provide for the law in this respect; but it assumes it as settled law, that trust property does not so pass. If the present case be held to fall within the operation of the 72d section, the court will decide that the 72d section, *pro tanto*, repeals the 79th. But there are many cases which show that the rule of law respecting trusts, controls the operations of the 72d section. Thus, so long ago as the case of *Copeman v. Gallant*, 1 P. Wms. 314, it was decided that a bankrupt, though in possession of goods, yet if he be empowered to dispose of them in trust for another, they are not liable to the bankruptcy, either in law or equity. So in *Ex parte Horwood*, Mont. & M. 169, where the bankrupt was in possession of household furniture, which was subject to a trust, the vice-chancellor held, and his decision was confirmed on appeal.



Mont. 24, that the furniture was not in the order and disposition of the bankrupt, and that his assignees should be restrained from selling it. In the present case, it seems to have been the opinion of the court below, that the very nature of the property excluded all idea of the reputation of ownership; for the owner of any shares in this company has no other possession of them, than the shares being entered in his name in the company's books.

With respect to the notice to the insurance office, if the court should deem such notice to have been necessary, it appears from the statement of the special case, that it was well known to Mr. Allen, a director of the company, and to Mr. Naylor, the actuary, that the two shares, though held by Kidder, were the property of Watkins. This knowledge, therefore, possessed by one of the managers, and the chief officer of the company, must be taken to amount to actual notice of that fact, to the office.

Mr. *Montagu*, in reply, contended, as before, that express notice of the trust to the office was indispensable, and that no sufficient notice had been given.

Lord Commissioner SHADWELL.—We will take time to consider the case. The first question is one of very great importance.

Lord Commissioner SHADWELL now delivered the judgment of the court as follows:—

In this case it appears to us, that the judgment of the Court of Review is wrong; and that the two shares mentioned in the special case belong to the assignees, as having been in the order and disposition of John Kidder, and whereof he was the reputed owner at the time of his bankruptcy, by the consent and permission of the true owner, George Price Watkins. The special case shows, that, with the consent of Watkins, Kidder had in himself the full and absolute legal property in the shares. By the rules of the society, Watkins could not have had any legal title at all to the two shares; and not only had Kidder the evidence of title, which arose from his name alone appearing in the memorial enrolled under the act of Parliament in the books of the society, and in the certificates,—but he also had the certificates themselves in his own possession, not occasionally, or for any temporary purpose, but at all times. He always received the dividends, *was treated as owner by the company*, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder. These things he might have done, without being allowed to hold the certificates in his possession. Whether it was for the purpose of preventing any suspicion that Kidder was not the true owner, or from not thinking it necessary to take the precaution of keeping the certificates in his own hands, Watkins consented that Kidder should always have possession of the certificates. Consequently, he was enabled at all times, by the exhibition of the only portable indicia of property, to hold himself out to the public as the true owner of the shares, and to gain credit by the disposition of them. There was no open or “honest purpose,” like the payment of debts, to be answered by this trusteeship, as in *Copeman v. Gallant*, 1 P. Wms. 314; nor was there any trust for the benefit of third persons, or created by third persons, as in *Ex parte Martin*, 2 Rose, 331, 19 Ves. 491; and *Ex parte Horwood*, 1 Mont. & M. 169. But the trust was created by Watkins for his own sole benefit, and for no other purpose, than that of enabling him to hold more shares than he was allowed by the regulations of the

company to hold in his own name. No convenience to society is promoted by such a trust, and great injury to the public may be occasioned by the delusive credit which it confers. It does not appear to us, that the private knowledge which Mr. Baugh Allen, one of the creditors, and Mr. Naylor, the actuary, had of the transaction, could operate as notice of this secret trust to the company, who, in fact, treated Kidder as the owner. For any thing that appears to the contrary, the dividends were received by Kidder, and the shares might have been sold by him, without the intervention of the directors, or the actuary. We are of opinion, that such a secret trust is not within the true intent and meaning of the 79th section of the bankrupt act, but is to be considered as a case of property left in the possession, order, and disposition of the bankrupt, with the consent of the true owner, thereby inducing a reputation of ownership, within the 72d section of that act. The judgment of the court below must therefore be reversed, but without costs.

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**Ex parte AUGUSTA KING, and three other children of FREDERICK BENJAMIN KING, being infants under the age of twenty-one years, by JOHN REMINGTON MILLS, their next friend.—In the matter of BENJAMIN SEVERN, the said FREDERICK BENJAMIN KING, and JOHN SEVERN.—p. 143.**

**A** testator, who was possessed of a large capital in a house of trade, in which he was a partner, bequeathed the residue of his estate to trustees, of whom A. B. was one, upon trust to permit A. B. to receive the annual produce for his life, and after his death to transfer the principal to his children; directing, that if A. B. became a partner in the house of trade, the testator's whole capital should continue therein, A. B. and the other partners giving to his executors their joint bond for the amount. A. B. becomes a partner, the bond is given, and the firm become bankrupt; and the trustees proved the amount due against the joint estate: *Held*, that the dividends on the profit should be invested in stock, and that the interest should accumulate, until the loss occasioned by the bankruptcy was made good, and the whole of the principal sum then due was realized.

THIS was a petition of appeal against two orders of the vice-chancellor, made respectively on the 16th December, 1830, and the 9th August, 1831, under the following circumstances.

Philip King, the grandfather of the petitioners, was at the time of his death a partner with the bankrupt, Benjamin Severn, in the business of a tea-dealer; and by his will, dated the 28th of July, 1801, gave and bequeathed the residue of his estate, subject to the charges therein mentioned, to his executors therein named, upon trust that they should permit and suffer his nephew, Frederick Benjamin King, the above-named bankrupt, and his assigns, to receive the dividends and annual produce thereof, during his life; and from and after his decease, in trust to pay, assign, or transfer the principal moneys, and the stocks, funds, or securities in or upon which the same should be invested, to the only child, if but one, or to all the children, if more than one, of the said Frederick Benjamin King, equally to be divided between them, if more than one, and to be paid to them when and as they should respectively attain the age of twenty-one years, and to be transmissible to the lawful issue of such children, if they should die before attaining such age as aforesaid; and the interest thereof, or so much and such part of the same as his said executors should think proper, to be applied in the mean time

towards the maintenance and education of the children of the said Frederick Benjamin King. And the testator by his said will declared, that the capital, from whence certain annuities were directed by him to be paid, should remain in the trade in which he was concerned as a partner with the said Benjamin Severn, until the expiration or other sooner termination of such partnership; and then, if his nephew Frederick Benjamin King should become a partner in the house with the share which the testator then had therein, with the approbation of Edward Kemble, one of his executors thereafter named, and his wife Elizabeth King, he directed that his whole capital in the partnership should continue therein, his nephew, and the partners who should continue the trade, giving to his executors their joint bond for the same; a power being reserved by the bond, or otherwise, for Edward Kemble to inspect the books of the house, after the partners should have taken their stock; and if Edward Kemble should think it not prudent to continue the capital therein, then and in such case he thereby directed his executors to take the capital out of the partnership, and to purchase out of the same such quantity of stock as would be necessary to secure the payment of the several annuities given by his will. And the testator appointed his wife Elizabeth King, the said Edward Kemble and Frederick Benjamin King, and the Reverend William Booty, clerk, executrix, and executors of his said will.

By a codicil to his will, bearing date the 10th January, 1803, the testator appointed the said Benjamin Severn an additional executor of his will.

The testator died on the 1st March, 1803, without altering or revoking his said will or codicil, which were duly proved by the executors.

Frederick Benjamin King was, between the date of the will and the death of the testator, admitted a partner in the business for a term of years, which expired on the 22d May, 1816.

On the 16th of January, 1804, Benjamin Severn and Frederick Benjamin King executed a joint and several bond, in the penal sum of 74,943*l.* 17*s.* 2*d.*, to Elizabeth King, Edward Kemble, and William Booty, three of the executors of the will, with a condition thereunder written; whereby, after reciting, amongst other things, that the said Elizabeth King, Edward Kemble, and William Booty, in order to put into effect the will of the said Philip King, and having reason to be satisfied with the security and eligibility of the said trade, had consented and agreed to permit and suffer the capital of and belonging to the said Philip King in the said trade to remain and continue therein, upon having the joint bond of the said Benjamin Severn and Frederick Benjamin King to secure the amount thereof, according to the directions of the will; and that it appeared, that the stock or capital of the said Philip King in the said trade, after deducting various legacies and expenses, amounted to the sum of 37,471*l.* 18*s.* 7*d.*; the said bond was conditioned to be void upon payment by the said Benjamin Severn and Frederick Benjamin King, or either of them, their or either of their heirs, executors, or administrators, unto the said Elizabeth King, Edward Kemble, and William Booty, or either of them, their or either of their executors or administrators, of the sum of 37,471*l.* 18*s.* 7*d.* on the 19th May, 1809; and in the mean time, and until payment and satisfaction thereof as aforesaid, of lawful interest for the same, after the rate of £5 per cent. per annum, to be computed from the 19th November then last past, by

half-yearly payments, as therein mentioned, upon such trusts as were mentioned and declared in the will of the said Philip King, deceased.

In addition to this sum of 35,471*l.* 18*s.* 7*d.*, the sum of 366*l.* 0*s.* 10*d.* was, with other moneys, forming further part of the estate and effects of Philip King, left by the executors in the hands of the said Frederick Benjamin King and Benjamin Severn, and employed by them in the said business; and was, together with the said sum of 37,471*l.* 18*s.* 7*d.*, carried to the credit of the executors of the testator, in an account opened by Benjamin Severn and Frederick Benjamin King, in the books of the said business, and entitled "The Executors of Philip King, Esquire."

In the year 1813, the bankrupt, John Severn, was admitted into partnership with Benjamin Severn and Frederick Benjamin King, together with Thomas Bishop, since deceased; and thereupon the said debt of 37,471*l.* 18*s.* 7*d.*, secured by the said bond, and also the said sum of 366*l.* 0*s.* 10*d.*, making together 37,837*l.* 19*s.* 5*d.*, were transferred to, and became part of the partnership assets of the new firm.

Thomas Bishop died in the month of December, 1828, leaving Benjamin Severn, Frederick Benjamin King, and John Severn him surviving; who thenceforth, until the issuing of the commission against them, continued to carry on the business in copartnership; and the said sum of 37,837*l.* 19*s.* 5*d.* was thereupon transferred to and became part of the partnership assets of the existing firm.

Edward Kemble and Elizabeth King, two of the executors, were also dead, leaving the said William Booty them surviving.

On the 7th October, 1829, a commission of bankruptcy was issued against Benjamin Severn, Frederick Benjamin King, and John Severn. Andrew Colville, of Leadenhall Street, London, merchant, Thomas Geddes, of Mincing Lane, London, merchant, and James Bellinger, since deceased, were duly chosen assignees.

The petitioners, together with five other daughters who had attained twenty-one, were the only children of Frederick Benjamin King.

On the 5th August, 1830, Emma King, one of the other daughters, presented a petition to the lord chancellor, stating the above facts; and also stating, that the surviving executor, William Booty, resided at Ludlow, in Shropshire, and had not lately acted in the execution of the trusts of the will, further than by joining in an affidavit with Frederick Benjamin King, for proof of the said debt of 37,837*l.* 19*s.* 5*d.* under the commission, and was, therefore, ignorant of many of the acts before stated, except so far as he was informed thereof by Frederick Benjamin King; and that the said William Booty and Frederick Benjamin King had applied to prove the said debt on the joint estate of the bankrupts, but that the commissioners had refused to allow such proof to be made by one of the bankrupts, without the sanction of the lord chancellor; and therefore praying that the said William Booty and Frederick Benjamin King might be allowed to prove such debt against the joint estate.

On the hearing of that petition before the vice-chancellor on the 12th August, 1830, his honour ordered, with the consent of the assignees and the said William Booty, that William Booty and Frederick Benjamin King should be at liberty to prove the said debt against the joint estate and that the commissioners should receive such proof; and that out of any dividend to be declared in respect thereof, the costs of all parties should be paid; and that the residue should be paid by the assignees into the bank with the privity of the accountant-general of the Court of

Chancery, to the credit of "the account of the legatees of Philip King, Esq., deceased," subject to further order.

In pursuance of this order, William Booty and Frederick Benjamin King proved the said debt against the joint estate of the said bankrupts.

On the 15th December, 1830, the two surviving assignees presented a petition to the lord chancellor, stating the said order of the vice-chancellor, and the proof made in pursuance thereof, and that a dividend of 6s. in the pound only, had been declared on the debts proved against the joint estate, which, on the said debt of 37,837*l.* 19*s.* 5*d.* amounted to the sum of 11,351*l.* 18*s.*; and that the assignees, after payment of the costs directed to be paid by such order, had paid the residue of the said dividends, amounting to the sum of 11,197*l.* 17*s.* 4*d.*, into the bank, as directed by the said order; and praying that the said sum of 11,197*l.* 17*s.* 4*d.*, after payment of such costs as therein mentioned to the solicitors of the petitioners and of the said W. Booty respectively, might be invested in the purchase of reduced 3 per cent. bank annuities, to be placed to the credit of this matter to the aforesaid account; and that the assignees might be at liberty to pay in any future dividends under the said commission in respect of the said proof, to the like account, to be invested in the like manner; and that the accountant-general might pay the dividends, from time to time to accrue due on the said reduced 3 per cent. bank annuities, to the assignees.

The present petitioners alleged, that no copy of the last-mentioned petition had been ever served upon any of them, nor upon any other of the children of the said F. B. King, and that none of them had notice thereof; but that the same came on to be heard before the vice-chancellor on the 16th December, 1830, in the absence of the petitioners and such other children; when his honour was pleased to order, that the costs of the assignees and of the said W. Booty should be taxed and paid out of the said sum of 11,197*l.* 17*s.* 4*d.*, in manner therein mentioned; and that the residue of the said sum, after payment of such costs, should be laid out in the purchase of 3 per cent. reduced annuities in the name of the accountant-general, to be placed to the credit of "the account of the legatees of Philip King, Esq., deceased;" and that the assignees should pay any future dividends in respect of the proof of the said debt of 37,837*l.* 19*s.* 5*d.* into the bank, to the credit of the like account, and to be laid out in the purchase of like bank annuities and that the dividends, from time to time to accrue due on the said bank annuities, should be paid to the assignees.

In pursuance of the last-mentioned order, the residue of the said sum of 11,197*l.* 17*s.* 4*d.*, after payment of such costs as aforesaid, was laid out in the purchase of the sum of 13,744*l.* 14*s.* 2*d.* bank 3 per cent. reduced annuities, in manner and to the account directed by the order.

On the 12th July, 1831, a petition was presented to the lord chancellor by Thomas Newman Farquhar, stating, that the assignees had caused the dividends or annual produce, payable during the life of the said F. B. King on the said sum of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities, to be put up to sale by public auction; and that James Farquhar, Esq., was declared the purchaser thereof at the sum of £3760, and that the same had since been assigned to the said T. N. Farquhar, in consideration of the like sum of £3760, by an indenture of assignment dated the 11th April, 1831, and made between the assignees of the first part, F. B. King of the second part, the said J. Farquhar of the

third part, and the said T. N. Farquhar of the fourth part; and the said T. N. Farquhar prayed, that the accountant-general might be directed to pay to him the dividends to accrue on the said sum of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities. This last petition came on to be heard before the vice-chancellor on the 9th August, 1831, when his honour was pleased to order, that the accountant-general should pay the dividends to accrue due on the said bank annuities to the said T. N. Farquhar, his executors, administrators, and assigns.

The petitioners alleged, that this last-mentioned petition also was never served on any parties, except the assignees, who appeared and consented to the order; that none of the petitioners, nor of the said other children of F. B. King, had notice thereof; and that the same was heard, and the order made in the absence of the petitioner and the said other children. That the assignees had received the dividends, which accrued due on the said sum of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities, before the date of the last-mentioned order; and that T. N. Farquhar had received them since. That since the sale of the dividends of that sum to T. N. Farquhar, a further dividend had been declared on the proof of the said debt of 37,837*l.* 19*s.* 5*d.*, amounting to the sum of 551*l.* 16*s.* 8*d.*, which was paid into the bank in the name of the accountant-general, pursuant to the vice-chancellor's order of the 16th December, 1830, and invested in the purchase of the sum of 614*l.* 16*s.* 5*d.* 3 per cent. reduced bank annuities, the dividends on which had been received by the assignees: and that the two sums of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities, and 614*l.* 16*s.* 5*d.* like annuities, were then standing in the name of the accountant-general, in trust as aforesaid.

The petitioners contended, that such part of the order of the vice-chancellor of the 16th December, 1830, as directed the dividends accruing due on the bank annuities to be paid to the assignees, was erroneous; and that the whole of the order of the vice-chancellor of the 9th August, 1831, was also erroneous; and that the dividends which had accrued, or might thereafter accrue due, on the bank annuities, ought to have been directed to accumulate, and from time to time laid out and invested in the purchase of like annuities, in the name of the accountant-general, in trust as aforesaid, until such a sum of 3 per cent. reduced bank annuities should have been purchased, as should be equal in value to the sum of 37,837*l.* 19*s.* 5*d.*, so proved as a debt against the estate of the said bankrupts. And that when such a sum of bank annuities should have been purchased, and not before, the assignees would be entitled to receive the dividends to accrue due thereon during the life of the said F. B. King; and that the petitioners would be entitled to the said bank annuities, subject to the life-interest of the said F. B. King therein, in the shares and according to the trusts mentioned and expressed in the will of the said P. King, deceased. The petitioners further stated, that in case the lord chancellor should be of opinion, that the said sale to T. N. Farquhar, and the order of the vice-chancellor made in consequence thereof, ought to be confirmed, then the petitioners were desirous that the dividends received, or to be received, in respect of such purchase,—or else, the purchase-moneys paid by the said T. N. Farquhar with interest thereon, he accounting for the said dividends,—should be paid and satisfied out of the joint estate of the said bankrupts, in manner before mentioned; and that the petitioners believed that such estate and effects were amply sufficient for that purpose.

The prayer was, that so much of the vice-chancellor's order of the 16<sup>th</sup> December, 1830, as directed that the dividends, from time to time to accrue due on the bank annuities thereby ordered to be purchased, should be paid to the assignees,—and also the order of the 9th August, 1831, might be respectively discharged; and that it might be referred to the master to take an account of what had been received by the assignees and by the said T. N. Farquhar, or any of them, in respect of the dividends accrued due on the said sum of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities, and of what had been received by the assignees in respect of the dividends accrued due on the said sum of 614*l.* 16*s.* 5*d.* like annuities; and that the assignees and T. N. Farquhar might be respectively directed to pay into the bank, in the name of the accountant-general, in trust in this matter, to the account of the legatees of P. King, Esq., deceased, the sums which should be found to have been received by them respectively, in the taking of such account; and that the said moneys, when paid in, might be laid out in the purchase of 3 per cent. reduced bank annuities, in the name of the accountant-general, in trust as aforesaid; and that the dividends then due or to accrue due on the said several sums, might from time to time be invested in the purchase of like annuities, by way of accumulation, until the bank annuities should amount together to a sum equal in value to the sum of 37,837*l.* 19*s.* 5*d.*, the amount of the debt proved on behalf of the legatees of the said P. King;—or, if the court should be of opinion, that the purchase of the dividends on the said sum of 13,744*l.* 14*s.* 2*d.* 3 per cent. reduced bank annuities by T. N. Farquhar ought to be confirmed, then that the assignees might be directed to pay out of the joint estate of the bankrupts what should be found to have been received by him, and also the amount of the dividends hereafter to be received by him, into the bank, in the name of the accountant-general, in trust as aforesaid; or else, to repay out of the joint estate the purchase-moneys paid by him in respect of his said purchase, with interest thereon, the said T. N. Farquhar in that case accounting for and paying the dividends received by him in manner before prayed; and that, in any case, the moneys to be paid into the bank might be invested and accumulated in manner before prayed; and that when the said bank annuities should have accumulated to the amount before-mentioned, then that the petitioners, and all other parties interested therein under the will of the said testator, might be at liberty to apply to the lord chancellor, or to the Court of Review, as they should be advised; and that the costs of the petitioners might be directed to be taxed as between solicitor and client, and be paid out of the dividends then due on the said bank annuities, or be raised and paid by sale of a competent part of such annuities.

Mr. *Jacob*, and Mr. *Wood*, appeared in support of the petition. The objection to the two orders is, first, that they were obtained *ex parte*: but the substantial objection is, that the children of F. B. King were entitled to have the interest of the fund in the three per cent. reduced annuities accumulate for their benefit, until the whole amount of the debt of 37,837*l.* 19*s.* 3*d.*, which had been proved by the trustees against the joint estate, should be raised and paid; the sole question being, whether the life interest of the bankrupt, F. B. King, in the dividends of the trust fund, is, or is not to be applied, in the first instance, to make good the deficiency in the trust fund, which occurred from the default of the bankrupt as trustee. We contend, that the life interest of the

bankrupt cannot be made available for the creditors under the commission, until this deficiency is made good; on the clear principle, that the assignees stand in the place of the bankrupt, and take his interest, subject to all the equities attaching to it. A point very similar to the present was decided by the Court of Review, in the case of *Ex parte Turpin*, 1 Deac. & C. 120; 1 Mont. 443. In that case a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them £3000, which, by the terms of his marriage settlement, it was declared that the bankrupt should be entitled to the interest of during his life, and after his death, the principal was to go to his wife; the bankrupt made default in the payment of the money; and it was there held, that the trustees might prove for the £3000, and that the interest upon the dividends to be received under such proof should accumulate until the whole sum of £3000 should be realized; after which, but not before, the interest was directed to be paid to the assignees for the benefit of the creditors. But, independently of the doctrine laid down in *Ex parte Turpin*, the petitioners, in this case, had a security upon the separate estate of F. B. King; for they had an equitable right of retainer on that estate, to the amount of the debt secured by the bond. The bond was not given by all three partners, as it ought to have been, but was only a joint and several bond from two of them. This was not conformable to the trusts expressed in the will; for, according to the provisions of the will, there should have been a joint and several bond from all three partners. There having been a breach of trust, therefore, committed of the trust moneys by the three partners, in applying them to the purposes of their business, without giving the requisite security, they incurred a joint and several liability. And our proof against the joint estate does not affect our security on the bond, as against the separate estates of the two partners who entered into the bond; *Ex parte Peacock*, 2 G. & J. 27; *Ex parte Bowden*, 1 Deac. & C. 135.

Mr. *Wigram*, and Mr. *G. Richards*, for the assignees. The acquiescence on the part of the petitioners, in the two orders now sought to be annulled, ought to be a protection to the assignees against the claim set up by these petitioners. But whatever claim they have arising out of these transactions, their remedy is against the trustees under the will, and not against the estate of the bankrupts. Supposing, however, the petitioners have a right to maintain their proof against the joint estate, the question is, whether, under the circumstances of the case, the petitioners are entitled to have the fund accumulate in the manner proposed. The decision in *Ex parte Turpin*, which is relied on by the other side, is one of which considerable doubts have been entertained. But, whether those doubts are well founded or not, there is a material difference between the facts of that case, and those of the present. In that case, a trader upon his marriage gave a bond to trustees for the payment of a sum of £3000, the interest of which, by his marriage settlement, was settled upon himself for life, with remainder to his wife for life, and upon her death, the principal was to be divided among the children; the trader became a bankrupt, and the trustees proved the amount of the sum secured by the bond, and received a dividend, *pari passu*, with the other creditors, which the trustees intended to invest for the benefit of the wife and children; the assignees then claimed to be entitled to the life interest of the bankrupt in the sum so invested; but the trustees contended that, the bankrupt not having performed his covenant, the



assignees, who could only claim under him, were not entitled to a **life** interest in any part of the fund, and that the trustees were entitled to have the fund accumulate until the whole of the £3000 was raised. The principle on which that case was decided was, that the assignees could only claim what the bankrupt could have claimed; and he could not have asked his trustees for the interest of any portion of the sum secured by the bond, until he had himself paid them the whole sum of £3000, pursuant to the terms of his obligation. The trustees, therefore, having a right to retain, as against the bankrupt, it was held, that they might exercise the same right against the assignees, and prevent them from disposing of any part of the fund. The present case is very different. The fund, which is here given by the testator to the bankrupt for life, with remainder to his children, was part of the capital of the house of trade, in which the bankrupt was a partner, and was proved as a joint debt against the firm. When the testator directed that this fund should be allowed to remain in the house of business, he rendered it liable to the fluctuations and uncertainties of trade; and when he gave the life interest in a fund so circumstanced to the bankrupt, F. B. King, and the principal afterwards to his children, he in substance gave them the life interest and principal respectively of that which, in case of bankruptcy, would be substituted for it, namely, the dividends on the amount of the sum proveable under the commission. As the testator, therefore, gave the bankrupt, King, a life interest in the sum invested in the business, in which King afterwards became a partner; King would consequently be entitled to the same interest in the fund, though reduced by the contingencies to which the testator had subjected it.

There is, however, a decided answer to the claim of these petitioners, arising from the want of mutuality between the debtor and creditor. The proof has been made, not on the bond, but on the common law obligation, arising out of the receipt of the money by the three partners; and the trustees have thus had the advantage of proving against a person not named in the bond, and of receiving a much larger dividend than if they had proved on the bond. *Primâ facie*, proof is payment; (a) and the receipt of these dividends, under the proof against the joint estate, must be considered as payment in full. The trustees, therefore, having elected to treat the debt as an obligation of the three, are debarred, in bankruptcy, from recurring to their right against the separate estates of the two. The income of the fund in question is part of the separate estate of King, and cannot be applied to pay the joint debt of the three. The right of retainer claimed by the trustees in this case must be regulated by the right of set-off. They acquire funds of the bankrupt, King, which they insist on retaining in satisfaction of an unliquidated claim against him. But we contend, that they have no separate claim against King, but merely a joint claim against the three partners; and, consequently, cannot retain the money belonging only to one. It is clear, that if there had been no bankruptcy in the case, and the trustees (having a joint claim against the three partners) had received £1000 on account of King, individually, they could not retain it, by way of set-off against the joint debt due from the three; and bankruptcy cannot give a higher equity to the trustees than what they before possessed. There may be some confusion, perhaps, in considering the case, with reference to the particular fund. But suppose there had been

(a) See *Ex parte Watson*, Buck, 449; *Ex parte Smith*, Ib. 492; *Ex parte Hunter*, Ib. 555.

two funds, one of stock settled, and the other secured by the joint bond of the bankrupt and two other persons,—and that the bankrupt was entitled, during his life, to the income arising from each fund; the trustees, in that case, clearly could not retain the dividends of the stock, to make good the debt due by the bankrupt and his joint obligors on the bond; because the debts would not be due in mutual rights, the debt on the bond being due from the three, and the dividends of the stock belonging only to one of the three. Now, in this case, so much as has been already paid of the debt of 37,837*l.* 19*s.* 3*d.*, namely, the dividend on that sum, which has been invested in the 3 per cents., may be considered as one fund; while the remainder of that sum is a debt still due; the income of the fund invested is the property of the one,—the debt remaining unpaid is due from the three. Upon this ground, the present case is materially distinguishable from *Ex parte Turpin*, so that it is not necessary to overrule that case in order to dismiss this petition. But that case was contrary to the decision of Lord THURLOW, in *Stratton v. Hale*, 2 Bro. C. C. 490, and *Ex parte Milford*, 1 Bro. C. C. 398; and in a subsequent case, moreover, the Court of Review has pronounced a decision irreconcilable with that in *Ex parte Turpin*. In *Ex parte Shute*, 3 Deac. & Chit. 1, Mont. & B. 385, a bankrupt had on his marriage entered into a bond to trustees to pay them £1200, upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, and the usual limitations to children; and on the faith of the bond, he was permitted to apply to his own use his wife's marriage portion, amounting to £150; and it was there held, that the limitation over to the wife, in the event of bankruptcy, was void, except as to the £150; so that, essentially, the first trust was, as in *Ex parte Turpin*, to the bankrupt for life; and yet the court decided that the assignees, and not the trustees, were entitled to the income arising from the dividends on the £1050 during the life of the bankrupt. *Ex parte Verner*, 1 Ball & B. 260, which occurred before the Lord Chancellor of Ireland, is also another authority in favour of the assignees. In the recent case of *Smith v. Smith*,<sup>(a)</sup> Lord ABINGER strongly intimated his dissatisfaction with the doctrine laid down in *Ex parte Turpin*. The principle of the bankrupt laws is, that there shall be an equal distribution of the bankrupt's effects among his creditors, leaving to those only who have securities the benefit of their express securities. Now, where the bankrupt, as in *Ex parte Turpin*, is bound to pay a sum of money to trustees, in trust for himself for life, and after his death in trust for his children, the trustees are, during the life of the bankrupt, *his* trustees; and if they call in the money, it can only be for his benefit. The real creditors are his children, and their claim arises only after the bankrupt's death. The trustees represent their *cestui que trust*; but they cannot set up any interest of the bankrupt as against his assignees, in whom all his estate is vested. If they had a right, therefore, to make any proof on the bankrupt's estate, it could only be as trustees for his children; and in that case the proof ought not to have been for the whole sum, but only for the amount of the reversionary interest of the children. For if the children, by these trustees, are permitted to prove as a present debt the full sum, to which they will be only entitled on the bankrupt's death, and are allowed to deal with the income in his lifetime; it is

(a) This case is not yet reported; it occurred in the Exchequer, and judgment was pronounced on it by Lord Abinger, on the 12th May, 1835.

clear, that they would have an advantage over the other creditors; for they would receive, in respect of a debt not due, the same dividend as would have been payable on a debt actually due. If the trustees are to be permitted to prove for the whole amount of the debt, the assignees ought to retain the interest of the dividends on such proof, during the life of the bankrupt: and on his death, it might then be paid to the trustees for the children. One of two things ought certainly to be done in this case; the debt should either have been proved at a reversionary value,—or, if proved for the whole amount, the assignees should receive the interest of the dividends during the bankrupt's life. The 6 Geo. 4, c. 16, recognises the principle, that a creditor, whose debt is not yet due, is not by his proof to be put in a better position than if it was due. Thus, although the 51st section enables a creditor, whose debt has not become due, to prove for the whole amount, and receive dividends equally with the other creditors; it declares, nevertheless, that he shall deduct thereout a rebate of interest for what he shall so receive, at the rate of 5 per cent., to be computed from the declaration of the dividend to the time when such debt would have become payable. In the present case, therefore, the trustees, having proved on behalf of the bankrupt's children for the whole amount of a debt not yet payable to them, ought to have allowed a rebate equal to the value of King's life interest in the sum so proved. But as this has not been done, the bankrupt's estate ought, at least, to have the accruing benefit for his life of the fund, in which the dividend has been invested. The petitioners have no right to insist, that the whole amount of the dividends on the proof shall be now paid to them, or their trustees, without any deduction or rebate; when the debt, in respect of which the proof was made, would not be payable for years to come.

Mr. *Jacob*, in reply. The money was paid in, under an order admitted to be right. The order for paying the interest to the assignees is the first erroneous order. The principle of the decision in *Ex parte Turpin* has been recognised in subsequent cases, and is no way impugned by *Ex parte Shute*, which has been cited by the other side; for, in the last case, the chief judge expressly draws a distinction between the facts of that case, and those in *Ex parte Turpin*. As to the case of *Stratton v. Hale*, it will be found, upon searching the registrar's book, that the decree in that case never went beyond the minutes, having in fact never been regularly drawn up and entered; and there is a note of the case taken by Sir *Samuel Romilly*, who was one of the counsel engaged in it, which is not in accordance with the printed report. Besides, at the time of the decision of that case, the doctrine that assignees can only stand in the same place in which the bankrupt himself could have stood, was not so well settled as now. In *Ex parte Mitford*, 1 Bro. C. C. 398, although the interest accruing on the stock was ordered to be paid to the assignees under the commission, yet the court appropriated other funds, in which the bankrupt had a life interest, to be retained by the trustees, towards satisfaction of the principal sum of £3000. That case therefore makes rather against the claim of the present respondents, than in favour of it. *Ex parte Verner*, 1 Ball & B. 260, was an Irish case, and appears to have been decided *sub silentio*; for there is no mention even of the names of the counsel who were engaged in it. With respect to the observations of Lord *ABINGER* in *Smith v. Smith*, they were wholly *obiter dicta*; for there was

another point in that case distinguishable from that in *Ex parte Turpin*. But the case of *Ex parte Maister, re Ramsay*, Mont. 452, note, 1 Deac. & C. 134, note (b), fully supports the principle of the decision in *Ex parte Turpin*. Putting that case, however, out of the question, the petitioners here had a security upon the separate estate of one of the bankrupts, and an equitable right of retainer as against his estate.

*Cur. adv. vult.*

Lord Commissioner SHADWELL now delivered the following judgment.

The prayer of this petition was opposed, in effect, on three grounds. First, it was said, that the debt could not be proved against the joint estate of the bankrupts, unless the debt from the two were extinguished. Supposing that to be so, yet it does not appear how it can affect the equity of the children of the bankrupt, F. B. King, which, if it arise at all, arises from the fact of his being a debtor; but whether jointly with one, or two others, is immaterial. And it is to be observed, that on the present petition no objection can be raised to the proof.

Secondly, it was said, that the debt has been paid by proof, and a dividend. The answer to that is, that proof and payment of a dividend, unless it be of 20s. in the pound, is not a satisfaction of the debt, so as to disable the party proving from resorting to other securities which he may have; and the right to retain the dividends, if there be such a right, is merely a security.

And, lastly, it is said, that the accountant-general, who receives the dividends on the fund standing in his name, and represents the trustees, has only a portion of the separate estate in his hands, which belongs to the separate creditors; and, in support of this position, the case of *Stratton v. Hale*, 2 Bro. 198, is relied on, as well as the other cases noticed by the chief judge of the Court of Review, in his judgment in the case of *Ex parte Turpin*, 1 Deac. & C. 120. Of those cases it is not necessary to say any thing beyond what he has said, except that it appears, from what has been stated from Sir S. Romilly's note, that Lord THURLOW's first opinion was different from what he finally pronounced; and that the decree is found only in the registrar's minute-book, but never was passed or entered. Why it never was perfected, does not distinctly appear. But it is reasonable to suppose that Lord ELDON held what took place in that case to be of no authority; because the point was expressly raised before him in 1816, in *Ex parte Maister, in re Ramsay*. A short note of that case is in p. 452 of Montagu's Reports; (a) and, having seen the cases laid before Sir A. Pigott and Mr. Cooke, and their briefs in that matter, and the book of the secretary of bankrupts, I am satisfied, that the attention of Lord ELDON must have been called to the point, and that he did deliberately decide against the ultimate opinion of Lord THURLOW. The same point was expressly decided in 1832 by the Court of Review, in *Ex parte Turpin*. I have also read over the printed, but hitherto unpublished, report of the case of *Smith v. Smith*; and it certainly seems, that the decision of Lord ABINGER was the same way. And Mr. Montagu having supplied me with his MS. report of the case of *Ex parte Young, in re Prior*, 2 Mont. & A. 228, in the Court of Review, I have perused it, and find that the same point was decided by the majority of the judges there on the 5th May last. The principle of these decisions is, that the assignees

(a) And see 1 Deac. & C. 134, note.

represent the bankrupt, and take his separate estate, subject to the equities that affect it; one of which is, that before he receives the dividends on the trust fund, he shall make good the loss occasioned by his bankruptcy. This is the principle laid down by Sir WILLIAM GRANT, in *Mitford v. Mitford*, 9 Ves. 100; and I must add, that if my attention had been called to the point which is now raised, I should, as a matter of course, have directed that the order should be made in the manner now prayed.

We are both of opinion, that the orders of the 16th December, 1830, and 9th August, 1831, must be discharged, subject to any arrangement with Farquhar, that may be agreed upon.

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Ex parte JOHN CHARLES ORD.—In the matter of RALPH ORD.—p. 166.

By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued:—*Held*, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to his assignees.

THIS was a petition, praying that certain shares in the York Union Banking Company, standing in the name of the bankrupt in the company's books, but which the petitioner laid claim to as his own property, might be transferred to the petitioner. One of the rules of the company was, that only principals should become subscribers; and the petitioner stated, that being at that time under articles of clerkship to his father, he conceived that he was not entitled to become a subscriber in his own name; but being desirous of taking some shares in the company, he applied to the bankrupt, who was his relation, to allow him to purchase forty shares in the bankrupt's name; to which the bankrupt consenting, the petitioner accordingly purchased forty shares, and inserted in the subscription book the bankrupt's name as the owner. The petitioner paid thereon a deposit of £20, and also £100 on account of the first instalment of 4*l.* 10*s.* per share, and drew two checks for the balance of the first and second instalments, in the bankrupt's name; which balance was still owing to the bank. The petitioner gave no notice to the company that the shares belonged to him; alleging, as an excuse for this omission, that the company did not attend to any notice of the trusts of shares, nor recognise any person as the owner of them, except the person in whose name they stood. The petitioner obtained certificates of these payments from the directors of the company, which he retained in his own possession; considering himself secure in so doing, as it was provided by the rules of the company, that upon every transfer of shares the certificates held by the former holder should be given up to be cancelled, and new ones issued, and that the production of any certificate should be at all times good *primâ facie* evidence of the title of the member to whom the same should be issued, to the number of shares included therein. Another of the rules declared, that no shares should be sold or transferred, until after the first meeting in the year 1835; which took place on the last Tuesday in February in that

year. The petitioner, in the interval between October, 1834, and May, 1835, resided in London.

The petitioner alleged, that the bankrupt had repeatedly declared, that the shares were the property of the petitioner; and that the bankrupt never made any payment in respect of the shares, nor in any manner interfered therewith, otherwise than at the request and instance of the petitioner; and that on the 7th April last he signed a declaration of trust, declaring that the shares were standing in his name as a trustee for the petitioner.

On the 14th April last, the fiat was issued.

On the 18th May following, the petitioner gave the following notice in writing to the directors of the company: "I do hereby give you notice, that the shares (forty) standing in the name of Ralph Ord, are held in trust for me, that he paid no part of the money advanced, and that they were taken in his name, on account of my not being eligible to hold them, not being a principal."

The petitioner caused a similar notice to be served on the bankrupt's assignees; who, nevertheless, proceeded on the 4th June last to sell the shares by auction; when one H. D. Maltby became the purchaser, having notice, however, of the petitioner's title to the shares. The assignees gave notice to the company, that they had sold the shares to the said H. D. Maltby, and required them to transfer the shares to him; upon which the directors gave notice to the petitioner that they intended so to transfer the shares forthwith.

The petitioner prayed, that the bankrupt, as well as the assignees, might be ordered to join and concur in doing all necessary acts for transferring the shares into the name of the petitioner, and that the assignees might be ordered to pay the costs.

Mr. *Koe*, for the petitioner, relied on the decision of this court in *Ex parte Watkins, re Kidder*, 4 Deac. & C. 87. (a) The facts here are equally as strong in support of the petitioner's claim as in that case. The shares were paid for with the money of the petitioner; and the only reason why they were entered in the bankrupt's name in the company's books was, that he thought he could not hold them in his own name, consistently with the rules of the company, being then under articles of clerkship to his father. The purchase of the shares was made in 1833, when the bankrupt declared to the secretary, that the shares were the property of the petitioner, and that the bankrupt's name was merely made use of as a trustee for him. This declaration of trust, although verbal, was nevertheless, cotemporaneous with the purchase of the shares. By another rule of the company, no shares could be transferred by any of the proprietors until February, 1835; and the bankrupt, shortly after this period, and before his bankruptcy took place, executed a regular declaration of trust, that he held the shares as a trustee for the petitioner. The bankrupt had here no document in his possession, by which he could have obtained any false credit with the world, as being the owner of these shares; for the certificates were in the possession of the petitioner. The only difference between this case and *Ex parte Watkins* is, that here the first declaration of trust was not in writing. In delivering his judgment in that case, his honour the chief judge says: "There is no doubt that shares in an insurance office, like

(a) But see *Ex parte Burbridge*, ante, p. 407, where the order of the Court of Review in *Ex parte Watkins* was set aside, on appeal.

other choses in action, are goods and chattels, within the meaning of the 72d section; but it is also clear, that where property of this nature is held by a bankrupt as trustee, it does not pass to his assignees. [Sir J. Cross. It appears, that the declaration of trust in this case was made only seven days before the fiat was issued. Does it appear when the act of bankruptcy was committed?] I do not rely on that declaration of trust, but on the statement of the bankrupt made to the secretary of the company in 1833, which was tantamount to a declaration of trust. I rely, too, on the absence of all fraud in this transaction, from the fact that the bankrupt never paid one farthing for the purchase of the shares.

Mr.           for the assignees, was stopped by the court.

ERSKINE, C. J.—In this case I am of opinion that the petitioner is not entitled to the order which he asks; as the shares must be considered not only to have been in the order and disposition of the bankrupt at the time of his bankruptcy, but also in his reputed ownership. The shares are purchased in the name of the bankrupt, without any ostensible reason assigned at the time for that proceeding; they are so held by him up to the very period of his bankruptcy, and the whole circumstances of the case are likely to cause the very mischief which the statute was intended to prevent. The shares are entered in the books of the company as the shares of the bankrupt, when their rules rendered it essential that they should be entered in the name of the true owner. There was no rule here, as in the case of *Ex parte Watkins*, that one person should not have more than a certain number of shares. The company would, as a matter of course, have transferred these shares to any person, on the order of the bankrupt. My opinion in *Ex parte Watkins*, was founded on this,—that although the rule of the company in that case was, that no shareholder should have more than two shares, yet that it was proved there to be the practice, that any additional shares might be held in the name of another person. Therefore, notwithstanding the bankrupt in that case might be said to have had the order and disposal of the shares, yet they were not, in my opinion, in his reputed ownership.

Sir J. Cross.—The question is here, with what intention were these shares taken in the name of the bankrupt. I cannot help thinking that they were so taken, for the purpose of giving him a false credit with the bank. The petitioner, who is an attorney's clerk, says, he thought that he could not hold the shares in his own name, as it was against the rules of the company that any person, who was not a principal, should become a shareholder; and yet he does that secretly which he thinks he cannot do openly.

Sir G. Rose concurred.

Petition dismissed.

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Ex parte HALL.—In the matter of HALL.—p. 171.

The bankrupt entered into a deed of composition with his creditors, by which they released him from his debts. Held, that a promissory note subsequently given to a creditor for the remainder of the debt, was a *nudum pactum*, and consequently a bad petitioning creditor's debt.

THIS was a petition by the bankrupt to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt.

The bankrupt had, on a former occasion, entered into a deed of com-

position with his creditors; by which they released him from their debts. The petitioning creditor was a party to this deed; but he stated on affidavit, that the bankrupt had subsequently given him a promissory note for the amount of the former debt. It appeared, however, that this note was given by the bankrupt, jointly with his father; and it was uncertain, whether the real consideration for the note was the debt of the bankrupt, or his father.

Mr. *Swanston*, and Mr. *Dixon*, in support of the petition, were stopped by the court.

Mr. *Montagu*, and Mr. *Bethell*, contra. It may be said, that the deed of composition, by which the bankrupt made an assignment of all his property, was itself an act of bankruptcy; and that this promissory note, having been subsequently entered into by the bankrupt, did not constitute a good petitioning creditor's debt, the debt having been contracted after an act of bankruptcy. By the 46 Geo. 3, c. 135, a prior act of bankruptcy did not invalidate the petitioning creditor's debt, unless the creditor had notice of the party having committed such act of bankruptcy. But this provision is altered by the 6 Geo. 4, c. 16, s. 19; which declares, generally, that no commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, making no exception as to whether he has, or has not, had notice of the act of bankruptcy. [Sir G. ROSE. If I am appointed a commissioner to open a fiat, and I find that an act of bankruptcy has been committed with the knowledge of the petitioning creditor, previous to the contracting of his debt, how can I, on my oath, adjudge the party a bankrupt; when the 47th section of the statute expressly provides, that a debt cannot be proved, where the party had, at the time the same was contracted, notice of a previous act of bankruptcy. The difficulty is, that although the petitioning creditor may, under the provisions of the act of bankruptcy, according to your argument, issue a commission, yet, under the 47th section, he cannot prove it, for the essential purposes of a commission.] A voluntary note or bond is sufficient to support a commission, although not proveable under it, for the purpose of receiving dividends in competition with creditors for a valuable consideration. But here the question is, whether, although the original debt may be extinguished, the moral obligation to pay it does not continue; and it is laid down by Lord MANSFIELD, and Mr. Justice BULLER, in *Huokes v. Saunders*, Cowp. 290, that where a man is under a moral obligation, or is liable in conscience and equity, to pay a sum of money, that is a sufficient consideration for a promise to do so. Besides the note itself, we have also a subsequent acknowledgment of its having been given by the bankrupt; for the petitioning creditor received a subsequent account from him, in which he debits himself, "for a note for £107 due with father." [ERSKINE, C. J. This shows it was a joint note. What evidence have you that it was joint and several?] We have not the note at present to produce before the court, but we will do so to-morrow, if the court will allow us time for that purpose.

The court accordingly allowed the case to stand over till the following day, to enable the respondents to produce the note.

A note was then handed to the court, which appeared to be a separate note of Joseph Hall, for the sum of £107; but there was no evidence to show, whether this was the note of the bankrupt, or his father, no proof being adduced of the handwriting of the party who had signed the note.



ERSKINE, C. J.—There is no evidence to prove that Joseph Hall, the bankrupt, was the maker of this note. On the contrary, the evidence that has been adduced is, that the note was due with his father. But even if it was the note of the son, I should say that it was void, as being given without consideration. Can a new promise to pay a debt be good, without a fresh consideration, when the debt itself has been released by deed? Under the petitioning creditor's own hand and seal, there is here a release of this debt by deed, dated 17th July, 1829. He says, I have a subsequent note of the bankrupt for the remainder of the debt. But before the commissioners proceeded to adjudication, they were bound to inquire the consideration for this note. The only one asserted is, that the bankrupt voluntarily made the note for the remainder of the debt. Then the question of law arises, whether that is a good consideration. I know of no case where it has been held, after a release by deed, by which the debt is extinguished, that a subsequent parol promise, made without consideration, can revive the debt. I think there is a marked distinction between a case, where the remedy is only gone and the debt remains—and a case like this, where the debt is absolutely extinguished. My opinion is, that the promissory note, taking it even to be the separate note of the bankrupt, amounts to nothing but a *nudum pactum*; and that the petitioning creditor has, therefore, no debt to support the fiat.

SIR J. CROSS—The very existence of this note having been disputed by the petitioner, some better evidence ought to have been adduced by the petitioning creditor to identify it. He says, it was voluntarily given by the bankrupt for the remainder of that debt, which he, the petitioning creditor, had previously released. The bankrupt has alleged in his petition, that the petitioning creditor pretended that he held a joint note of the bankrupt and his father; which allegation the petitioning creditor has not proved; and he now produces a separate note, signed Joseph Hall, without showing whether it was given by the father, or the son. There is a gross mistake in fact, and in law, in this case—indeed, the only matter which the petitioning creditor has endeavoured to substantiate by proof was, that this promissory note was given by the bankrupt. He has wholly failed in such proof; and, therefore, the fiat ought to be annulled.

THE LORD CHIEF JUSTICE—On the face of the proceedings, there is certainly no evidence to support the fiat. The only evidence for the deposition in support of the fiat, is the statement of the petitioning creditor, is for goods sold and delivered to the bankrupt, and for the very debt which the petitioning creditor has now released. Then the question arises, whether the goods sold and delivered to the bankrupt, can be considered as a consideration for the remainder of the debt, when the only consideration for the debt is the release of the debt. Take the note to be the separate note of the bankrupt,—the *onus* is thrown on the petitioning creditor to prove that a promissory note was given by the bankrupt, for a valuable consideration. For, according to the law, there is no case which says, after the debt is released, a subsequent promise may come against the assets of his debtor, to revive the debt. If the note had turned out to be the note of the father, and the son, I think the court ought to have annulled the fiat. On the face of these proceedings on the part of the petitioning creditor, the fiat ought to be annulled.

The order made was to annul the fiat, with costs.

**Ex parte EDWIN LEAF, THOMAS JAMES SMITH, and WILLIAM JONES.—In the matter of JAMES WINDROSS.—p. 176.**

A., B., and C. dissolve their partnership, by B. retiring from the concern, and assigning all his share in the partnership stock, debts, and effects to A. and C., but no notice of such assignment was given, individually, to the debtors of the partnership. A. and C. continue to carry on the trade till the death of A. A fiat is then issued against B. and C., as surviving partners of A., when some of the debts due to the firm of the three still remain uncollected: *Held*, that the joint creditors of the firm of the three could not prove against the *separate* estates of B. and C., as the outstanding debts due to the three constituted joint property of that firm, existing at the time of the bankruptcy.

THIS was a petition of certain creditors, praying that a proof made by other creditors under the fiat might be expunged, except for the purpose of assenting to, or dissenting from, the bankrupt's certificate.

The bankrupt had carried on the business of a linen-draper in copartnership with George Dawson and John Simpson, under the firm of Dawson, Simpson, and Windross; but on the 17th of October, 1834, that partnership was dissolved as to Simpson, and, by an indenture between the parties of that date, Simpson assigned over to Dawson and Windross his share in all the debts owing to the partnership, in the lease of the house where the trade was carried on, and in all the stock in trade and other effects belonging to the partnership; and Dawson and Windross covenanted to indemnify Simpson from the claims of all the creditors of the partnership. Notice of this dissolution was duly published in the gazette, and that all the debts owing to or by the partnership would be received and paid by Dawson and Windross; but express notice of the assignment was not given to the debtors of the firm of Dawson, Simpson, and Windross. The creditors of that firm, also, did not do any thing to release Simpson from the debts owing by the partnership. After this dissolution, Dawson and Windross continued to carry on the business, under the firm of Dawson and Windross, until Dawson's death, which happened on the 10th of December, 1834; and afterwards the business was carried on by Windross until his bankruptcy. On the 30th of December, 1834, a fiat was issued against Windross, as surviving partner of Dawson and Windross; and on the 6th of January, 1835, another fiat was issued against Simpson and Windross, as surviving partners of Dawson, Simpson, and Windross; both of which fiats were in the course of prosecution.

The petitioners were creditors of the firm of Dawson and Windross for 30*l.* 7*s.* 10*d.*, which they had proved under the fiat against Windross. They were also creditors of the firm of Dawson, Simpson, and Windross, for 20*l.* 1*s.* 3*d.*

Brown, Clarkson, & Co., were creditors of Dawson, Simpson, and Windross, for £500, but not creditors of Dawson and Windross; they had, however, been permitted to prove this sum under the fiat against Windross.

Edward Wilson was the holder of an acceptance of Dawson, Simpson, and Windross, for £1000, which he had, prior to the bankruptcy of Simpson and Windross, negotiated, and the holders of it had proved the amount against the estate of Dawson and Windross.

The petitioners alleged, that it was the duty of the assignees under the fiat against Windross, to have opposed such proofs, and that the petitioners had reason to believe that such proofs were not duly opposed. That

many of the debts due to the firm of Dawson, Simpson, and Windross, were, at the time of issuing the fiat against Windross, uncollected and unreceived; and that in consequence of the parties so indebted having had no sufficient notice of the assignment made by Simpson to Dawson and Windross, such debts must be considered as in the order and disposition of Simpson and Windross, as surviving partners of Dawson at the time of their bankruptcy.

The prayer was, that it might be declared that the creditors of the firm of Dawson, Simpson, and Windross, ought not to receive dividends under the fiat against Windross, concurrently with the creditors of Windross, in his own right, or as surviving partner of Dawson, and that such proof might be directed to stand for the purpose only of assent to or dissent from the certificate of Windross, and might in all other respects be expunged; and that the costs of the petition might be paid by Brown, Clarkson, & Co., or out of the estate of Simpson and Windross, or the estate of Dawson and Windross.

Mr. *Bethell* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Anderdon*, for the respondents, Brown, Clarkson and Co. It is not disputed, that if there was any joint estate of the three, then the joint creditors of the three could not prove against the estate of the one. But in this case, where the three entered into an agreement that the property of the three should become the property of the two, that was an absolute change of ownership; and after the assignment from Simpson of his share in the property to Dawson and Windross, no Court of Equity would have permitted him afterwards to deal with any portion of the effects belonging to the former partnership. There was no longer, therefore, any joint property of Dawson, Simpson, and Windross. Nobody questions the *bona fides* of the assignment; and though it is admitted that no express notice was given of the assignment to some of the debtors of the three, yet the doctrine of reputed ownership does not apply to the facts of this case. In *Ex parte Williams*, 11 Ves. 3, where there was a dissolution of partnership by the retirement of a partner, followed by the bankruptcy of the other, Lord ELDON held, that the right of the joint creditors against joint property remaining in specie, depended upon the *bona fides* of the transaction, and whether, by the bargain for the dissolution, that, which was the property of all, had become the property of one. "In *Ex parte Ruffin*," 6 Ves. 119, his lordship added, "there could be no doubt upon that, a legal instrument being produced, the legal effect of which was such as I have stated. That case was no more than that a bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader, in whose hands they were left, and the other was only to come in as a creditor. Upon the facts of this case, without saying whether the conclusion of the commissioners as to the joint debts is right, there is distinct evidence of an agreement, that the joint effects should be considered separate effects; and that fact calls upon me to declare the conclusion of law, that these are separate effects." Now, there being in the present case an absolute assignment from Simpson to Dawson and Windross of all his share in the property of the partnership, it follows that what were previously the joint effects of the three became then the separate effects of the two, and consequently there could be no longer any joint property remaining of Dawson, Simpson, and Windross. Dawson being dead, and a fiat having issued

against Windross, as the surviving partner, the assignees of Windross must take his estate, subject to all the equities at the time of his bankruptcy; one of which was, that the debts of the three were chargeable on the property assigned to the two. In the present case, the real ownership of the property of the former partnership of Dawson, Simpson, and Windross, was in Windross, the surviving partner, and the representatives of the deceased partner Dawson. In Co. Litt. 182, a, it is laid down under the title of Joint-tenants, that there is an exception to the general rule applicable to joint-tenants, in the case of joint-merchants, as between whom the property they have as partners, shall not survive, but go to the executors of him that deceaseth; the rule being, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. There was no property here in the possession, order, or disposition of Simpson, with the consent and permission of the true owners, namely, Windross and Dawson's representatives. If the three partners had all been living, it might then perhaps have been considered a case of reputed ownership. But, as there is no joint property of the three, and no solvent partner, the joint creditors of the three can prove against the estate of either partner. The only rule in bankruptcy which can affect the rights of the parties, namely, that as to reputed ownership, is here wholly inapplicable; for, at the moment of the bankruptcy, the possession of all the effects of the former partnership of Dawson, Simpson, and Windross, was in Windross alone. Here there is no outstanding estate of the original partnership. The death of Dawson distinguishes this case from those in the books, namely, *Ex parte Burton*, 1 G. & J. 207; *Ex parte Usborne*, 1b. 358; *Ex parte Wheeler*, Buck, 25; and *Ex parte Liddiard*, 2 Mont. & A. 87.

Mr. *Bethell*, in reply. In the present case there was no actual ownership in the representatives of Dawson, the deceased partner; and as no notice was given to the debtors of the former partnership of the assignment from Simpson to Dawson and Windross, the debts, according to the doctrine of all the cases, continued to be the property of Dawson, Simpson, and Windross. The representatives of the deceased partner have no interest at law, or in equity, in the partnership property. All that they can demand is an account.

Mr. *Montagu* appeared for the assignees of Simpson and Windross.

Mr. *Ching*, and Mr. *Keene*, appeared for two of the assignees of Windross, who were joint creditors of the former partnership.

ERSKINE, C. J.—The question raised on this petition is, whether, at the time of the bankruptcy of Windross, there was any joint property of Dawson, Simpson, and Windross; because the only ground on which the proof of Brown, Clarkson, and Co. can be permitted to stand is, that there was then no joint fund belonging to the former partnership. As the question is an important one, I should wish for a little time to consider my opinion. But my present impression is, that the commissioners have done wrong in saying that there was no joint property.

Sir G. ROSE.—I think there can be no doubt that, with respect to the debts owing to the original partnership, of the assignment of which no notice was given to the debtors, they remain the property of Dawson, Simpson, and Windross; for I have no hesitation in saying, that upon reference to the orders made in former cases on this subject, they will be found to contain that protection to the creditors of the original firm. It is impossible to challenge this proposition, namely, that on the very

eve of bankruptcy that can be made the separate property of two partners, which was previously the property of three. The question in this case is, how far the joint creditors of a partnership can come against the separate property of an individual partner. It cannot be pretended for one moment that they can do so, while there is one farthing of the joint fund remaining. I think there was here joint property, within the meaning of the rule which has been uniformly the guidance of the court upon questions of this nature; and, consequently, that the joint creditors of Dawson, Simpson, and Windross cannot come against the separate estate of Windross. No joint property of the three, which remained *in specie* at the time of the bankruptcy of Simpson and Windross, would pass to the separate creditors of Windross; and the same observation applies to the debts owing to the firm of the three, if no notice was given to the debtors of the assignment.

*Cur. adv. vult.*

ERSKINE, C. J.—In this case, Dawson, Simpson, and Windross had, down to the 17th of October, 1834, carried on business together as partners, and had, in the course of their trade, contracted joint debts and liabilities, and had also become jointly interested in debts contracted by other persons, and then due to the firm. On the 17th October, 1834, Simpson retired from the firm, and assigned all his share of the partnership effects and credits to Dawson and Windross, who, on their parts, covenanted to pay all the debts of the firm, and to indemnify Simpson. Notice of this arrangement was inserted in the Gazette, and Dawson and Windross took possession of all the partnership effects, and continued to carry on the trade till the 10th December, 1834, when Dawson died; then Windross continued to carry on the business alone till the 30th of the same month, when he became bankrupt, and a separate fiat was issued against him. On the 6th of January, 1835, a joint fiat was issued against Simpson and Windross, under which they were adjudged bankrupts, and assignees were appointed. At that time some of the debts due to the original partnership, and some of the debts due from them, still remained outstanding and unpaid. Some of the joint creditors of the firm of Dawson, Simpson, and Windross, applied to prove their debts against the separate estate of Windross, and were permitted so to do; and this petition is, in effect, an appeal from the decision of the commissioners, in admitting such proof.

Now, as in bankruptcy joint creditors are not allowed to prove against the separate estate of one member of a firm, in any case where there is joint property, however small, (a) the question before the court was reduced to the single point, whether the outstanding debts originally due to Dawson, Simpson, and Windross are to be considered as the joint property of that firm. The question appears to have been argued before the commissioner, upon the ground, that as no notice had been given to the debtors of the assignment of Simpson's interest to Dawson and Windross, the debts, upon the death of Dawson, were in the order and disposition of Simpson and Windross, and therefore passed to their assignees under the joint fiat. And the commissioners, having decided that the debts did not pass under the 72d section of the bankrupt act, appear to have overlooked the further question, whether they were not applicable, in the first place, to the payment of the joint creditors of

(a) As to the reason and justice of the rule, excluding joint creditors from proving against the separate estate, if there is the smallest portion of joint property, see 1 Deac. B. l. 649, note (1.)

Dawson, Simpson, and Windross. I am of opinion, that they are so applicable, and, therefore, to that extent, that there is joint property. And I rest this opinion, not upon the ground that the debts were in the order and disposition of Simpson and Windross, and so passed to their assignees under the 72d section of the bankrupt act; but upon this, that although by the assignment in October, 1834, the property in the debts passed in equity to Dawson and Windross, yet that Simpson retained a lien upon them, as against Dawson and Windross, so long as any of the joint creditors remain unpaid; and that that equity would only be defeated, as against the creditors of Dawson and Windross, by Simpson's permitting them to have the exclusive order and disposition of the debts so assigned, according to the principle explained in *Ex parte Rowlandson*, 1 Rose, 416.

Now, in order to invest them with the exclusive order and disposition of these debts, notice to the debtors of the assignment by Simpson was necessary. It is admitted, that no specific notice was given; but it has been contended, that the notice in the gazette was sufficient; but this is contrary to many decided cases, and is especially inconsistent with the decision in *Ex parte Burton*, 1 G. & J. 207, and *Ex parte Usborne*, 1 G. & J. 358, which were cited at the bar, and in both of which notice in the gazette was given. The debts, therefore, remained in the order and disposition of Dawson, Simpson, and Windross, and never were in the exclusive order and disposition of Dawson and Windross, or of Windross alone. Simpson's lien therefore still remained; under which he, and the creditors working out their rights through his, might insist that those debts should be first applied in payment of the joint debts of the three; and then, to the extent of those debts, there is joint property; which excludes this case from the exception under which joint creditors are sometimes permitted to prove against the separate estates of some of their debtors. The commissioners, therefore, should keep distinct accounts of the estate of the three, as well as of the two partners, and also of the separate estates of each; and the joint creditors of the original firm should receive dividends only out of the joint estate of the three.

Sir J. Cross and Sir G. Rose concurred.

The order declared, that the debts due to Dawson, Simpson, and Windross, which were outstanding and unreceived at the date of the fiat issued against Windross, were the joint property of Simpson and Windross, as surviving partners of Dawson; that the creditors of Dawson, Simpson, and Windross were not entitled to prove against the separate estate of Windross, for the purpose of receiving dividends; that all farther proceedings under the separate fiat against Windross should be suspended, and the proofs and proceedings already had and taken be transferred to those under the joint fiat against Simpson and Windross, without prejudice to the rights of any parties; that distinct accounts should be kept of the joint estates of Dawson, Simpson, and Windross, and of Dawson and Windross, and of the respective separate estates of John Simpson and James Windross, and that such joint estates should be divided among the respective creditors of the joint estates; that the costs of keeping such distinct accounts should be paid out of the respective estates; and that the costs of the petition should be paid out of the joint estate of Simpson and Windross, as surviving partners of Dawson.

Ex parte FREDERICK WILLIAM BENECKE.—In the matter of  
CHARLES PEARSON.—p. 186.

The petitioner covenants with the bankrupt, that he will procure a lease to be granted to him of certain premises by a third person:—*Held*, that this was an agreement for a lease, within the 75th section of the bankrupt act; and that the petitioner was entitled to call on the assignees to elect, whether they would accept or decline such agreement.

THIS was a petition calling upon the assignees to elect whether they would accept or decline an agreement for a lease, which had been entered into between the petitioner and the bankrupt, under the following circumstances:

The petitioner, who had carried on the business of a manufacturing chymist, at Deptford, agreed, in consideration of two bonds to be given him by the bankrupt, to transfer to the latter the goodwill of his business, and to procure him a lease of the premises where the same was carried on. And accordingly, by articles of agreement entered into between them, on the 30th July, 1833, the petitioner covenanted with the bankrupt that he would, on or before the 29th September then next, procure to be granted by R. Edmonds, Esquire, (who was seised of the fee-simple of the property,) unto the bankrupt, a good and effectual lease of the premises in question, for the term of eighteen years from the 25th December then last, at the yearly rent of £200, subject to the covenants set forth in the schedule to the said agreement; and that he would also, on the 1st August then next, deliver up the possession of the premises to the bankrupt, together with the plant, utensils, and fixtures, belonging thereto, which were used by the petitioner in his trade of a manufacturing chymist. The bankrupt, on his part, covenanted with the petitioner, among other things, that he would accept such lease, without requiring any evidence of the lessor's title, and would, on the 1st August then next, accept and take possession of the premises, and would also execute and deliver unto the petitioner a bond in a sufficient penalty for securing the due payment of £3200 by certain yearly instalments, and interest, and likewise another bond for securing the payment of £6000, and interest, at the end of five years from the 1st August; and that for better securing the payment of the last-mentioned bond, he would execute a mortgage to the petitioner of the said premises and fixtures. And, for the due performance of the several stipulations contained in this agreement, each of the parties bound himself to the other in the sum of £2000 as liquidated damages.

In consequence of some objections to the title of the lessors, no lease of the property was procured by the petitioner to be executed by the bankrupt on the 1st of August, 1834, when the first instalment on the bond became due. To recover this instalment, the petitioner brought an action against the bankrupt in the Court of Exchequer, and obtained judgment, which the bankrupt endeavoured to stay by filing a bill in Chancery for an injunction, which was dismissed with costs.

On the 19th June, 1835, the fiat was issued; whereupon the petitioner's solicitor applied to the assignees, to ascertain whether they would accept or decline the agreement for the lease; and, receiving no answer to the application, sent them an abstract of the title upon which the agreement was entered into, and offered them any further information in his power; stating, that a good title could be made by the lessors, ar.

that they were willing to execute the lease; requesting also an answer, whether they would accept or decline the agreement; and giving them notice, that if they did not return an answer on a certain day, a petition would be presented to compel them to elect. A copy of this notice was also served upon the solicitors to the fiat. No answer being returned to this application, the present petition was presented, praying, that if the assignees declined the agreement, the court would order them to deliver up to the petitioner immediate possession of the premises.

Mr. *Hull* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Sidebottom*, for the assignees. The petitioner has in this case entered into a contract with the bankrupt, which he himself is unable to perform; the court, therefore, has no jurisdiction to make any order on this petition; for the petitioner cannot come here to force the assignees to elect whether they will perform an agreement, when it is beyond his power to fulfil the agreement on his own part. The mode of dealing with a petition of this description is just the same as if the petitioner had filed a bill in a Court of Equity for the specific performance of an agreement; when, if he could not perform his own part of the agreement, his bill would be dismissed. But even if the petitioner had the power to fulfil the contract, he is not entitled to any order under the 75th section of the bankrupt act. This is not a contract by the petitioner to grant a lease, but only an agreement to procure one to be granted; and an agreement of this nature is not within the meaning or the language of the act of Parliament, which describes the party entitled to apply to the court for an order against the assignees, as "the lessor, or such person agreeing to grant a lease."

Mr. *Hull*, in reply, was stopped by the court.

ERSKINE, C. J.—The question is, not whether the assignees are justified in objecting to the proposed lease, but whether they will abandon the agreement, or not. I think the petitioner is entitled to the order he asks.

Sir J. CROSS.—The petitioner in this case undertakes, that some other persons shall grant a lease to the bankrupt. Surely that amounts to "an agreement for a lease," within the meaning of the act of Parliament.

Sir J. ROSE.—The petitioner has a right to come here and require the assignees to say, whether they will perform the contract or not, which the bankrupt entered into previous to his bankruptcy. If they elect to perform the agreement, then the petitioner must perform his part of it; otherwise, his petition will be dismissed with costs.

Mr. *Swanston* then, on the part of the assignees, elected to decline the benefit of the agreement; provided the petitioner would give up the two bonds for £3200 and £6000.

Mr. *Hull* had no objection to give up the bonds, but not a covenant for unliquidated damages contained in the articles of agreement.

The order finally made was, that the assignees, electing to decline the agreement for the lease, should, within a week, deliver up to the petitioner the possession of the premises, with the plant and machinery, as they had been delivered to the bankrupt; and that the petitioner should, within the like period, deliver up to the assignees the agreement, and also the bonds executed by the bankrupt, without prejudice to any right of proof or remedy under the fiat, or otherwise; the assignees to have their costs out of the estate.



## Ex parte BLAKE.—In the matter of CALCRAFT.—p. 191.

A separate fiat having issued against one of three partners, it was ordered, that another separate fiat, which was about to be issued against one of the other partners, should be directed to the same commissioners as those named in the first fiat.

In this case, a separate fiat having issued against one of three partners, and another separate fiat being about to be issued against one of the other partners, application was made at the bankrupt office to have the second fiat directed to the same commissioners as those named in the first; but the office thought the 17th section of the bankrupt act did not apply to a case of this description.

Mr. *Swunston* now moved for an order, that the second fiat might be directed to the same commissioners. The words of the 17th section of the 6 Geo. 4, c. 16, are, "If, after a commission issued against *any two or more* members of a firm, any other commission or commissions shall be issued against any other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed." In describing the first commission, the clause certainly specifies one issued against *two or more* members of a firm; so that there was some reason for the doubt expressed at the office, whether the section was applicable to a case where the first commission or fiat was issued against only *one* member of a firm. But it is submitted, that the real intent of the statute was, that a second fiat should in all cases be directed to the same commissioners, as those named in a previous fiat against any member of a partnership. The eleventh general order (a) applies only to second or renewed fiats against the same party, which are directed to go to the same commissioners, before whom the former commission or fiat was prosecuted.

ERSKINE, C. J.—I think it is right that the second fiat in this case should be directed to the same commissioners as those named in the first. I thought, indeed, that there had been a general order to that effect.

The rest of the court concurring, it was

Ordered as prayed.

(a) See 1 Deac. & Chit. App. xxv.

## Ex parte TOPHAM.—In the matter of BATH.—p. 192.

Where an official assignee made default, in not accounting for moneys received, the court permitted the creditors' assignee to use the names of the chief registrars in suing the sureties upon the bond.

THE official assignee, who had been originally appointed under this fiat, became insolvent in January, 1833; upon which he was removed from his appointment, and shortly afterwards died in the King's Bench prison. In February, 1835, an audit meeting was held before the commissioner, when a balance of 55*l.* 8*s.* was then found due to the bankrupt's estate from Lowe, the insolvent official assignee. This was a petition from the creditors' assignee, praying that the chief registrars, to

whom Lowe and his sureties had entered into a bond (a) to account for moneys received by him upon his appointment as official assignee, might forthwith assign such bond to the petitioner, to enable him to put the same in force, for the receiving of the 55*l.* 8*s.*; or that the petitioner might be permitted to sue upon the bond in the names of the chief registrars, upon executing to them a proper indemnity; or that the chief registrars might be ordered to put such bond in force, for enforcing the payment of the balance so due from Lowe.

Mr. *Keene* appeared in support of the petition.

Mr. *J. Russell*, who appeared for three of the six sureties on the bond, submitted that, whatever order was made on this occasion, it ought not to apply to these three, as they had already paid their proportion of contribution, to make good the sum for which Lowe had not accounted.

The court ordered, that the petitioner might use the names of the chief registrars in suing upon the bond, upon giving them a proper indemnity.

(a) See Rule 22, 1 Deac. & Chit. App. xxvii.

### Ex parte CATTARAL.—In the matter of BIRD.—p. 193.

Where two assignees were elected, one of whom was chosen without his own consent, and refused to serve, the court directed a new choice altogether.

THIS was a petition presented by creditors, for a new choice of assignees. It appeared, that two had been elected at the meeting before the commissioners; but that one, having been chosen without his own consent, refused to serve.

Mr. *Duckworth*, and Mr. *Keene*, appeared in support of the petition.

Mr. *J. Russell*, who appeared for Smith, the other assignee, said, that it was for some time doubtful whether the party would consent or not to serve; and that the bankrupt's estate was now nearly wound up.

ERSKINE, C. J.—For Smith's own indemnity, he ought to consent to this application. If he is elected *sole* assignee, he will then be a legal assignee. He is now an illegal assignee.

Order made for new choice; petitioners to have their costs out of the estate; Smith, the opposing assignee, to pay his own.

### Ex parte BURN and Others.—In the matter of ISAACS.—p. 194.

The signature of one of three assignees to a petition was attested by the solicitor, who presented the petition, under the word "*witness*," without stating him to be solicitor in the matter of the petition: *Held*, a sufficient attestation.

Where one commissioner had attended to the proceedings under a fiat, and had taken the bankrupt's last examination, and the bankrupt obtained the signature of another commissioner to his certificate, the court referred the certificate back to the first commissioner, in order to examine the bankrupt, and decide whether he would sign his certificate.

THIS was the petition of the assignees to stay the bankrupt's certificate.

Mr. *Swunston*, and Mr. *Bichner*, appeared in support of the petition.

ERSKINE, C. J.—There is no evidence to prove that Joseph Hall, the bankrupt, was the maker of this note. On the contrary, the evidence that has been adduced is, that the note was due with his father. But even if it was the note of the son, I should say that it was void, as being given without consideration. Can a new promise to pay a debt be good, without a fresh consideration, when the debt itself has been released by deed? Under the petitioning creditor's own hand and seal, there is here a release of this debt by deed, dated 17th July, 1829. He says, I have a subsequent note of the bankrupt for the remainder of the debt. But before the commissioners proceeded to adjudication, they were bound to inquire the consideration for this note. The only one asserted is, that the bankrupt voluntarily made the note for the remainder of the debt. Then the question of law arises, whether that is a good consideration. I know of no case where it has been held, after a release by deed, by which the debt is extinguished, that a subsequent parol promise, made without consideration, can revive the debt. I think there is a marked distinction between a case, where the remedy is only gone and the debt remains,—and a case like this, where the debt is absolutely extinguished. My opinion is, that the promissory note, taking it even to be the separate note of the bankrupt, amounts to nothing but a *nudum pactum*; and that the petitioning creditor has, therefore, no debt to support the fiat.

Sir J. Cross.—The very existence of this note having been disputed by the petitioner, some better evidence ought to have been adduced by the petitioning creditor to identify it. He says, it was voluntarily given by the bankrupt for the remainder of that debt, which he, the petitioning creditor, had previously released. The bankrupt has alleged in his petition, that the petitioning creditor pretended that he held a joint note of the bankrupt and his father; which allegation the petitioning creditor has not denied; and he now produces a separate note, signed Joseph Hall; without proving whether it was given by the father, or the son. The vital question in this case—indeed, the only matter which the petitioning creditor had to substantiate by proof was, that this promissory note was given by the bankrupt. He has wholly failed in such proof; I am, therefore, of opinion, that the fiat ought to be annulled.

Sir G. Rose.—Upon the face of the proceedings, there is certainly no good petitioning creditor's debt: for the deposition in support of the debt, made by the petitioning creditor, is for goods sold and delivered by him to the bankrupt,—the very debt which the petitioning creditor had previously released by deed. Then the question arises, whether the promissory note, which has been subsequently set up, can be considered as constituting a good petitioning creditor's debt, when the only consideration for giving it was the former debt so released. Take the note to be the separate note of the bankrupt,—the *onus* is thrown on the petitioning creditor to prove, not merely that a promissory note was given by the bankrupt, but that it was given for a valuable consideration. For, according to my impression, there is no case which says, after the debt is extinguished, that the creditor may come against the assets of his debtor, by virtue of any subsequent promise. If the note had turned out to be a joint note of the father and the son, I think the court ought to have marked its disapprobation of these proceedings on the part of the petitioning creditor, by assigning the bond.

The order made was to annul the fiat, with costs.

**Ex parte EDWIN LEAF, THOMAS JAMES SMITH, and WILLIAM JONES.—In the matter of JAMES WINDROSS.—p. 176.**

A., B., and C. dissolve their partnership, by B. retiring from the concern, and assigning all his share in the partnership stock, debts, and effects to A. and C., but no notice of such assignment was given, individually, to the debtors of the partnership. A. and C. continue to carry on the trade till the death of A. A fiat is then issued against B. and C., as surviving partners of A., when some of the debts due to the firm of the three still remain uncollected: *Held*, that the joint creditors of the firm of the three could not prove against the *separate* estates of B. and C., as the outstanding debts due to the three constituted joint property of that firm, existing at the time of the bankruptcy.

THIS was a petition of certain creditors, praying that a proof made by other creditors under the fiat might be expunged, except for the purpose of assenting to, or dissenting from, the bankrupt's certificate.

The bankrupt had carried on the business of a linen-draper in copartnership with George Dawson and John Simpson, under the firm of Dawson, Simpson, and Windross; but on the 17th of October, 1834, that partnership was dissolved as to Simpson, and, by an indenture between the parties of that date, Simpson assigned over to Dawson and Windross his share in all the debts owing to the partnership, in the lease of the house where the trade was carried on, and in all the stock in trade and other effects belonging to the partnership; and Dawson and Windross covenanted to indemnify Simpson from the claims of all the creditors of the partnership. Notice of this dissolution was duly published in the gazette, and that all the debts owing to or by the partnership would be received and paid by Dawson and Windross; but express notice of the assignment was not given to the debtors of the firm of Dawson, Simpson, and Windross. The creditors of that firm, also, did not do any thing to release Simpson from the debts owing by the partnership. After this dissolution, Dawson and Windross continued to carry on the business, under the firm of Dawson and Windross, until Dawson's death, which happened on the 10th of December, 1834; and afterwards the business was carried on by Windross until his bankruptcy. On the 30th of December, 1834, a fiat was issued against Windross, as surviving partner of Dawson and Windross; and on the 6th of January, 1835, another fiat was issued against Simpson and Windross, as surviving partners of Dawson, Simpson, and Windross; both of which fiats were in the course of prosecution.

The petitioners were creditors of the firm of Dawson and Windross for 30*l.* 7*s.* 10*d.*, which they had proved under the fiat against Windross. They were also creditors of the firm of Dawson, Simpson, and Windross, for 20*l.* 1*s.* 3*d.*

Brown, Clarkson, & Co., were creditors of Dawson, Simpson, and Windross, for £500, but not creditors of Dawson and Windross; they had, however, been permitted to prove this sum under the fiat against Windross.

Edward Wilson was the holder of an acceptance of Dawson, Simpson, and Windross, for £1000, which he had, prior to the bankruptcy of Simpson and Windross, negotiated, and the holders of it had proved the amount against the estate of Dawson and Windross.

The petitioners alleged, that it was the duty of the assignees under the fiat against Windross, to have opposed such proofs, and that the petitioners had reason to believe that such proofs were not duly opposed. That

many of the debts due to the firm of Dawson, Simpson, and Windross, were, at the time of issuing the fiat against Windross, uncollected and unreceived; and that in consequence of the parties so indebted having had no sufficient notice of the assignment made by Simpson to Dawson and Windross, such debts must be considered as in the order and disposition of Simpson and Windross, as surviving partners of Dawson at the time of their bankruptcy.

The prayer was, that it might be declared that the creditors of the firm of Dawson, Simpson, and Windross, ought not to receive dividends under the fiat against Windross, concurrently with the creditors of Windross, in his own right, or as surviving partner of Dawson, and that such proof might be directed to stand for the purpose only of assent to or dissent from the certificate of Windross, and might in all other respects be expunged; and that the costs of the petition might be paid by Brown, Clarkson, & Co., or out of the estate of Simpson and Windross, or the estate of Dawson and Windross.

Mr. *Bethell* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Anderdon*, for the respondents, Brown, Clarkson and Co. It is not disputed, that if there was any joint estate of the three, then the joint creditors of the three could not prove against the estate of the one. But in this case, where the three entered into an agreement that the property of the three should become the property of the two, that was an absolute change of ownership; and after the assignment from Simpson of his share in the property to Dawson and Windross, no Court of Equity would have permitted him afterwards to deal with any portion of the effects belonging to the former partnership. There was no longer, therefore, any joint property of Dawson, Simpson, and Windross. Nobody questions the *bona fides* of the assignment; and though it is admitted that no express notice was given of the assignment to some of the debtors of the three, yet the doctrine of reputed ownership does not apply to the facts of this case. In *Ex parte Williams*, 11 Ves. 3, where there was a dissolution of partnership by the retirement of a partner, followed by the bankruptcy of the other, Lord ELDON held, that the right of the joint creditors against joint property remaining in specie, depended upon the *bona fides* of the transaction, and whether, by the bargain for the dissolution, that, which was the property of all, had become the property of one. "In *Ex parte Ruffin*," 6 Ves. 119, his lordship added, "there could be no doubt upon that, a legal instrument being produced, the legal effect of which was such as I have stated. That case was no more than that a bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader, in whose hands they were left, and the other was only to come in as a creditor. Upon the facts of this case, without saying whether the conclusion of the commissioners as to the joint debts is right, there is distinct evidence of an agreement, that the joint effects should be considered separate effects; and that fact calls upon me to declare the conclusion of law, that these are separate effects." Now, there being in the present case an absolute assignment from Simpson to Dawson and Windross of all his share in the property of the partnership, it follows that what were previously the joint effects of the three became then the separate effects of the two, and consequently there could be no longer any joint property remaining of Dawson, Simpson, and Windross. Dawson being dead, and a fiat having issued

against Windross, as the surviving partner, the assignees of Windross must take his estate, subject to all the equities at the time of his bankruptcy; one of which was, that the debts of the three were chargeable on the property assigned to the two. In the present case, the real ownership of the property of the former partnership of Dawson, Simpson, and Windross, was in Windross, the surviving partner, and the representatives of the deceased partner Dawson. In Co. Litt. 182, a, it is laid down under the title of Joint-tenants, that there is an exception to the general rule applicable to joint-tenants, in the case of joint-merchants, as between whom the property they have as partners, shall not survive, but go to the executors of him that deceaseth; the rule being, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. There was no property here in the possession, order, or disposition of Simpson, with the consent and permission of the true owners, namely, Windross and Dawson's representatives. If the three partners had all been living, it might then perhaps have been considered a case of reputed ownership. But, as there is no joint property of the three, and no solvent partner, the joint creditors of the three can prove against the estate of either partner. The only rule in bankruptcy which can affect the rights of the parties, namely, that as to reputed ownership, is here wholly inapplicable; for, at the moment of the bankruptcy, the possession of all the effects of the former partnership of Dawson, Simpson, and Windross, was in Windross alone. Here there is no outstanding estate of the original partnership. The death of Dawson distinguishes this case from those in the books, namely, *Ex parte Burton*, 1 G. & J. 207; *Ex parte Usborne*, Ib. 358; *Ex parte Wheeler*, Buck, 25; and *Ex parte Liddiard*, 2 Mont. & A. 87.

Mr. Bethell, in reply. In the present case there was no actual ownership in the representatives of Dawson, the deceased partner; and as no notice was given to the debtors of the former partnership of the assignment from Simpson to Dawson and Windross, the debts, according to the doctrine of all the cases, continued to be the property of Dawson, Simpson, and Windross. The representatives of the deceased partner have no interest at law, or in equity, in the partnership property. All that they can demand is an account.

Mr. Montagu appeared for the assignees of Simpson and Windross.

Mr. Ching, and Mr. Keene, appeared for two of the assignees of Windross, who were joint creditors of the former partnership.

ERSKINE, C. J.—The question raised on this petition is, whether, at the time of the bankruptcy of Windross, there was any joint property of Dawson, Simpson, and Windross; because the only ground on which the proof of Brown, Clarkson, and Co. can be permitted to stand is, that there was then no joint fund belonging to the former partnership. As the question is an important one, I should wish for a little time to consider my opinion. But my present impression is, that the commissioners have done wrong in saying that there was no joint property.

Sir G. Rose.—I think there can be no doubt that, with respect to the debts owing to the original partnership, of the assignment of which no notice was given to the debtors, they remain the property of Dawson, Simpson, and Windross; for I have no hesitation in saying, that upon reference to the orders made in former cases on this subject, they will be found to contain that protection to the creditors of the original firm. It is impossible to challenge this proposition, namely, that on the very

eve of bankruptcy that can be made the separate property of two partners, which was previously the property of three. The question in this case is, how far the joint creditors of a partnership can come against the separate property of an individual partner. It cannot be pretended for one moment that they can do so, while there is one farthing of the joint fund remaining. I think there was here joint property, within the meaning of the rule which has been uniformly the guidance of the court upon questions of this nature; and, consequently, that the joint creditors of Dawson, Simpson, and Windross cannot come against the separate estate of Windross. No joint property of the three, which remained *in specie* at the time of the bankruptcy of Simpson and Windross, would pass to the separate creditors of Windross; and the same observation applies to the debts owing to the firm of the three, if no notice was given to the debtors of the assignment.

*Cur. adv. vult.*

ERSKINE, C. J.—In this case, Dawson, Simpson, and Windross had, down to the 17th of October, 1834, carried on business together as partners, and had, in the course of their trade, contracted joint debts and liabilities, and had also become jointly interested in debts contracted by other persons, and then due to the firm. On the 17th October, 1834, Simpson retired from the firm, and assigned all his share of the partnership effects and credits to Dawson and Windross, who, on their parts, covenanted to pay all the debts of the firm, and to indemnify Simpson. Notice of this arrangement was inserted in the Gazette, and Dawson and Windross took possession of all the partnership effects, and continued to carry on the trade till the 10th December, 1834, when Dawson died; then Windross continued to carry on the business alone till the 30th of the same month, when he became bankrupt, and a separate fiat was issued against him. On the 6th of January, 1835, a joint fiat was issued against Simpson and Windross, under which they were adjudged bankrupts, and assignees were appointed. At that time some of the debts due to the original partnership, and some of the debts due from them, still remained outstanding and unpaid. Some of the joint creditors of the firm of Dawson, Simpson, and Windross, applied to prove their debts against the separate estate of Windross, and were permitted so to do; and this petition is, in effect, an appeal from the decision of the commissioners, in admitting such proof.

Now, as in bankruptcy joint creditors are not allowed to prove against the separate estate of one member of a firm, in any case where there is joint property, however small, (a) the question before the court was reduced to the single point, whether the outstanding debts originally due to Dawson, Simpson, and Windross are to be considered as the joint property of that firm. The question appears to have been argued before the commissioner, upon the ground, that as no notice had been given to the debtors of the assignment of Simpson's interest to Dawson and Windross, the debts, upon the death of Dawson, were in the order and disposition of Simpson and Windross, and therefore passed to their assignees under the joint fiat. And the commissioners, having decided that the debts did not pass under the 72d section of the bankrupt act, appear to have overlooked the further question, whether they were not applicable, in the first place, to the payment of the joint creditors of

(a) As to the reason and justice of the rule, excluding joint creditors from proving against the separate estate, if there is the smallest portion of joint property, see 1 Deac. B. l. 649, note (1.)

Dawson, Simpson, and Windross. I am of opinion, that they are so applicable, and, therefore, to that extent, that there is joint property. And I rest this opinion, not upon the ground that the debts were in the order and disposition of Simpson and Windross, and so passed to their assignees under the 72d section of the bankrupt act; but upon this, that although by the assignment in October, 1834, the property in the debts passed in equity to Dawson and Windross, yet that Simpson retained a lien upon them, as against Dawson and Windross, so long as any of the joint creditors remain unpaid; and that that equity would only be defeated, as against the creditors of Dawson and Windross, by Simpson's permitting them to have the exclusive order and disposition of the debts so assigned, according to the principle explained in *Ex parte Rowlandson*, 1 Rose, 416.

Now, in order to invest them with the exclusive order and disposition of these debts, notice to the debtors of the assignment by Simpson was necessary. It is admitted, that no specific notice was given; but it has been contended, that the notice in the gazette was sufficient; but this is contrary to many decided cases, and is especially inconsistent with the decision in *Ex parte Burton*, 1 G. & J. 207, and *Ex parte Usborne*, 1 G. & J. 358, which were cited at the bar, and in both of which notice in the gazette was given. The debts, therefore, remained in the order and disposition of Dawson, Simpson, and Windross, and never were in the exclusive order and disposition of Dawson and Windross, or of Windross alone. Simpson's lien therefore still remained; under which he, and the creditors working out their rights through his, might insist that those debts should be first applied in payment of the joint debts of the three; and then, to the extent of those debts, there is joint property; which excludes this case from the exception under which joint creditors are sometimes permitted to prove against the separate estates of some of their debtors. The commissioners, therefore, should keep distinct accounts of the estate of the three, as well as of the two partners, and also of the separate estates of each; and the joint creditors of the original firm should receive dividends only out of the joint estate of the three.

Sir J. Cross and Sir G. Rose concurred.

The order declared, that the debts due to Dawson, Simpson, and Windross, which were outstanding and unreceived at the date of the fiat issued against Windross, were the joint property of Simpson and Windross, as surviving partners of Dawson; that the creditors of Dawson, Simpson, and Windross were not entitled to prove against the separate estate of Windross, for the purpose of receiving dividends; that all farther proceedings under the separate fiat against Windross should be suspended, and the proofs and proceedings already had and taken be transferred to those under the joint fiat against Simpson and Windross, without prejudice to the rights of any parties; that distinct accounts should be kept of the joint estates of Dawson, Simpson, and Windross, and of Dawson and Windross, and of the respective separate estates of John Simpson and James Windross, and that such joint estates should be divided among the respective creditors of the joint estates; that the costs of keeping such distinct accounts should be paid out of the respective estates; and that the costs of the petition should be paid out of the joint estate of Simpson and Windross, as surviving partners of Dawson.



Ex parte FREDERICK WILLIAM BENECKE.—In the matter of  
CHARLES PEARSON.—p. 186.

The petitioner covenants with the bankrupt, that he will procure a lease to be granted to him of certain premises by a third person:—*Held*, that this was an agreement for a lease, within the 75th section of the bankrupt act; and that the petitioner was entitled to call on the assignees to elect, whether they would accept or decline such agreement.

THIS was a petition calling upon the assignees to elect whether they would accept or decline an agreement for a lease, which had been entered into between the petitioner and the bankrupt, under the following circumstances:

The petitioner, who had carried on the business of a manufacturing chymist, at Deptford, agreed, in consideration of two bonds to be given him by the bankrupt, to transfer to the latter the goodwill of his business, and to procure him a lease of the premises where the same was carried on. And accordingly, by articles of agreement entered into between them, on the 30th July, 1833, the petitioner covenanted with the bankrupt that he would, on or before the 29th September then next, procure to be granted by R. Edmonds, Esquire, (who was seised of the fee-simple of the property,) unto the bankrupt, a good and effectual lease of the premises in question, for the term of eighteen years from the 25th December then last, at the yearly rent of £200, subject to the covenants set forth in the schedule to the said agreement; and that he would also, on the 1st August then next, deliver up the possession of the premises to the bankrupt, together with the plant, utensils, and fixtures, belonging thereto, which were used by the petitioner in his trade of a manufacturing chymist. The bankrupt, on his part, covenanted with the petitioner, among other things, that he would accept such lease, without requiring any evidence of the lessor's title, and would, on the 1st August then next, accept and take possession of the premises, and would also execute and deliver unto the petitioner a bond in a sufficient penalty for securing the due payment of £3200 by certain yearly instalments, and interest, and likewise another bond for securing the payment of £6000, and interest, at the end of five years from the 1st August; and that for better securing the payment of the last-mentioned bond, he would execute a mortgage to the petitioner of the said premises and fixtures. And, for the due performance of the several stipulations contained in this agreement, each of the parties bound himself to the other in the sum of £2000 as liquidated damages.

In consequence of some objections to the title of the lessors, no lease of the property was procured by the petitioner to be executed by the bankrupt on the 1st of August, 1834, when the first instalment on the bond became due. To recover this instalment, the petitioner brought an action against the bankrupt in the Court of Exchequer, and obtained judgment, which the bankrupt endeavoured to stay by filing a bill in Chancery for an injunction, which was dismissed with costs.

On the 19th June, 1835, the fiat was issued; whereupon the petitioner's solicitor applied to the assignees, to ascertain whether they would accept or decline the agreement for the lease; and, receiving no answer to the application, sent them an abstract of the title upon which the agreement was entered into, and offered them any further information in his power; stating, that a good title could be made by the lessors, an

that they were willing to execute the lease; requesting also an answer, whether they would accept or decline the agreement; and giving them notice, that if they did not return an answer on a certain day, a petition would be presented to compel them to elect. A copy of this notice was also served upon the solicitors to the fiat. No answer being returned to this application, the present petition was presented, praying, that if the assignees declined the agreement, the court would order them to deliver up to the petitioner immediate possession of the premises.

Mr. *Hull* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Sidebottom*, for the assignees. The petitioner has in this case entered into a contract with the bankrupt, which he himself is unable to perform; the court, therefore, has no jurisdiction to make any order on this petition; for the petitioner cannot come here to force the assignees to elect whether they will perform an agreement, when it is beyond his power to fulfil the agreement on his own part. The mode of dealing with a petition of this description is just the same as if the petitioner had filed a bill in a Court of Equity for the specific performance of an agreement; when, if he could not perform his own part of the agreement, his bill would be dismissed. But even if the petitioner had the power to fulfil the contract, he is not entitled to any order under the 75th section of the bankrupt act. This is not a contract by the petitioner to grant a lease, but only an agreement to procure one to be granted; and an agreement of this nature is not within the meaning or the language of the act of Parliament, which describes the party entitled to apply to the court for an order against the assignees, as "the lessor, or such person agreeing to grant a lease."

Mr. *Hull*, in reply, was stopped by the court.

ERSKINE, C. J.—The question is, not whether the assignees are justified in objecting to the proposed lease, but whether they will abandon the agreement, or not. I think the petitioner is entitled to the order he asks.

Sir J. CROSS.—The petitioner in this case undertakes, that some other persons shall grant a lease to the bankrupt. Surely that amounts to "an agreement for a lease," within the meaning of the act of Parliament.

Sir J. ROSE.—The petitioner has a right to come here and require the assignees to say, whether they will perform the contract or not, which the bankrupt entered into previous to his bankruptcy. If they elect to perform the agreement, then the petitioner must perform his part of it; otherwise, his petition will be dismissed with costs.

Mr. *Swanston* then, on the part of the assignees, elected to decline the benefit of the agreement; provided the petitioner would give up the two bonds for £3200 and £6000.

Mr. *Hull* had no objection to give up the bonds, but not a covenant for unliquidated damages contained in the articles of agreement.

The order finally made was, that the assignees, electing to decline the agreement for the lease, should, within a week, deliver up to the petitioner the possession of the premises, with the plant and machinery, as they had been delivered to the bankrupt; and that the petitioner should, within the like period, deliver up to the assignees the agreement, and also the bonds executed by the bankrupt, without prejudice to any right of proof or remedy under the fiat, or otherwise; the assignees to have their costs out of the estate.

## Ex parte BLAKE.—In the matter of CALCRAFT.—p. 191.

A separate fiat having issued against one of three partners, it was ordered, that another separate fiat, which was about to be issued against one of the other partners, should be directed to the same commissioners as those named in the first fiat.

In this case, a separate fiat having issued against one of three partners, and another separate fiat being about to be issued against one of the other partners, application was made at the bankrupt office to have the second fiat directed to the same commissioners as those named in the first; but the office thought the 17th section of the bankrupt act did not apply to a case of this description.

Mr. *Swanston* now moved for an order, that the second fiat might be directed to the same commissioners. The words of the 17th section of the 6 Geo. 4, c. 16, are, "If, after a commission issued against *any two or more* members of a firm, any other commission or commissions shall be issued against any other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed." In describing the first commission, the clause certainly specifies one issued against *two or more* members of a firm; so that there was some reason for the doubt expressed at the office, whether the section was applicable to a case where the first commission or fiat was issued against only *one* member of a firm. But it is submitted, that the real intent of the statute was, that a second fiat should in all cases be directed to the same commissioners, as those named in a previous fiat against any member of a partnership. The eleventh general order (a) applies only to second or renewed fiats against the same party, which are directed to go to the same commissioners, before whom the former commission or fiat was prosecuted.

ERSKINE, C. J.—I think it is right that the second fiat in this case should be directed to the same commissioners as those named in the first. I thought, indeed, that there had been a general order to that effect.

The rest of the court concurring, it was

Ordered as prayed.

(a) See 1 Deac. & Chit. App. xxv.

## Ex parte TOPHAM.—In the matter of BATH.—p. 192.

Where an official assignee made default, in not accounting for moneys received, the court permitted the creditors' assignee to use the names of the chief registrars in suing the sureties upon the bond.

THE official assignee, who had been originally appointed under this fiat, became insolvent in January, 1833; upon which he was removed from his appointment, and shortly afterwards died in the King's Bench prison. In February, 1835, an audit meeting was held before the commissioner, when a balance of 55*l.* 8*s.* was then found due to the bankrupt's estate from Lowe, the insolvent official assignee. This was a petition from the creditors' assignee, praying that the chief registrars, to

whom Lowe and his sureties had entered into a bond (a) to account for moneys received by him upon his appointment as official assignee, might forthwith assign such bond to the petitioner, to enable him to put the same in force, for the receiving of the 55*l.* 8*s.*; or that the petitioner might be permitted to sue upon the bond in the names of the chief registrars, upon executing to them a proper indemnity; or that the chief registrars might be ordered to put such bond in force, for enforcing the payment of the balance so due from Lowe.

Mr. *Keene* appeared in support of the petition.

Mr. *J. Russell*, who appeared for three of the six sureties on the bond, submitted that, whatever order was made on this occasion, it ought not to apply to these three, as they had already paid their proportion of contribution, to make good the sum for which Lowe had not accounted.

The court ordered, that the petitioner might use the names of the chief registrars in suing upon the bond, upon giving them a proper indemnity.

(a) See Rule 22, 1 Deac. & Chit. App. xxvii.

### Ex parte CATTARAL.—In the matter of BIRD.—p. 193.

Where two assignees were elected, one of whom was chosen without his own consent, and refused to serve, the court directed a new choice altogether.

THIS was a petition presented by creditors, for a new choice of assignees. It appeared, that two had been elected at the meeting before the commissioners; but that one, having been chosen without his own consent, refused to serve.

Mr. *Duckworth*, and Mr. *Keene*, appeared in support of the petition.

Mr. *J. Russell*, who appeared for Smith, the other assignee, said, that it was for some time doubtful whether the party would consent or not to serve; and that the bankrupt's estate was now nearly wound up.

ERSKINE, C. J.—For Smith's own indemnity, he ought to consent to this application. If he is elected *sole* assignee, he will then be a legal assignee. He is now an illegal assignee.

Order made for new choice; petitioners to have their costs out of the estate; Smith, the opposing assignee, to pay his own.

### Ex parte BURN and Others.—In the matter of ISAACS.—p. 194.

The signature of one of three assignees to a petition was attested by the solicitor, who presented the petition, under the word "*witness*," without stating him to be solicitor in the matter of the petition: *Held*, a sufficient attestation.

Where one commissioner had attended to the proceedings under a fiat, and had taken the bankrupt's last examination, and the bankrupt obtained the signature of another commissioner to his certificate, the court referred the certificate back to the first commissioner, in order to examine the bankrupt, and decide whether he would sign his certificate.

THIS was the petition of the assignees to stay the bankrupt's certificate.

Mr. *Swanston*, and Mr. *Bichner*, appeared in support of the petition.

Mr. *Twiss*, and Mr. *Ayrton*, for the bankrupt, objected, that two of the petitioners had signed the petition, without the attestation of a solicitor, the attestation being merely by the solicitor's clerk; and that although the signature of the third petitioner was attested by a solicitor, under the word "*witness*," yet the attestation did not state him to be solicitor in the matter of the petition. *Ex parte Cracklow*, Mont. 353, decides, that a mere attestation of the solicitor to the petition, and not to the petitioner, is insufficient. The reverse of this must be equally fatal; and any defect of this nature, in the attestation of a petition to stay the bankrupt's certificate, cannot be amended; *Ex parte Tanner*, 2 Deac. & Ch. 563.

ERSKINE, C. J.—I think the word "*witness*" here is sufficient, as to the attestation by the solicitor of the signature of one of the petitioners; the solicitor being the *actual solicitor presenting the petition*. In *Ex parte Cracklow*, it was doubtful whether the word "*witness*" related to the lord chancellor's signature, or to that of the petitioner. Here, the attestation is "*Witness to the signature of A. B.*" The attestation of the signatures of the two other petitioners by a clerk is, certainly, contrary to Lord ELDON's general order of the 12th August, 1809. (a) But since the establishment of this court, a solicitor, who is admitted as an officer of the court, is responsible for the correctness of any petition to which he affixes his name; and it may, at any rate, be received as the petition of the one assignee, whose signature is attested by the solicitor.

Mr. *Twiss*, and Mr. *Ayrton*, then objected that one assignee could not present a petition without the others joining in it, or being served with a copy of it; *Ex parte Hurris*, 2 Deac. & C. 4; and that one assignee could not sign a petition for his co-assignees; *Ex parte Morgan*, Buck, 109.

The court overruled the objection.

Mr. *Swanston*, and Mr. *Bichner*, then stated the contents of the petition; which alleged, that the bankrupt had not given up some of his property; and that Mr. Commissioner Williams, who had attended to the proceedings under the fiat, and had taken the bankrupt's last examination, being out of town when the certificate was ready for the signature of the commissioner, the bankrupt had improperly and clandestinely obtained the signature of Mr. Commissioner Merivale.

The court said, that the allegation in the petition, of the bankrupt not having given up some of his property, was no ground for staying the certificate, if he had disclosed such property; but that as the fiat had been worked by Mr. Commissioner Williams, and Mr. Commissioner Merivale had no knowledge of the previous examinations, the certificate ought to go back to Mr. Williams, to examine the bankrupt, and decide whether he would sign the certificate, or not.

Ordered, that the certificate be referred back to Mr. Commissioner Williams, to review the same; the assignees to have their costs out of the estate, and those of the bankrupt to be reserved.

**Ex parte ABRAHAM HENRY CHAMBERS the elder.**—In the matter of ABRAHAM HENRY CHAMBERS the elder, and ABRAHAM HENRY CHAMBERS the younger.—p. 197.

A bankrupt is not estopped from petitioning to supersede, although he has surrendered to his commission, interfered in the choice of assignees and the disposition of the estate, and has also passed his last examination, and endeavoured to obtain his certificate.

A bankrupt is not bound by acts of acquiescence, when he is ignorant of his rights. A judgment at law, establishing the validity of a commission, is not conclusive on the Great Seal, on a subsequent petition to supersede; and the court is bound to look into all the circumstances of the case, as affecting the requisites to support the commission.

Although injury may arise to some parties from superseding a commission, yet if the bankrupt is clearly entitled to a supersedeas, he must have justice done him; the court taking care of the interests of those parties who may be affected by the supersedeas.

Where several actions had been brought by and against the bankrupt and the assignees, disputing the validity of the commission, and there were conflicting verdicts and judgments at law, the whole case turning upon the credit of the witnesses,—the court refused to decide the question whether the commission ought to be superseded; but, not being satisfied of the proof of an act of bankruptcy, directed an issue to try that fact.

The examination of a third party before the commissioner, which is taken behind the back of the bankrupt, cannot be read in evidence on the bankrupt's petition to supersede; but the court, for its own satisfaction, has a right to look at it.

A party has no right to read a document in evidence, merely because he has offered the other side a copy of it; nor can his counsel, on the hearing of the petition, do hypothetically what he cannot do directly.

A rule of the Court of King's Bench, made in an action pending in that court, cannot be read on a petition of bankruptcy, without being verified by affidavit; and notice ought to be given to the other party of the intention to read it on the hearing.

*Quære*, as to the validity of a joint commission against two of three partners, on a debt jointly due from the two.

The court will not make any order for an allowance to the bankrupt, for the purpose of meeting the expenses of an issue to try the validity of the commission, unless the assignees consent.

THIS was a petition to the Great Seal from Abraham Henry Chambers the elder, praying that the commission might be superseded, for want of a sufficient petitioning creditor's debt and act of bankruptcy.

The bankrupts had carried on the business of bankers in copartnership, under the firm of Chambers and Son, until the 3d November, 1824, when they suspended their payments; and a deed of arrangement was then entered into between them and their creditors, by which it was agreed that a committee of management should be appointed by the creditors to wind up the affairs of the banking-house; and the creditors granted the bankrupts a letter of license for five years, subject to the power of revocation by the committee, if Messrs. Chambers failed in the performance of the conditions on their part, which were contained in the deed. There was also a condition inserted, that if the letter of license was revoked, the bankrupts were to be restored to the possession of all their property, which was described in the schedule, and valued at 293,689*l.* 1*s.* 5*d.* Notwithstanding the suspension of their business as bankers, Messrs. Chambers continued to carry on a business, in which they were jointly concerned with a person of the name of White, as dealers in, and as manufacturers of, a substance called Pozzalani clay. A dispute having afterwards arisen between Chambers the elder and the committee of management, as to his performance of the conditions of the deed, the letter of license was revoked on the 9th November, 1825; and on the 19th November, 1825, a joint commission was issued against the two Chambers's, on the petition of William A'Beckett, one of the creditors who had signed the deed of arrangement, in respect of a debt due from

them as bankers; and they were also described, by trade, as bankers in the commission. Chambers the elder disputed the right of the committee of management to revoke the letter of license, and in June, 1826, gave notice of his intention to dispute the commission. On the 17th November following, a petition was accordingly presented by him to the lord chancellor for a supersedeas, on the ground of the collusion of certain parties who had caused it to be sued out, without any reference to the legal requisites. This petition was dismissed; reserving, however, the right of the bankrupt to impeach the commission in an action at law. But before Chambers the elder brought any action for this purpose, various trials at law took place, in which the assignees were either parties or privies, in which the validity of the commission came in question.

The first trial, which took place in December, 1827, was that of an action in the Exchequer, brought by Wilton, an execution creditor of the bankrupts, against the sheriff of Middlesex, for a false return of *nulla bona* to a writ of *fi. fa.* issued against the goods of the elder Chambers. The only species of trading, on which the defendant relied in this action, was that of *bankers*. The jury found a special verdict, upon which the court gave judgment for the plaintiff, thereby finding the commission to be invalid.

The second trial occurred in the King's Bench, at the sittings after Hilary Term, 1829, and was that of an action of trespass brought by the assignees against the sheriff of Middlesex and Wilton, for seizing and taking the goods of Chambers the elder. The assignees, in order to prove their title, produced the commission, which described Messrs. Chambers as *bankers, being traders according to the provisions of the act of 6 Geo. 4, c. 16*; whereupon it was objected for the defendants, that Messrs. Chambers had never carried on the business of bankers after the passing of that statute, and that it was necessary to show a trading after that act passed, and that consequently a commission against them, as *bankers*, could not be supported. To this it was answered, that the commission need not describe the trading; that the word *bankers* was merely a description of the persons of the bankrupts, and not of their trade; and that the plaintiffs might give evidence of another trading to support the commission. Lord TENTERDEN was of that opinion; and evidence was then given, that Messrs. Chambers, after the passing of the 6 Geo. 4, c. 16, had carried on the business of *Pozzalani manufacturers*. A question was also made, as to the right of Chambers, sen., to dispute the validity of the commission, in consequence of his having done some act to recognise it: and it was said, that Wilton was acting in collusion with him, and was therefore in like manner estopped; but the court held, that even if Wilton were estopped, the other defendants were not. The jury found a verdict for the assignees, which was afterwards set aside and a new trial (a) granted, on the ground of there being insufficient proof of an act of bankruptcy by Chambers the younger.

The third trial took place at the sittings after Hilary Term, 1831, in which the same parties were plaintiffs and defendants; when, to prove the bankruptcy of Chambers, jun., the assignees gave evidence to show that he had applied for protection under the commission issued against him and his father, and other acts of acquiescence; upon which the jury

again gave a verdict for the assignees, which was also set aside, and another new trial (a) granted, on the ground that the acts of Chambers, jun., who was not a party, nor identified in interest with any party to the record, were not admissible in evidence.

At the fourth trial, being the second new trial of the last-mentioned action, the jury found again a verdict for the assignees, establishing the act of bankruptcy. But this verdict was also set aside and a new trial granted, on the ground of the perjury of a principal witness.

At the fifth trial, on the 24th June, 1833, which was the third new trial of the last-mentioned action, the assignees consented to be nonsuited. A rule nisi was obtained for a new trial, but was afterwards discharged.

A sixth trial took place in the Court of Exchequer, at the sittings after Hilary Term, 1831, of an action brought by Chambers the elder against his assignees for money had and received, when he obtained a verdict, negating the act of bankruptcy relied on by the assignees. This verdict, however, was afterwards set aside, and a new trial granted, (b) on the ground that a written memorandum of the arrest of the bankrupt, made by the sheriff's officer at the time of the caption, was improperly received in evidence, notwithstanding the officer's death.

The seventh trial was a new trial of the last-mentioned action, and occurred before Lord LYNDEHURST; when his lordship rejected the evidence of the memorandum made by the sheriff's officer, and a verdict was given for the assignees. A bill of exceptions was tendered to this decision, which was afterwards argued in the Exchequer Chamber, and the judgment was confirmed. (c)

The present petition was presented in 1831, but the hearing was ordered by Lord BROUGHAM to be deferred, until the bill of exceptions was decided in the Exchequer Chamber. Besides disputing any act of bankruptcy committed by either of the bankrupts, it impeached the validity of the petitioning creditor's debt, on several grounds,—one of which was, that the debt was not due from Messrs. Chambers and White, as *Pozzalani manufacturers*, but merely from Chambers and Son, as *bankers*; and that it did not come within the provisions of the 6 Geo. 4, c. 16, s. 16, which enables a creditor to issue a commission against one or more partners of a firm, when his debt is sufficient to entitle him to issue a commission against *all* the partners; inasmuch as the debt of the petitioning creditor, in this case, was not sufficient to entitle him to issue a commission against the firm of *all* three partners, but only against two.

Sir William Follett, Mr. Temple, Mr. Alexander, Mr. Montagu, and Mr. Bethell, appeared in support of the petition. They cited *Maggs v. Hunt*, 4 Bing. 212; *Surtees v. Ellison*, 9 B. & C. 750; *Hewson v. Heard*, 9 B. & C. 754; *Palmer v. Moore*, *Ibid.*; *Ex parte Hamper*, 17 Ves. 412; *Ex parte Hodgkinson*, 1 G. Coop. 101; *Ex parte Read*, 2 Rose, 85; *Ex parte Norfolk*, 19 Ves. 455; *Dubois v. Ludert*, 1 Marsh. 346, *contra*; *Ex parte Jackson*, 19 Ves. 244; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Benfield*, 5 Ves. 424; *Ex parte Layton*, 6 Ves. 434; *Stratfield v. Halliday*, 3 T. R. 779; *Allen v. Hartley*, 1 C. B. L. 9, 7th ed.; 2 Christ. B. L. 90; *Flower v. Herbert*, 2 Ves. 326; *Mercer v. Wise*, 3 Esp. 19, 1 Deac. B. L. 816; *Heane v. Rogers*, 9 B. & C.

(a) See *Bernasconi v. Farebrother*, 3 B. & Adol. 372.

(b) See *Chambers v. Bernasconi*, 1 Tyrw. 335.

(c) See *Chambers v. Bernasconi*, 4 Tyrw. 531.



577, (17 E. C. L. R. 449;) *Like v. Howe*, 6 Esp. 20; *Ex parte Shaw*, 1 G. & J. 187; *Ex parte Giles*, 1 Deac. & C. 548; *Ex parte Bass*, 4 Madd. 270. But see *Ex parte Lewis*, 2 G. & J. 208; *Mott v. Mills*, 3 Carr. & P. 197, (14 E. C. L. R. 269;) *Ex parte Hornby*, Mont. & B. 12; *Ex parte Abell*, 1 G. & J. 199; *Maggs v. Hunt*, 4 Bing. 212, (13 E. C. L. R. 404;) *Ex parte Gallimore*, 2 Rose, 234.

Mr. *Knight*, Mr. *Swanston*, Mr. *Jacob*, Mr. *Kelly*, Mr. *G. Richards*, and Mr. *Arnold*, appeared for the assignees. They cited, *Ex parte Lees*, 16 Ves. 472; *Ex parte Munk*, 1 Mont. & A. 612; *Ex parte Clarke*, 2 Deac. & C. 194; *Heane v. Rogers*, 9 B. & C. 577; *Flower v. Herbert*, 2 Ves. 326; *Ex parte Hornby*, 1 Mont. & B. 1; *Like v. Howe*, 6 Esp. 20; *Clarke v. Clarke*, Ib. 61; and *Goldie v. Gunston*, 4 Camp. 381; *Ex parte Hooper*, 1 Deac. & C. 117; *Eyre v. Everett*, 2 Russ. 381; *Protheroe v. Forman*, 2 Swanst. 227; *Degville v. Wil- low*, 1 Sch. & Lef. 201; *Ex parte Bass*, 4 Madd. 270; *Duchess of Kingston's case*, 12 St. Tr. 253; *Streetfield v. Halliday*, 3 T. R. 779; *Crispe v. Perrot*, Willes, 467; *Ex parte Meymott*, 1 Atk. 196; *Cobb v. Symonds*, 5 B. & A. 516, (7 E. C. L. R. 179;) *Holroyd v. Gwynne*, 2 Taunt. 176; *Gimingham v. Laing*, 2 Marsh. 236, 6 Taunt. 532, (1 E. C. L. R. 476;) *Robson v. Rolls*, 9 Bing. 648.

Mr. *Knight*, in the course of his argument, proposed to read an examination of one *Gilbert*, taken before the commissioners in the month of March in the present year, on the ground that he had been requested to verify his examination by affidavit, but had declined to do so,—and that notice had been given by the assignees to the petitioner of their intention to read the examination on the hearing of the petition.

Sir *W. Follett* objected to the examination being read, it being the examination of a third person, taken *ex parte* behind the back of the petitioner, who could, therefore, have no opportunity to cross-examine the party. If it had been in the shape of an affidavit, it might then have been answered.

Mr. *Knight* contended, that it was the practice in bankruptcy to read an examination taken under these circumstances, and more especially when the assignees, as in this case, had offered the petitioner a copy of the examination.

Lord Chief Commissioner PEPYS.—You cannot make that evidence, which is not evidence, by offering the other side a copy of the document proposed to be read. (a)

Lord Commissioner SHADWELL.—The court can look at the examination for its own information, if it thinks proper. (b)

(a) See 1 Deac. B. L. 789.

(b) *Quere.* Is not this course still more detrimental to the interests of the other party? For if the matter contained in the examination is important, it might influence the judgment of the court, without any means afforded to that party of removing the impression. If the examination were openly read and commented on by the party proposing to use it, the other side would know then what parts of it were meant to be relied on, and would of course shape their argument accordingly; or they might crave leave of the court to answer such parts of the examination as they might think materially affected their client's interests. But this private inspection of an examination by the court seems contrary to all sound principle of the law of evidence. It is not like the case of a judge at the assizes inspecting the examination which has been taken by a magistrate of a witness, who is afterwards examined *viva voce* on a criminal trial; for the intent there is to see whether the witness is consistent in his story, and worthy of belief, and operates therefore in favour of the party who is on his trial. Moreover, the examination, which is there referred to by the judge, is always taken by the magistrate in the presence of the party accused. In the present case, all these material ingredients are wanting. It is very true, that the object of the

Sir *W. Follett*.—It is rather strong to say that the court will look at the examination for the purpose of acting upon it. I submit, that the court ought not to look at the examination, if the tendency of such inspection is to bias the minds of the court; for what is not evidence in open court, is not evidence to the judges of the court in private.

Mr. *Knight*.—It is essential that the proceedings before the commissioners should be looked at by the court, more especially with any view to further inquiry. Lord *ELDON*, on these occasions, was in the constant habit of reading the proceedings. Mr. *Knight* then put a hypothetical case, in which he was proceeding to detail all the facts stated in Mr. *Gilbert's* examination.

Sir *W. Follett* strongly objected to this course of proceeding, as disrespectful to the court, and contrary to the decision it had already expressed.

Lord Commissioner *BOSANQUET*.—You cannot do hypothetically what you cannot do directly.

Sir *W. Horne*, who appeared for the petitioning creditor, contended, that if the court had a right to look at the examinations of parties appearing on the face of the proceedings, it was their duty to do so. The subsequent examinations frequently contain more perfect evidence of the requisites to support the commission, than what is contained in the examinations previous to the adjudication; and the court looks at them for the same purpose as it looks at the answer of a co-defendant, which is not evidence for the other defendant affirmatively, but is some guide to the conscience of the court in pronouncing its decree. In like manner, the examinations of third parties under a commission of bankrupt, although not conclusive, may nevertheless be of such a nature as to induce the court to call for further inquiry, as was done in the case of *Ex parte Fowles*, Buck, 98.

Lord Chief Commissioner *PEPYS* took time to consider the point till the following day, and then expressed himself to the following effect. It is very clear, that the examination in question cannot be read in evidence, being that of a third party taken behind the back of the petitioner. In *Ex parte Campbell*, 1 Rose, 51, the examination of a bankrupt, taken not in his own bankruptcy, but under another commission, was rejected as evidence by Lord *ELDON*, upon a petition in his bankruptcy to expunge a debt. So, in *Ex parte Coles*, Buck, 242, it was held, that an examination taken before the commissioners, on an inquiry before them, was not admissible in evidence, on a petition to expunge the proof of a creditor who was not a party to the inquiry. But although the examinations of third parties are not evidence, yet the court has a right to look at them; as they may furnish grounds for directing an examination of the parties in the presence of a petitioner affected by their testimony. This was determined by Lord *ELDON* in *Ex parte Scott*, Buck, 280; and he was certainly in the habit of looking at the proceedings, on the hearing of any petition in bankruptcy. The court is therefore of opinion, that the examination in this case is not

inspection here, as the lord chief commissioner most properly puts it, would be to see whether the examination "might furnish grounds for directing an examination of the party in the presence of the petitioner," should the latter be affected by the contents of the examination. But it might so happen, that the judge might not think the petitioner so materially affected by the contents of the examination, as to call for a re-examination of the party in the presence of the petitioner; and yet some impression might be left in the mind of the judge, which the petitioner's counsel would thus be rendered incapable of removing.

evidence between the parties litigant, and that the contents of it ought not to be stated; but that the court has, for its own satisfaction, a right to look at the examination.

Mr. *Knight* also, in the course of his argument, tendered in evidence, and commenced reading, certain rules of the Court of King's Bench, directing a feigned issue to try the validity of the commission, and that Mr. Wilton's name should be inserted as a defendant, upon giving security for costs.

Sir *W. Follett* objected to these rules being read, as Mr. Chambers was no real party to the action in which they were obtained,—as the rules were not verified,—and as no notice has been given by the assignees to the petitioner of their intention to use the rules on the hearing of the petition.

Lord Chief Commissioner *Perrys*.—It is not too late to make an affidavit to verify the rules. But as the assignees have not given notice of their intention to use them, if any observations are made on their contents, which the other side require to answer, it is proper that an opportunity should be afforded to the petitioner to answer such observations.

Sir *W. Horne*, Mr. *Wakefield*, and Mr. *A'Beckett*, for the petitioning creditor, cited *Ex parte Drake*, 2 Deac. & C. 91; 1 Mont. 486.

Sir *W. Follett*, in reply, cited, *Ex parte Dick*, 1 Rose, 51; *Ex parte Lees*, 16 Ves. 472; *Ex parte Munk*, 1 Mont. & A. 612; *Ex parte Clarke*, 2 Deac. & C. 194; *Ex parte Bass*, 4 Madd. 270; *Heane v. Rogers*, 9 B. & C. 577, (17 E. C. L. R. 449;) *Ex parte Drake*, 2 Deac. & C. 91; Mont. 486; *Ex parte Magennis*, 1 Rose, 60, 18 Ves. 289; *Ex parte Brown*, 2 Swanst. 290; *Allan v. Hartley*, 1 C. B. L. 9, 7th ed.; *Streetfield v. Halliday*, 3 T. R. 783; *Fisher v. Boucher*, 10 B. & C. 705, (21 E. C. L. R. 152.)

*Cur. adv. vult.*

Lord Chief Commissioner *Perrys* now delivered the judgment of the court.

This case came before the court upon two petitions presented by Mr. Chambers, praying the court to supersede a joint commission of bankruptcy, issued against him and Mr. Chambers the younger, his son. It appeared, that in June, 1826, notice was given to the assignees by Mr. Chambers the elder, of his intention to apply to supersede that commission; and a petition for that purpose was accordingly presented by him to this court, which was heard before the vice-chancellor, and the application refused. In 1829 an action was brought by the assignees under the commission against Mr. Farebrother and another, the sheriff of Middlesex, for trespass, in taking the goods of the elder Chambers, under an execution at the suit of Mr. Wilton, a creditor. The chief object of that action, it is alleged, was to enable Mr. Chambers to dispute the validity of the commission at law, so as to be able to come to this court afterwards to supersede it. A new trial in that action was applied for, and granted; and was had in 1831. The grounds of these different trials, and the result of them, are stated in the tenth volume of *Barnwell and Cresswell's Report's*. [His lordship here recapitulated the subsequent trials at law, with the result of them.] The last of these trials was in June, 1833, when the plaintiffs elected to be nonsuited; after which another new trial was asked, but was refused. This is the history of the proceedings at law.

The petition now before the court raises several points of dispute; 1st,

the trading; 2dly, the petitioning creditor's debt; and 3dly, the act of bankruptcy alleged to have been committed by Chambers the elder. With respect to the petitioning creditor's debt, there is no doubt the debt was originally good; but the objection to it is, that by a deed entered into by the petitioning creditor along with the other creditors of Mr. Chambers, containing a letter of license, the debt has become an equitable debt, and not sufficient to support the commission. It is said, that the letter of license was never properly revoked, because the parties revoking it were not properly authorized to do so. This turns upon an inspection of the deed; but were it otherwise, the many verdicts obtained by the assignees, and not set aside or questioned upon that ground, amount to such an establishment at law of this legal question, as to render it unavailing here as a ground for supporting a supersedeas. A similar observation applies to the trading. Had this been thought a tenable point, the contest would not have proceeded upon the act of bankruptcy. All the verdicts for the assignees establish the trading; and every application to set them aside upon other grounds, amounts to an admission that upon this ground the commission is unimpeachable; it cannot, therefore, now be raised as a ground for a supersedeas.

The objection to this commission, because White, the third partner, is not included in it, is a point of much importance as affecting other cases, but not of any material importance as affecting this. No case on this point has been cited, either one way or the other. There is, indeed, an opinion of Mr. Christian on the subject, (second ed. p. 96,) but that opinion is stated by him to have been questioned and differed from by other competent persons. The old acts of Parliament give no assistance in the solution of this question. It has been contended in argument, that this was a question for the Great Seal only; and that, therefore, we should now decide whether this be not a proper ground for superseding. It is, however, clear, that the courts of law, in questioning the propriety of joint and separate commissions, have considered it as affecting the legal validity of the commission. The case of *Crispe v. Perrott*, Willes, 467, which was cited as applicable to the present case, only decided that the joint creditors of a firm might sue out a separate commission against one of the partners of a firm. *Allan v. Hartley* decided, that a joint creditor could not sue out a joint commission against some of several partners, but must include all, or take out a separate commission against each. That case therefore went to decide,—although the acts of Parliament are silent upon the subject,—that the courts of law considered it as a question of law, whether it was a commission which was properly made a joint commission, or whether other persons, who were omitted, ought not to have been included. The case of *Streatfield v. Halliday*, 3 T. R. 779, proved nothing to this point, the question raised there being after verdict. There were several suppositions, which would have been sufficient to support the verdict. And as to Mr. Justice BULLER's observation, that there might have been two commissions, one against the two, and another against the third, nothing in that case goes to prove that the three had carried on trade together. A commission against the two might have been sued out by a joint creditor of the two in their joint trade, and a commission against the third by a creditor of his in his separate trade. These cases, however, prove that the courts of law have considered the question, whether a commission ought to be joint or several, as a question touching the legal validity of the commission.

and not a question for the Great Seal only; and so Lord LOUGHBOROUGH expressed himself in *Ex parte Henderson*, 4 Ves. 164. If, therefore, this be an objection at law, it has been decided in favour of the commission in every instance in which a verdict has passed for the assignees, none of which have been set aside upon this ground; and the only instance in which the point was raised, Lord TENTERDEN decided against it; and the Court of King's Bench, upon the motion for a new trial, confirmed his decision. As a legal question, therefore, this must be considered as concluded; and if it were a question for the Great Seal only, it has been open ever since the commission issued. No difficulties are likely to arise, with respect to the administration of the property under this commission, upon this point; the whole of the property of the partnership belongs to the two, and little or no property to the third. Without, therefore, expressing any opinion as to what may be the proper course to be adopted upon an application to supersede on this ground on any future occasion, there does not appear any sufficient reason for superseding in the present case.

The act of bankruptcy of Chambers the younger must be considered as established at law. A jury having come to a conclusion in favour of the commission, in the action that was tried on the 7th February, 1832, the assignees must be taken to have proved the act of bankruptcy; and it is not now seriously disputed. It is impossible to listen to the affidavits of persons, who might have been examined on the trial, as to the proof or disproof of such act of bankruptcy.

The next question is, the act of bankruptcy of Chambers the elder. It must be borne in mind, that this case comes before us, not upon evidence taken on an issue directed by this court, but upon the result of actions, which the parties have, in the exercise of their right, instituted amongst themselves. The result is, that, after four trials, the assignees have failed in proving an act of bankruptcy by Chambers the elder. The contest in the last of the two other trials in the Exchequer was, the degree of credit due to the witnesses who were called to speak to that question; for the certificates admitted at the former trial, recording the arrest of Chambers the elder, were excluded in the last, in consequence of the decision of the Court of Exchequer Chamber that they were not admissible evidence. The verdict in that action was against Mr. Chambers. [His lordship here commented upon the evidence adduced on the different trials at law, relating to the act of bankruptcy of Chambers the elder, and the contradictions given to some of the witnesses by the family and servants of Mr. Chambers, and proceeded as follows.] If the court were now at liberty to look into the various points which have been before the several juries, and if it were safe and proper, according to the practice of this court, to come to a final conclusion, upon such knowledge of the proceedings on those trials as the court has been put in possession of, it would yet be impossible upon this evidence to say, that the fact of an act of bankruptcy having been committed by Chambers the elder has been proved.

Various objections have been raised to our entertaining the question, or coming to any conclusion as to the fact of there being such act of bankruptcy or not, and as to our adopting any course of having this fact once more fairly investigated at law. It is said, that the bankrupt has acquiesced,—that the dismissal of the petition by the vice-chancellor, in 1827, from which there has been no appeal, and the result of the

action of *Chambers v. Bernasconi*, are conclusive against him, and a bar to his relief here,—and that the Great Seal has no jurisdiction to interfere, where a commission has been established by a verdict at law. It is important to ascertain at what time the acquiescence commenced. In June, 1826, the bankrupt gave notice of his intention to dispute the commission. In April, 1827, the vice-chancellor dismissed the first petition, being of opinion that the equitable grounds did not entitle the bankrupt to a supersedeas; but he expressly guarded himself against giving any opinion as to the legal objection; and, so far from being of opinion that the bankrupt was to be concluded by what had taken place since the commission issued, he left him to law, for the purpose, if he could, of shaking the commission. Up to April, 1827, therefore, there is the judgment of Sir J. LEACH, that there was then no bar by acquiescence; and from that period to the present time the contest has gone on at law. But there is another ground most important to be attended to; because, neither in bankruptcy, nor in any other proceeding, can it be right, nor is it consistent with the rules and practice of this court, to consider a party bound by acquiescence, when not cognisant of his rights. It is quite clear, that before the decision in *Maggs v. Hunt*, 4 Bing. 212, (13 E. C. L. R. 404,) in May, 1827, the bankrupt could not have been, nor were the assignees, or any parties to the proceedings, cognisant of the law as applicable to the case which each party had to consider. It would, therefore, be an extreme hardship, to hold a party bound by acts adopted and taken in ignorance of his rights. The particular acts of acquiescence, however, which have been relied upon, are clearly not such as amount to estoppel, as laid down most correctly by Mr. Justice BAYLEY, in *Heane v. Rogers*, 9 B. & C. 587, (17 E. C. L. R. 449;) and the vice-chancellor in 1827, and Lord LYNDBURST, in *Chambers v. Bernasconi*, 4 Tyrw. 531, were of this opinion.

It is then said, that the verdict in *Chambers v. Bernasconi* is conclusive; and that when parties have established their right at law, this court will not examine into the propriety of the judgment, or give relief, because that judgment may be erroneous. It is certainly a well-known rule, that there is no equity merely to set aside an erroneous decision at law; and it is also true, that where parties come into a Court of Equity for relief, consequential to a right established by law, this court will not inquire into the propriety of the judgment at law,—as in cases where an account depends upon a legal title, or upon a patent, or copyright, this court gives consequential relief arising from the legal right, and will not inquire into the propriety of the judgment, which, whilst it stands, establishes the right. The verdict, therefore, in this case brought before us, can only be used as evidence of a fact, and is no more conclusive on this court, than any other proceeding at law, adduced as evidence of facts brought under its consideration. If the judgment at law were so conclusive at law, as to debar a party there from disputing his commission, it would operate strongly upon the discretion of this court; but that is not so; he is concluded by the judgment, only, as to the subject-matter of the action, and not as to the question upon which the judgment proceeded. The court is, therefore, of opinion, that the petitioner is not precluded by the judgment; and that we are not only entitled, but bound to look into all the circumstances of the case, as affecting the question of the act of bankruptcy; and the result of that investigation

does not satisfy us, that a sufficient act of bankruptcy has hitherto been established.

It was said, that the supersedeas is discretionary; and the case of *Ex parte Mash*, 1 Mont. & A. 612, has been cited, to show that a supersedeas may be refused, if the commission want the legal requisites. But that case only establishes what many others might be adduced to prove,—that a bankrupt might so conduct himself, as to be precluded from the right to dispute his commission. Considering, however, the very severe nature of the bankrupt laws, it requires a very strong case to induce the court to exclude a man from being permitted to show that he was not a bankrupt, and that he had been improperly deprived of his property. The court has been called upon to order a supersedeas upon the facts before it, without further inquiry; but this the court cannot do. Strictly speaking, we know only the result of two actions, and not the evidence that led to them; and looking merely at the history of the actions, there are four verdicts out of five in support of the commission, and only one against it, which was set aside. It is true, that three of these four verdicts were afterwards set aside, and that the only one that stands was obtained upon evidence afterwards proved to be unworthy of credit. In this conflict of verdicts and judgments at law, after nine years' litigation, the whole case turning upon the credit of the witnesses, this court cannot safely take upon itself the decision of a question of fact, so as either to supersede, or confirm this commission.

As to the observations that have been made, in regard to the injury that may arise from superseding the commission,—if the petitioner is in fact entitled to a supersedeas, however much the injury may be regretted, yet he must have justice done him; but the result will not be so, nor would the question be settled by dismissing the petition. If, upon the result of the issue, the commission cannot be supported, the court will take care, in superseding, to do justice to all parties, and, above all, to those who are strangers to this contest, but whose interests might be affected; if the commission prove valid, the court will prevent the property from being wasted, or the creditors delayed by any further litigation.

The determination of the court is, that there must be an issue to try, whether, at the time of suing out the commission, Chambers, the elder, had committed an act of bankruptcy. The issue is to be tried in the Court of Common Pleas, and notice must be given by the assignees of what acts of bankruptcy they mean to rely on at the trial; and let it be part of the order, that all the witnesses who have been examined on the former trials, shall be examined again. The court is also of opinion, that as Wright and Fletcher are both dead, their depositions shall be read in evidence upon the trial.

Mr. *Montagu* then, on behalf of the bankrupt, made an application to the court, which, he acknowledged, was never made before, namely, that as all the effects of the petitioner have been seized under the commission, there should be allowed to him, out of the funds belonging to the estate, such reasonable sum, according to the discretion of the commissioners, or one of the masters of the court, as might enable him to meet the expenses of trying the issue.

Lord Chief Commissioner PERYS.—There is no instance of such an order being made in bankruptcy.

Mr. *Knight*, on the part of the assignees, offered to advance the peti

tioner any sum for this purpose, if Mr. Chambers would give security to abide by such order as the court might make as to the repayment of the money.

Lord Chief Commissioner PEYRS.—On these terms the court would be disposed to make the order.

*Note.*—No such order, however, was, in fact, made. (a)

(a) The issue afterwards came on for trial at the sittings before Michaelmas Term, 1836; when, after the case of the assignees was finished, terms of compromise were proposed by their counsel, which, after a long treaty, were acceded to by Mr. Chambers, who thereupon agreed to abandon all further proceedings to dispute the commission.

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**Ex parte JOHN CHERRY HOLT**, and four others, all Infants under the age of twenty-one years, by **ROBERT HOLT**, their father and next friend.—In the matter of **ROBERT MAKIN** the elder, **ROBERT MAKIN** the younger, and **WILLIAM MAKIN**.—p. 248.

A trustee, who was directed to convert the whole of the testatrix's property into money, and place the same out at interest upon mortgage for the benefit of the *cestui que trusts*, employs the money in his business, paying interest to the parties entitled to it; and afterwards becomes bankrupt and obtains his certificate, without any proof having been made under his commission for the amount of the trust-money, either by himself, or the *cestui que trusts*, who were entirely ignorant of his misapplication of the trust-money; and he continued to pay the interest to them after his bankruptcy, the same as before. He becomes bankrupt a second time; when the *cestui que trusts* discover that he had not invested the money pursuant to the trusts of the will.—*Held*, that his certificate under the first commission was a bar to any proof for the amount under the subsequent fiat.

THIS was a petition to prove a debt against the separate estate of the bankrupt, Robert Makin, under the following circumstances:—Grace Cherry, by her will, dated the 13th December, 1793, after directing payment of all her just debts, funeral and testamentary expenses, and giving certain pecuniary legacies, gave and bequeathed all the residue of her estate and effects, both real and personal, unto Robert Makin and William Sutton, their heirs, executors, administrators, and assigns, upon trust to convert the whole thereof into ready money, and to place the same out at interest upon mortgage security, and the interest thereof, as often as the same should fall due, to pay unto Catherine Cherry, widow, during her natural life, provided she the said Catherine Cherry should give unto her the said testator's trustees, or the survivor, his executors or administrators, perfect and satisfactory security (and not otherwise) that she would leave all the property she might die possessed of,—and that such property should not be wasted or diminished in her lifetime, other than so much thereof as might be needful for her comfortable support,—unto her said trustees, in trust to be by them placed out at interest; and the interest thereof, as often as the same should fall due, to be paid and applied in manner following; that is to say, one moiety thereof unto Phœbe the wife of Thomas Painter, for her sole and only use, notwithstanding her present or future coverture, and the interest of the other moiety unto George Cherry, during his natural life; and after the decease of them the said Phœbe Painter and George Cherry, then a moiety thereof to, unto, and equally amongst the children of her the said Phœbe Painter, if more than one, at such time and times as the person or persons in whom the same might be invested in trust might deem



most conducive to their benefit; and the other moiety, in like manner to the children of the said George Cherry; and in case of the decease of any of the said children leaving lawful issue, then such issue to be entitled to the share his, her, or their deceased parents would have been entitled to, if living; but should either of them the said Phœbe Painter and George Cherry happen to die without lawful issue, and the other should leave such issue, then such issue to take the whole in equal shares as aforesaid; and that the issue in either case might be entitled to receive the remaining unapplied or unpaid part thereof, as they should severally attain the age of twenty-one years; but if the said Phœbe Painter and George Cherry should both die without lawful issue, then over, as by the said will mentioned. And from and after the death of the said Catherine Cherry, (should she give satisfactory security,) then upon trust to pay a moiety of the said interest to arise as aforesaid unto the said Phœbe Painter for her own sole and separate use, and upon trust to pay the other moiety thereof unto the said George Cherry during his natural life; but should the said Catherine Cherry not give such satisfactory security, then to pay the said interest immediately unto the said Phœbe Painter and George Cherry. And from and after the decease of them the said George Cherry and Phœbe Painter, then upon trust to call in the principal money, and pay and apply a moiety thereof unto and equally amongst the children of the said Phœbe Painter, at such times and in such manner as her said trustees might deem most conducive to their benefit and advantage, and the other moiety, in like manner, to the children of the said George Cherry; and in case of the decease of any of the children of either of them, then the issue of such of them happening to die to be entitled to the estate his, her, or their parent or parents would have been entitled to; but if either of them should happen to die without lawful issue, and the other should leave lawful issue, then upon trust to pay the whole to such issue, at such time and times as the said trustees might deem most prudent; but that the whole should be paid, in either of the cases, by the time the person or persons entitled thereto should attain the age of twenty-one years. But if the said Phœbe Painter and George Cherry should happen both to die without lawful issue, then upon trust as in the said will is mentioned. And the said testatrix thereby nominated and appointed the said Robert Makin and William Sutton executors of her said will.

Grace Cherry shortly afterwards departed this life, leaving the said Catherine Cherry, Phœbe Painter, and George Cherry her surviving, without having altered or revoked her said will; which was afterwards duly proved by the executors.

Catherine Cherry, by her last will, bearing date the 16th August, 1794, after directing the payment of her just debts, funeral and testamentary expenses, gave, devised, and bequeathed all the residue of her estate and effects, real and personal, unto the said Robert Makin and William Sutton, and the survivor, his heirs, executors, administrators, and assigns, upon the several trusts expressed and contained in the will of Grace Cherry. And the testatrix thereby nominated and appointed them, Robert Makin and William Sutton, executors of her said will.

Catherine Cherry died, without altering or revoking her will, leaving the said Phœbe Painter (who afterwards intermarried with James Leech, and became his widow) and George Cherry, her surviving; and her executors afterwards duly proved her will.

George Cherry died an infant, and without issue, shortly after the decease of Catherine Cherry.

After payment of the debts, expenses, and legacies mentioned in the will of Grace Cherry, and after payment of those mentioned in the will of Catherine Cherry, the respective estates and effects of the two testatrices being blended together, the clear residue arising therefrom amounted to the sum of 851*l.* 3*s.* 2*d.*, which sum ought to have been invested on mortgage security, as directed by both wills; but, instead of such investment, it was retained by the two trustees, Robert Makin and William Sutton, who then carried on business in copartnership as corn-merchants, in their own hands. The trustees allowed interest on this sum, at the rate of £5 per cent. per annum, until the year 1818, when they dissolved partnership; and, on the settlement of their accounts, the principal sum was left in the hands of Robert Makin, who then assumed the debt, and took upon himself the payment thereof. After such dissolution, William Sutton never afterwards acted in the management of the fund, nor in any way interfered therewith; and he subsequently died in insolvent circumstances.

Phœbe Leech had one child only, viz. Hannah Painter, by her first husband, Thomas Painter; and no child by her second husband.

Hannah Painter attained the age of twenty-one years, and intermarried with Robert Holt, and died on the 3d October, 1833, leaving Phœbe Leech, her mother, and the five petitioners, her children, her surviving.

The interest, which from time to time accrued upon the principal sum of 851*l.* 3*s.* 2*d.*, was paid by Robert Makin to Phœbe Leech.

On the 18th January, 1830, a commission of bankrupt was issued against Robert Makin, under which he was duly found and declared a bankrupt.

On the 1st November, 1830, a dividend of 1*s.* 7*d.* in the pound was declared under his commission; and on the 3d August, 1831, a final dividend of 4*s.* 9*d.* was declared, making together 6*s.* 4*d.* in the pound; when the estate was wholly administered and closed.

Robert Makin did not make any claim, or take any step, as trustee or otherwise, under either of the abovementioned wills, to establish a proof, under his commission, for the sum of 851*l.* 3*s.* 2*d.*; but he continued to pay the interest to Phœbe Leech, in like manner as before his bankruptcy. The petitioners alleged, that until long after the affairs of Robert Makin's estate had been finally wound up, and he had obtained his certificate, they continued wholly ignorant of the fact, that the trust-money had not been invested on mortgage, or that any debt was proveable against the estate of Robert Makin, in respect of the said trust-money; the petitioners being then and still, infants of tender years, and their father, Robert Holt, being an illiterate man, and unacquainted with matters of business. After obtaining his certificate under this commission, he entered into business in copartnership with his sons, Robert Makin the younger, and William Makin.

On the 21st April, 1834, a fiat in bankruptcy was issued against Robert Makin and his two partners, under which they were duly found bankrupts; and, in December last, Robert Makin obtained his certificate. Since the issuing of the fiat, Robert Makin continued to make payments to Phœbe Leech, from time to time, in respect of the interest of the trust-money; but no steps were taken by him to prove the amount of the trust-money, as a debt against his separate estate, under the fiat. On

the 18th of April last, a dividend of 20s. in the pound was made on the separate estate of Robert Makin, and a surplus of 474*l.* 12s. was carried over to the joint estate; the commissioners, however, at the same time declaring, that they would bring back so much thereof, as might be necessary to satisfy any claim which might be established against the separate estate.

The petitioners alleged, that it was not until after this dividend was declared, that they discovered the fact, that no part of the trust-fund was ever duly invested by Robert Makin, and that the whole thereof had been applied by him to his own use; and they submitted, that Robert Makin, notwithstanding his certificate under the first commission, continued accountable for the trust-money; and that the amount thereof was still proveable as a debt against his separate estate under the fiat, for the benefit of Phæbe Leech, for her life, and afterwards of the petitioners, or such of them as might survive her.

The prayer was, that Robert Holt, or such other person as the court might appoint, might be allowed to go in under the fiat and prove the said sum of 851*l.* 3s. 2*d.*, or such other sum as he might be able to establish before the commissioners, in respect of the clear principal-money possessed by Robert Makin, upon the trusts of the said will, as a debt against his separate estate; or, in case the court should be of opinion that the petitioners were not entitled to have the whole of such debt proved, then that it might be declared that Robert Makin was chargeable with a breach of trust, in omitting to prove such debt under the first commission, and that he became and was accountable for so much money, as might have been received for dividends on such debt, in case the same had been proved under the first commission; and that the said Robert Holt, or such other person as aforesaid, might be at liberty to prove against the separate estate of Robert Makin under the said fiat, for such amount as might have been received for dividends upon the said debt, in case the same had been proved under the first commission; and that it might be referred to the commissioners named in the fiat, to compute the amount of such dividends accordingly; and that the dividends, which might be declared upon such proof, might be ordered to be invested in the public funds, in the name of the accountant in bankruptcy, or in such other mode as the court might direct, for the benefit of the parties who might be entitled thereto.

Mr. *Swanston*, and Mr. *Booth*, in support of the petition. There are two questions in this case; 1st, whether the statute of limitations will deprive the petitioners of the remedy they seek; and, secondly, whether the certificate obtained by the bankrupt, under the first commission, will be a bar to the right of proof under the fiat. With respect to the first point, it may be only necessary to refer to the two cases of the *South Sea Company v. Wymondsell*, 3 P. Wms. 143; and *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633. In the first of these cases it was held, that the statute of limitations was no plea in a suit where the bill charged a fraud, provided it appears that the fraud was discovered within six years before the filing of the bill. And in *Hovenden v. Lord Annesley*, it was held by Lord REDESDALE, that if a party was to be constituted a trustee by the decree of a Court of Equity founded on fraud, the statute of limitations would run only from the time that the circumstances of the fraud were discovered. In the present case, the facts stated in the petition clearly show a case of fraud in the bankrupt,

Robert Makin, in omitting to invest the trust-money on mortgage, or some other security, and employing it for his own purposes. It was fraudulent, also, in omitting to take the proper steps for causing a proof for the amount to be made under his first commission. The petition, moreover, expressly alleges, that it was not until after the dividend was declared under the fiat, which was only on the 18th April last, that the petitioners discovered the fact, that no part of the trust-fund was ever invested by Robert Makin, and that the whole of it had been applied to his own use. The statute of limitations, therefore, cannot be set up in answer to this petition. 2dly, The certificate obtained under the first commission is no bar to the proof under the subsequent fiat. It is very clear, that a Court of Equity would not permit him to plead his certificate in bar, under the circumstances stated in this petition; for it would be to allow him to practise a gross fraud on the infants, who were interested in the trust-property. The bankrupt continued paying the interest, as if he had invested the money pursuant to the directions contained in the will. If the court should think that they cannot order proof to be made for the whole sum of 851*l.* 3*s.* 2*d.*, of which the bankrupt possessed himself, and converted to his own use,—they will at least direct a proof for the amount of the dividend that might have been received on that sum under the first commission, if the bankrupt had done his duty, by causing the amount of the debt to be proved under that commission, and which the petitioners, being infants, were not able to prove.

Mr. *Heathfield*, *contrà*. All debts, that may be proved under a commission of bankruptcy, are barred by the bankrupt's certificate; and there is no distinction, whether the creditors are infants or not. [Sir G. ROSE. The question is, whether the payment of interest by the bankrupt has created a fresh demand, and so far revived the debt, as to enable the petitioners to prove it under the subsequent fiat.] The case of *Walcott v. Hall*, 2 Brown, 305, is very similar to the present; and it was there held, that a legacy to A., payable at twenty-one, or marriage, with interest, was a vested legacy, proveable under a commission of bankrupt against the executor, and that his certificate was therefore a bar to the claim of the legatee; for although not proveable by the legatee as a debt, yet that a guardian, upon petition, would have been permitted to prove it. In the present case, the bankrupt himself could not have proved the amount of this debt under his first commission, without an order of the court; *Ex parte Shaw*, 1 G. & J. 127; *Ex parte Moody*, 2 Rose, 413. It cannot be said, therefore, that he was guilty of a breach of trust, in not doing that which he had no power to do. [ERSKINE, C. J. The payment of interest does not, as I take it, admit that he had misappropriated the money, but that he was merely liable for the amount of the fund.] An infant *cestui que trust*, when the trustee becomes bankrupt, must rely on his guardian to see that any debt owing by the trustee is proved under his commission. There is no case to show, that the infancy of the *cestui que trust* is an excuse for not proving. There is another difficulty, also, in the way of the court acceding to the prayer of this petition, namely, that the creditors of the separate estate of Robert Makin, under the fiat, have received a dividend of 20*s.* in the pound; and the surplus of the separate estate has been already carried over to the joint fund.

Mr. *Swanston*, in reply. It is not disputed, on the other side, that the

bankrupt was a trustee for the petitioners. [ERSKINE, C. J. If, before the issuing of the first commission, the bankrupt did not invest the money pursuant to the trust of the will, is not that a debt proveable under the first commission?] The bankrupt never intimated to the petitioners, that he was a debtor to them in respect of this fund; and the fraud was not discovered, until after the first dividend had been declared under the subsequent fiat. The trusts of the will are, that the bankrupt and his cotrustee shall place out the amount of the trust-moneys upon mortgage security; and a court of equity would not fail to take this view of the case, if the matter had been brought before a tribunal of that description, namely, that when the trustee went on paying the interest of the trust-fund to the *cestui que trust*, it was tantamount to a representation on his part, that the money was duly invested according to the trusts of the will; and the trustee would have been held liable, as soon as the representation was discovered to be untrue. The two trustees, Makin and Sutton, dissolved their partnership in 1818; from which time the interest which accrued due on the trust-fund was paid by Robert Makin, and the principal sum was left in his hands, and became a debt due from him. [Sir G. ROSE. This case can hardly be put on the ground of a *devastavit*.] In *Walker v. Symonds*, 3 Swanst. 58, Lord ELDON said, that it was the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust-fund; and he also held, that the *cestui que trust* had a right to proceed separately against one trustee, who was implicated in a joint breach of trust. (a)

Then, with respect to the operation of the certificate under the first commission,—there is a great difference between a case of fraud, and one of mere laches, on the part of the trustee. In the former case, the certificate is not a bar to the claims of the *cestui que trust*, although it might be so in the latter case. As to this being a debt proveable under the first commission, I deny that it was so; for the bankrupt, by his own fraud and concealment from the *cestui que trusts* of the mode in which he had employed the trust-money, rendered it impossible for them to prove the amount under that commission. Is there any case, then, to show, that a debt is barred by a bankrupt's certificate, when the creditor was prevented by the fraud of the bankrupt from proving the debt? But the case may be put upon a distinct ground, independently of any question of fraud. When the bankrupt was accounting to the petitioners for the interest of the money as still due, is not that a clear recognition of his accountability for the amount of the principal debt? What has his certificate to do with that admission? He has thus, from time to time, acknowledged his liability to the *cestui que trusts*; which is an entire new contract, and one upon which the certificate does not operate. Nor does this contract depend, for its validity, upon its being made for a valuable consideration; for the bankrupt here, throughout the whole transaction, assumes a fiduciary character; his first breach of trust not having terminated his character of trustee. It is a perfect fallacy, then, to say, that the first malversation committed by him was the only foundation for the debt. As long as the relation of trustee and

(a) There seems to be no doubt, from Lord Eldon's observations in *Walker v. Symonds* where he refers to the cases collected in 1 Eden's Reports, 149, that the investment of trust money on personal security was of itself a breach of trust.

*cestui que trust* subsisted between two parties, the liability of the trustee still continues.

But there is still another view, which may be taken of this case. The claim now made by the *cestui que trusts* was at one time a joint debt from the bankrupt and Sutton, his cotrustee, founded on a breach of trust which they both committed. The *cestui que trusts* had an option to treat it as a joint, or separate debt. Now, nothing has come out in evidence to show that Sutton died before the issuing of the first commission. The debt, therefore, if treated as a joint debt, could not be proved under the first commission, except for certain purposes. [Sir G. ROSE. Would not the debt be barred notwithstanding?] If we were to file a bill in a Court of Equity against the bankrupt, it would be no bar to plead the certificate, or the statute of limitations; when the foundation of the debt is a breach of trust, which has been concealed from the *cestui que trusts*. [Sir G. ROSE. A breach of trust resolves itself into an equitable debt, or a claim founded on an implied assumpsit.] [ERSKINE, C. J.—As long as the trustee continued to perform the trust, he could not be considered your debtor; he only became such, when he misappropriated the fund. Now, when do you say he did this?] Admitting, for one moment, that the fund was misappropriated by the bankrupt before the issuing of the first commission, and even with the knowledge of the *cestui que trusts*, still the certificate would be no bar in a Court of Equity; for that court would act upon the bankrupt's own statement, made by him since his certificate was obtained. But the bankrupt here wilfully concealed the fraud he had committed from all knowledge of the *cestui que trusts*; and if a Court of Equity will not hold the statute of limitations to apply in such a case, what is there here to induce this court to come to a different decision? I rest the case upon this point. If, in a Court of Equity, the petitioners could not be prevented from enforcing this claim, by a plea of the statute of limitations, there can be no greater obstacle to the enforcement of the claim on the present occasion.

ERSKINE, C. J.—As at present advised, it appears to me, that there is an insurmountable difficulty in assisting the petitioners in the claim they make to prove under the present fiat; although I should feel every inclination to do so, if I could see any thing in their case that would justify this court in aiding them. But the simple question we have now to decide upon is, whether, as the debt *might* have been proved under the former commission, it is not barred by the bankrupt's certificate. It nowhere appears, that the debt has been revived by any promise of the bankrupt to pay it, since he obtained his certificate. The payment of interest, by itself, is but an equivocal act. The bankrupt might, as an act of justice to the *cestui que trusts*, go on paying the interest, without admitting that the trust-money was in his hands, or that he had ever misapplied it; and I, therefore, think, that we cannot take it as a fact, from the mere circumstance of his continuing to pay the interest, that the money was still in his hands, or that he promised to pay the amount to the petitioners, notwithstanding his certificate. But feeling anxious to discover, if it is possible, any point of law, or equity, that may be favourable to the claim of these petitioners, I should wish to take time to consider my judgment, before I come to a final decision on the case.

Sir J. CROSS.—I feel the same anxiety, as his honour the chief judge has just expressed, to do justice to these children, unless the rules of law

stand in our way, and prevent the court from affording them the relief they seek. I should wish, therefore, for time to consider the matter, the better to form a right judgment. The petition alleges, that the bankrupt, after his first bankruptcy, continued to pay the interest of the trust-money, in like manner as before; and that the petitioners continued wholly ignorant of the fact, that the trust-money had not been invested on mortgage, or that any debt was proveable against the bankrupt's estate. Now, is it not a general principle, that when one man says he has got another's money, and pays him interest for it, the acknowledgment is binding upon him both in a Court of Law and Equity. And if a trustee prevents his *cestui que trust* from seeking a remedy in another place, ought he not to be held answerable for the consequences?

Sir G. ROSE.—I do not at present see how this court can render any relief to these petitioners, although I, for one, should be very desirous of doing so, if I could bring my mind to think that the prayer of the petition came within the scope of our authority. It appears from the statement of the petition, that the amount of the trust-money in the bankrupt's hands at the issuing of the first commission was 851*l.* 3*s.* 2*d.* Was not this, therefore, an equitable debt due from Robert Makin, the elder, which might have been proved under his commission; and is there any doubt that when a debt exists as a debt proveable under a commission, it is effectually barred by the certificate? The present case does not, as it appears to me, involve any question of a *devastavit*, as was put in argument by the counsel for the petitioners. It is a distinct breach of trust, which may be made available either in an action at law, or by a claim in equity. It is enough to say on the present occasion, that in the whole course of my experience in bankruptcy proceedings, I never remember a case in which it was decided, that where a trustee was liable, before his bankruptcy, to a *cestui que trust* for the payment of a sum of money, the certificate would not bar the claim.

The court this day (Feb. 1, 1836) delivered their judgment.

ERSKINE, C. J., after stating the contents of the two wills of Grace Cherry and Catharine Cherry, as set forth in the petition, proceeded as follows:—It appears, that after the deaths of the two testatrices, the bankrupt, Robert Makin, the elder, and William Sutton, the trustees named in their respective wills, converted all the residue of their estates into money, and, instead of investing the amount of the proceeds, as they ought to have done, upon mortgage, employed it in their business, allowing interest thereon at the rate of £5 per cent.; and that, after they dissolved their partnership, Robert Makin, the elder, who continued the business, allowed interest as usual to Phæbe Leech, the grandmother of the petitioners. In 1830, Robert Makin, the elder, became a bankrupt, having this money then in his hands; but no proof whatever was made under his commission for the amount of the trust-money, either by the bankrupt himself, or by any other party on behalf of the *cestui que trusts*; and he continued to pay the interest to Phæbe Leech in like manner as before. The petitioners claim to prove for the sum of 851*l.* 3*s.* 2*d.*, the amount of the trust-money due to them from Robert Makin, the elder, under his former bankruptcy. It has been contended, on behalf of the petitioners, that they have a right to prove the whole amount of this sum, as the bankrupt must be taken to have had the money still in his hands after his first bankruptcy; and that the payment of the interest amounts

to a promise to pay the principal. With regard to there being any subsequent promise, the court cannot take that into consideration; as the statute requires such a promise to be in writing. (a) And as to what has been urged, of the payment of the interest rendering him still chargeable as if the money was in his hands, I should certainly have been very glad to have so decided; but I cannot bring my mind to view the matter in that light; for, on the face of the petition itself, it appears that such was not the fact; it being stated, that the money was employed in Robert Makin's business, and no part thereof could, therefore, remain in his hands after his bankruptcy. The payment of the interest, then, by itself, is so equivocal an act, that I think we cannot direct the proof to be made, under the present fiat, for the whole sum of £851, which was proveable under the first commission.

But it is then put in the alternative, and it is urged, that as the bankrupt was guilty of a breach of trust in not proving the amount of this sum under his first commission, the petitioners would, at any rate, have a right to prove for such amount as might have been received for dividends upon that sum, in case it had been proved under the first commission. But the bankrupt could not have proved this sum under his own commission, without an order of the court. I cannot see, therefore, that there is any debt proveable by these petitioners under the present fiat, without satisfactory evidence that the bankrupt was guilty of a wilful default, in not proving the amount of the trust-money under the first commission. The case of *Walcott v. Hall*, 2 Brown, 305, which was cited at the bar, is distinguishable from the facts of the present case.

Sir J. CROSS.—I find it very difficult to bring my mind to any satisfactory conclusion in pronouncing a judgment in this case, the facts being so imperfectly stated in the petition. The case of *Walcott v. Hall*, which was cited in argument against the claim of these petitioners, is, in some respects, similar to the present case,—but there is one distinction, and that is, that the creditors here knew nothing about the application or misapplication of the trust-money by the bankrupt;—and it certainly was an important question, that they should know what had become of the money, and whether it was lost. I am anxious, for the sake of these infants, that they should be relieved, if possible, from the loss arising to them from the conduct of their trustee. But was this a debt proveable under the first commission? If it was, it does seem very extraordinary that the bankrupt should go on paying interest as before, after he had obtained his certificate. But it is not distinctly explained in the petition what really became of the trust-money, when it was lost, or in what way it was applied; we know nothing, indeed, of the facts of this part of the case, except from the admissions of the parties. The petitioners did not ask for further inquiry. We must take the fact to be, therefore, that the trust-money was lost before the bankruptcy. There is another difficulty, also, in determining the rights of these petitioners, from the circumstance of there having been a co-trustee, who is stated to be dead. Was he dead before the first bankruptcy, or not? Upon the whole, I feel myself bound, in the absence of so many facts unexplained, to concur with his honour the chief judge, in deciding against the claim of these petitioners.—Sir G. ROSE concurred.

Petition dismissed; but the costs of the assignees were directed to come out of the estate.



**Ex parte JOHN PERRING.—In the matter of CHARLES CAMP BELL.—p. 266.**

A petition to stay a certificate, alleging, that the petitioner was *informed* that the bankrupt had lost £20, and upwards by gaming in one day, is defective; the petitioner must positively allege the fact, notwithstanding it is positively sworn to by a witness in support of the petition. Sir J. Cross, *dissent*.

Where a creditor delayed proving his debt, in the belief that no dividend would be paid, an order was made that he might go in and prove, for the purpose of assenting to, or dissenting from, the certificate.

THIS was the petition of a creditor to disallow the bankrupt's certificate, under the following circumstances.

The fiat issued on the 24th of March, 1835, under which only six creditors proved any debts, and only three of these were creditors to the amount of £20. The petitioner was a creditor, as endorsee of two bills of exchange for 97l. 10s. and £100, endorsed to him by the bankrupt, but had not proved his debt, in the belief that no dividend would be paid under the fiat. The petitioner then alleged, that having had information that the bankrupt had lost various sums of money at play, the petitioner made inquiries upon the subject; when he was informed by one William Watson, of No. 4, Caroline Place, Hampstead Road, on the 8th of August last, that the bankrupt had, in the early part of February last, lost by gaming in one day, the sum of £130, at the game of *Rouge-et-Noir*.

The prayer was, that the confirmation and allowance of the certificate might be stayed, the petitioner undertaking to prove his debt; and that the petitioner might, after such proof, be at liberty to assent to, or dissent from, the allowance of the certificate; and that, for that purpose, it might be sent back to the commissioners to recertify.

The petition was supported by the affidavit of the petitioner; stating, that the information he had received from Watson, the petitioner believed to be true. And Watson himself also made an affidavit, in which he stated, that he had been well acquainted with the bankrupt for four years; that on a Friday or Saturday, about the early part of February last, about two o'clock, the deponent went to No. 3, Pickering Place, St. James's Street, then kept by a person named Romeo as a common gaming-house,—and that he then saw the bankrupt, in a room on the first floor, playing at *Rouge-et-Noir*, and that the bankrupt staked sums from £5 to £6, on the game, with various success; that the bankrupt left the room about half-past two, and the deponent continued in the room till seven o'clock in the evening of the same day; that about half-past four in the afternoon of the same day, the bankrupt again came into the same room, and began playing at *Rouge-et-Noir*, first staking £5 upon the game, which having lost, he gave a bank-note of £100 to a person at the table to get him change, who in a few minutes returned, and gave the bankrupt several bank-notes, and about twenty sovereigns in gold; that the bankrupt then commenced playing for £10 the game, and afterwards for £15 and £20 the game, and lost every stake he then played, that the bankrupt, in that one day, lost the whole of the £100 at *Rouge-et-Noir*, and remained in the room till about half-past six in the evening, when he left; that before he left the room he exclaimed, in the presence of the deponent, "Damn the game, I will never come into the room any more, for I have lost £130."

In answer to this affidavit, it was sworn by a witness on behalf of the bankrupt, that inquiry had been made after the deponent, William Watson, at No. 4, Caroline Place, Hampstead Road, and that no such person could be found there, or was ever heard of.

Mr. J. Russell appeared in support of the petition.

Mr. Swanston, and Mr. Keene, took a preliminary objection to the petition: that it did not allege the fact in positive terms, that the bankrupt had actually lost the money, but that the petitioner was merely informed by William Watson, that the bankrupt had lost it. In *Ex parte Crouch*, 3 Deac. & C. 17, where a petition to stay the certificate charged, that the bankrupt had even admitted that he had lost £25 in one sitting, the court dismissed the petition, for not alleging positively the fact, that the money was lost in one day. It is true, that the fact is here positively sworn to in Watson's affidavit; but a defective petition cannot be amended by an affidavit, and more especially a petition to stay the certificate, which is a case *strictissimi juris*. Thus, in *Ex parte Cundall*, 1 G. & J. 37, Sir J. LEACH refused to stay the certificate, upon matter contained in affidavits in reply, where the petition, and affidavits filed with it, did not make a case for staying it. In a suit in equity to establish heirship, it would not be sufficient to allege in the bill, that the plaintiff had been informed and believed that he was heir. Such a bill would be clearly demurrable; but if not, how could it be supported in evidence? Not by evidence to prove the fact, that the plaintiff actually was heir,—because that was not alleged in the bill; but by proof that he had been informed he was heir. Then, presuming all the allegations in the petition to be true, is the material fact sufficiently alleged?

ERSKINE, C. J.—It certainly appears to me, that the fact is not sufficiently alleged in the petition. I have always understood, that on a petition to stay a certificate, the facts should be stated with the greatest precision. But the majority of the court are of opinion, that the petition, together with the affidavit of Watson, are sufficient to entitle the petitioner to be heard. The case must therefore proceed.

Sir J. CROSS.—When I first came into this court, I entertained the idea, that a petition should be drawn with the greatest precision, and could not be amended; but I afterwards found that that was not the case. This is a mere clerical slip; for the petitioner in his affidavit says, that he believes the information to be true. And when I call to mind, that a late act of Parliament enables a judge at *nisi prius* to amend a formal defect in the record *instantly*, I think we ought to permit this petition to be amended, which is merely demurrable in point of form. This is not a question as to the disposal of property, but merely one as to the exercise of the discretion of the court, in permitting a technical defect to be amended.

Sir G. ROSE.—The allegation in this petition runs very near the mark; but, upon the whole, I think it is sufficient to let in evidence of the fact, that the bankrupt lost the money at play. That fact cannot be alleged in a petition with the accuracy of an indictment; nor do allegations in petitions require the precision of pleadings at common law. Information and belief is unquestionably a sufficient allegation in a petition, though not in the affidavit to support it. Then I am to ask myself in this case, whether, on the petition and affidavit, taken together, I can discharge my conscience, by saying that I have no doubt of the non-existence of any gambling transaction.

Mr. *Swanston*, and Mr. *Keene*, then went into the facts of the case, and read an affidavit of the bankrupt, which denied having lost the sum of £130, or any part thereof, at No. 3, Pickering Place, St. James's Street.

ERSKINE, C. J.—The bankrupt should have met fairly the allegation in Watson's affidavit, which is very specific, as to his changing a £100 note to enable him to resume the game of *Rouge-et-Noir*. It is also very remarkable, that he has never denied the fact of having played for money or losing at play, except at No. 3, *Pickering Place*. The allegation in the petition is certainly very general, but then the facts in Watson's affidavit are very particular; and it was very easy for the bankrupt to have said that he had not lost in one day by gaming, either at No. 3, or at any other place, to the amount of £20. The circumstance of Watson not being found, according to the description in his affidavit, might then have been worthy consideration. But if the bankrupt will file evasive affidavits, he must do so at the peril of losing his certificate.

Sir J. Cross.—The bankrupt's affidavit is no answer to Watson's affidavit. He does not contradict any thing specifically. He does not deny, that he got a £100 bank note changed on the day in question, or that he made use of the expression stated in Watson's affidavit; but he merely says, that he did not lose £20 at one sitting, at No. 3, Pickering Place. The word "lose" may be very equivocal; for, according to the understanding of gamblers, a man does not lose, if he finally wins at the conclusion of the sitting. But the act 6 Geo. 4, c. 16, s. 130, has been construed to mean, if the bankrupt shall at any period of the play lose £20, notwithstanding he may finally prove to be a winner. *Ex parte Newman*, 2 G. & J. 329.

Sir G. Rose concurred.

It was ordered, that the certificate should be stayed, and that the petitioner might go in and prove his debt under the fiat; but that he should be restrained from proceeding in an action brought by him against the bankrupt, or from commencing any other.

The petition, however, was ordered to be put into the paper of this day, (November 24th,) for the purpose of being spoken to.

ERSKINE, C. J.—I am still of opinion, that the allegation in this petition ought to have been more precise, as to the fact of the bankrupt having lost the money by gaming. My opinion remains unchanged, that the petition is, in this respect, defective.

Sir G. Rose.—I think it right, upon consideration, to concur in the judgment pronounced by the chief judge; on the ground, that where there is any doubt upon the subject, the leaning ought to be in favour of the bankrupt. I confess, that the inclination of my opinion still is, that the allegation in the petition, coupled with the affidavit in support of it, is sufficient to let in evidence of the fact; but as there is a difference of opinion between the two other judges on this head, and my own mind is by no means free from doubt, I think it is just, that the bankrupt should have the benefit of that doubt. If it were not for that consideration, I should concur with Sir J. Cross.

The final order was, that the petition should be dismissed, as to the disallowance of the certificate; but that the petitioner might have leave to prove his debt, for the purpose of assenting to, or dissenting from the allowance of it.

**Ex parte BRADSTOCK and Another.**—In the matter of **WILSON.**  
—p. 272.

A reference to the commissioner was directed, to report whether a contract made by the assignees for the sale of certain portions of the bankrupt's property, would be beneficial to the estate.

THIS was the petition of the assignees under the fiat, praying, that it might be referred to the commissioners to inquire and report, whether it would be for the benefit of the estate of the bankrupt, that a certain contract entered into by the petitioners with one H. Clifford, for the sale to him of certain estates belonging to the bankrupt, should be completed; and whether, with a view to the completion thereof, it would be for the benefit of the bankrupt's estate, that the sum of £2000 should be paid out of the purchase-money to Ann Wilson and her husband, who were mortgagees of the property, as a consideration for their releasing their claim to the estates, and joining in the conveyance thereof to H. Clifford; and that the commissioner might be at liberty to state any special circumstances in his report; and that in case the commissioner should be of opinion that the contract would be beneficial to the estate, then that the same might be confirmed and carried into effect by the court.

Mr. *Swanston*, and Mr. *Howard*, for the petitioner, stated, that one-third in value of the creditors had sanctioned the arrangement, at a meeting called for that purpose.

Mr. *Ayrton* consented, on the part of the mortgagees.

The court made the order as prayed, Sir G. ROSE observing, that it would be *periculo potentis*, and would not protect the assignees against any dissentient creditors, if the arrangements were not proper. (a)

(a) See *Ex parte Farmer*, 1 Deac. & C. 110; *Ex parte Goding*, 1 Deac. & C. 323; *Ex parte Hurley*, 2 Deac. & C. 631; *Ex parte James*, 3 Deac. & C. 290; *Ex parte Prater*, 4 Deac. & C. 214.

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**Ex parte ALEXANDER.**—In the matter of **HOBBS.**—p. 273

When an assignee, without leave of the court, purchases any portion of the bankrupt's property, it is the invariable rule, on the complaint of any creditor, to order him to be removed from the office of assignee, and to account for the profits he has made by such purchase.

THIS was the petition of a creditor for the removal of an assignee, under the following circumstances. The bankrupt was a horse-dealer, and shortly after the choice of assignees, the horses belonging to the bankrupt were sold by auction. Collins, the acting assignee, attended at the sale, and became the purchaser of several lots, at prices, as the petitioner stated, considerably less than the value of the horses. It was alleged, that he, and several other persons, agreed not to bid against each other, but to meet after the sale, and come to some agreement about the horses, and that Collins gave to each of these persons various sums of money.

The prayer was, that Collins might be removed from being assignee, and that some proper person or persons might be chosen in his room, or in the room of him, and also of Bovill, the other assignee; and that

Collins might account for the estate of the bankrupt purchased by or for him, and pay over to the official assignee what should be found due in respect thereof, particularly in respect of any profit made on the resale by him of the several horses; and that such as were not then sold might be resold, and if they should not fetch the prices equal to those at which he purchased them, then that he might be held to his purchase, and that he might pay all costs.

Mr. *Bethell*, and Mr. *Wright*, in support of the petition, referred to *Ex parte Badcock*, Mont. & M. 231, where Lord LYNCHURST held, that the rule of the court was uniform and inflexible against all transfers of the bankrupt's property, either to the assignees or the commissioners. They were then stopped by the court.

Mr. *Swanston*, and Mr. *J. Russell*, appeared for Collins, one of the assignees.

It is admitted, that there must be an inquiry in this case, and an account taken of the profit, if any, which Collins made by the purchase. But, as no fraudulent intent can be charged against him, it is not a case for his removal, any more than in *Ex parte Turvill*, 3 Deac. & C. 346, where an assignee purchased a freehold house and land, which was part of the bankrupt's property; and yet this court did not remove him, although it ordered a resale. As to the case of *Ex parte Badcock*, Lord LYNCHURST did not remove the assignee there, as a matter of course; but the order for his removal was made, after much consideration, and on the ground of the assignee continuing to deal with the bankrupt's property. In the present case, the petitioner attended the sale of the horses, and knew that Collins was bidding for some of them, without making any objection to what was going on.

Mr. *Twiss* appeared for Bovill, the other assignee.

Mr. *Bethell*, in reply, was stopped by the court.

ERSKINE, C. J.—It is a general rule, which prevails not only in bankruptcy, but in all other proceedings, that where an individual has taken upon himself a trust for the benefit of others, he shall not place his own interests in competition with theirs. This is a most beneficial rule, and assignees are especially within the spirit of it. When an assignee, therefore, takes upon himself the character both of seller and purchaser of the bankrupt's property, the general rule must prevail against him. If he wishes to bid for any portion of the bankrupt's property, he ought to be first removed from the office of assignee. It is true, that cases have sometimes occurred, where assignees have bid for, and become purchasers of, the bankrupt's estate, and yet have not been removed, because their removal has not been prayed. But these cases are exceptions to the general rule; and I confess I think, that in every such case, although no fraud may have been committed by the assignee, it would be most proper that he should be removed. It appears to me, that it is quite enough for the removal of this assignee, that he attended at the sale and bought the bankrupt's property. If we were to hold, that the purchase was good by the assignee, because it was *bonâ fide*, it would give rise to innumerable applications to set aside purchases by assignees of the bankrupt's property; and the court would have in all such cases to ascertain, from a complication of circumstances, whether the transaction was *bona fide* or not. In the present instance, the assignee has made out no case to show that he should be an exception to the general rule. On the contrary, the biddings here, being by an assignee who

understood horses, might have been especially injurious to the sale; for, if he declined to bid for a particular horse, other persons might refuse also, thinking, no doubt, there must be something wrong about that horse, for which so good a judge of horseflesh refused to bid. I can come to no other conclusion, in this case, than that Collins must be removed from the office of assignee. With respect to Bovill, the other assignee, the only case made against him is, that he has never acted in the sale of the bankrupt's property, and that he has made an affidavit in support of the transaction on the part of Collins. In regard to him, therefore, I think that this petition ought to be dismissed with costs.

Sir J. Cross.—It is a rule universally recognised in courts of justice, that a man ought not to be buyer and seller in the same transaction. The affidavits in the present case demand the most serious consideration of the court; for either Collins has been guilty of a conspiracy and a gross fraud, or the solicitor for the petition has been guilty of subornation of perjury. It is sworn, that Collins, for the purpose of keeping down the biddings, permitted another man to bid at the sale, and obtain a horse at a lower price than he himself would have given, and afterwards went to the purchaser and gave him 19s. 6d. for his bargain. Is not this enough to show fraud on the part of Collins? With respect to the charges brought against the solicitor, I feel it but justice to say, that I think them a foul imputation against the character of that gentleman.

Sir J. Rose.—Collins had a plain duty to perform, if he wished to bid for any of these horses at the sale; which was, to present previously a petition to this court, praying to be discharged from the office of assignee, at his own costs. And I think the court would act unwisely, if it did not, in this particular case, put in practice the general rule. The horses were bought by Collins, and sold again at a profit, whether great or small is immaterial; and no offer has been made by him to account for the difference, before this petition was presented. Without imputing, then, any fraud to Collins, or to any one else, and without any vindictive proceeding against Mr. Collins, still, the consequence of this transaction is inevitable, that he must account; and his removal follows as a matter of course, unless he can show any thing to induce us in this instance to relax the rule in his favour; which, otherwise, his own admissions would prevent us from doing. In regard to the question of costs, as it affects Mr. Bovill, the other assignee,—he has been brought here on an adverse petition, and therefore, as to him, the petition must be dismissed with costs; for if it was even a matter of doubt, whether the petition was hostile to him or not, he was bound to come here and defend himself.

The order was, that Collins should be removed from his office of assignee, and that another assignee should be chosen in his room; that he should account for the profits made by the purchase of the horses,—but that this part of the order, as to the accounting, should be suspended, if he paid over to the official assignee the amount of such profits, to be verified by affidavit; that Collins should pay the costs of this petition; and that the petitioner should pay the costs incurred by Bovill; with liberty for the petitioner to apply, if dissatisfied with Collins's affidavit.

## In the matter of PETER GERRISH.—p. 278.

Where a creditor issued a country fiat, without being able to prove that the bankrupt had previously committed an act of bankruptcy, though he could prove he had committed one since, the court refused permission to him to issue another fiat before the expiration of the twenty-eight days.

IN this case a fiat had been issued on the 20th October, directed to commissioners in the country, the time for opening it not having yet elapsed. It appeared, that the petitioning creditor was unable to prove that the party committed an act of bankruptcy before the issuing of the fiat, but that he could prove one committed since; and that he was desirous of issuing another fiat.

Mr. *Wright* moved, under these circumstances, that the present fiat might be annulled, and that the petitioning creditor might be permitted to issue another.

ERSKINE, C. J.—The usual practice is, that you must let the twenty-eight days run out, before you can apply to annul a fiat, for the purpose of issuing a fresh one. That practice must govern the present case. Applications of this kind are sometimes made, to hang up a fiat *in terrorem*. (a)

(a) See *Re Crawley*, 3 Deac. & C. 251; *Ex parte Smith*, lb. 309.

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Ex parte DAVID PARAMORE.—In the matter of JAMES GREENWAY.—p. 279.

Where a creditor petitions for the removal of an assignee, without alleging sufficient grounds for that purpose in his petition, but merely states them on affidavit, his petition will be dismissed with costs.

A., holder of the bankrupt's promissory note, having a security in his hands for the full amount, endorses the note to B., but still retains the security. *Quære*, whether B. can prove the note, without deducing or mentioning the security.

THIS was the petition of a creditor for the removal of an assignee, under the following circumstances, as alleged by him in his petition.

The fiat issued on the 12th June, 1835, under which the petitioning creditor, Joseph Green Bidwill, proved a debt of 232*l.* 15*s.* 11*d.*, in respect of a bill of exchange for 231*l.* 7*s.* 8*d.*, and expenses. This bill was drawn by Joshua Green Bidwill, trading under the firm of Bidwill & Co., upon, and accepted by, the bankrupt, the consideration of which was for money paid, laid out, and expended to and for the use of the bankrupt. By virtue of this proof, Bidwill voted in the choice of assignees, and elected himself sole assignee. The petitioner alleged, that, at the time of such proof, Bidwill was in possession of certain wines consigned to him by the bankrupt, as security for the payment of the said debt, or the proceeds thereof, and concealed this fact when he proved his debt; that he afterwards sold the wines, and applied the proceeds thereof to his own use, in satisfaction or reduction of his debt; and that he refused to debit himself with the proceeds of such wines, as assignee, and insisted upon his right to retain them.

The prayer was, that Bidwill might be ordered to deliver up the wines, or to account for the same, and to be debited with the amount thereof, as assignee; or that he might be removed from being such assignee; and that a meeting of the commissioners might be

called, to proceed to the choice of one or more assignee or assignees in his stead, and that he might be restrained from voting in such new choice; that Bidwill might be ordered to deliver to such new assignee or assignees such part of the estate and effects of the bankrupt as should remain in specie in his hands, and also the produce of the wines, together with all books and papers; and that he might be ordered to account before the major part of the commissioners, for such parts of the bankrupt's estate and effects as had come to his hands, or to the hands of any other person or persons by his order, or for his use; and that he might be ordered to pay all costs incidental to the application.

It appeared, from an affidavit in support of the petition, that at the meeting for the choice of assignees there was some dispute among the creditors, whether one or two persons should be appointed to that office; that three of the creditors, whose debts amounted together to £1057, voted for Bidwill as sole assignee; and that the other creditors, whose debts amounted to £917, voted for two assignees, and that the petitioner should be one of those two. The commissioners adjourned the choice to the following day; when, after hearing the objections urged by both parties, they confirmed the choice of Bidwill as sole assignee. It was alleged, that a creditor of the name of Brake, who voted for Bidwell, had proved as endorsee of a promissory note of the bankrupt for £200, dated 5th May, 1835, and payable two months after date to Bidwill or order. This note appeared to have been given by the bankrupt to Bidwill for another debt of £200, and had been subsequently negotiated by Bidwill to Brake, who proved the amount under the fiat; but the note had been since taken up by Bidwill, who then applied to the commissioners to expunge the proof on the note, which they refused to do.

In answer to the allegations in the petition, the assignee stated in his affidavit, that he did not claim to hold the wines as a security for the debt of 232*l.* 15*s.* 11*d.*, which he proved under the fiat, but in respect of the other debt of £200, for which the bankrupt gave his promissory note, and for which the wines, and the proceeds thereof, were specifically appropriated; that the wines were invoiced at the sum of 274*l.* 16*s.*; that part only had been sold, and netted £108; and that the remainder, when sold, would not, in the judgment of the assignee, be sufficient to cover the said debt of £200, being of a very inferior and unmarketable quality.

Mr. *Swanston*, and Mr. *J. Russell*, in support of the petition. The question in this case is, whether the wines consigned by the bankrupt to Bidwill, the assignee, were consigned generally,—or whether it was intended to give him a special lien upon them, in respect only of the debt of £200. If the intention was to give Bidwill a general lien on the wines, then it was not competent for him to apply them only as security for the note for £200; and even if he was entitled to a lien on them in respect only of the note, he lost that lien when he negotiated the note. That lien would be transferred with the note to Brake; but Brake, by proving on the note, and voting in the choice of assignees, also lost the lien; and Bidwill could not afterwards revive the lien, by taking up the note, or be in a better situation than Brake. It is plain, that Bidwill parted with the promissory note, for the purpose of getting it proved under the fiat, not only with a view of carrying the choice of assignees, but for the purpose of obtaining a dividend on the amount of the note; which he



could not have done, had he continued to hold it himself, if the wines were, according to his own statement, intended to be a security for the amount of the note. The effect of the note being proved by Brake, and subsequently taken up by Bidwill, is the same as if Bidwill himself had proved it. The question is, then, whether Bidwill ought to have been elected assignee, by virtue of his own proof, and the proof of Brake; both of which proofs were made, without any mention of the wines being held as a security. Whatever lien he had on the wines must be taken to have been waived by him, when he caused and permitted such proofs to be made; for it was nothing less than a fraud, on his part, to stand by and permit Brake to prove the note without any allusion to the wines, which he claimed to hold as a security for the payment of this very note. It was by these proofs alone, that Bidwill got himself elected sole assignee; for he was only elected by a majority in value, the majority in number of the creditors being against him; £1057 to £917, was the difference of value; so that, if the proof on the note for £200 had not been made, the majority, even in value, would have been against him.

Mr. *Girdlestone*, and Mr. *Bethell*, appeared for the assignee. The prayer of this petition is worded in a very extraordinary manner; for it prays, that Bidwill may be ordered to deliver up the wines, or be removed from his office of assignee,—in the alternative; so that if the court should think he has a right to the lien he claims on the wines, he is nevertheless to be deprived of his right to fill the office of assignee. The affidavit of Bidwill states, that when he attended before the commissioner to prove the bill for 231*l.* 7*s.* 8*d.*, he was asked by the petitioner, whether he claimed any lien on the wines in respect of that bill, and that he expressly stated he did not; but that the lien he claimed on them was in respect of another debt. This other debt was the note for £200; and Bidwill offered to account for the surplus of the produce of the wines, if they sold for more than £200. In *Ex parte Amphlets*, Mont. 77, it was held, that a creditor, who had a bond deposited with him as a security, might apply it to part of the debt, and prove for the residue. (They were then stopped by the court.)

Mr. *Swanston*, in reply. It is clear, that Bidwill held a security for a debt which he had proved; for, on the evidence, it appears that he held the wines as a security for the bill, as well as the note. [Sir G. ROSE. On what principle can you contend, that Bidwill might not appropriate his security to the satisfaction of one debt, in preference to the other?] This, perhaps, he might have done, if he had acted *bonâ fide*. But he permits the note to be proved, with the suppression of a material fact, namely, that the wines were held by him as a security for the payment of it. The very circumstance of his applying to withdraw the proof, or the note, shows the impropriety of introducing it on the proceedings, and the invalidity of his appointment as assignee. It does not appear, when the note was negotiated by him to Brake; but the intent of negotiating it, there is no doubt, was to effect that proof by another, which Bidwill could not make himself, without giving up his security. No one can maintain the propriety of the proof for the £200. Bidwill, it seems, had a general lien; which it is not denied he might renounce in respect of the bill; but he was bound to disclose the real circumstances to the commissioner. Instead of doing so, he merely informed the commissioner that he held the wines as a security for

another debt, not for the note for £200 which had been proved by Brake. [ERSKINE, C. J. If what you state is the real fact, you should have stated it in your petition, or have got leave to amend it, for the purpose of introducing this fact; for there is not one word about the £200 note in the petition.] [Sir G. ROSE. If another man holds the proceeds of goods as a security for the payment of a bill of which I am the holder, what prevents me from proving it under a commission against any one of the parties to it?] At the time Brake made the proof on the note, he was entitled to the benefit of any security which Bidwill might hold for the payment of it. Brake had, in fact, in the hands of a trustee for him, namely, Bidwill, the sum of £108, which was part of the produce of the wines, and also the remainder of the wines which were then unsold. Bidwill cannot be allowed to say now, that this was a general lien against his own declaration before the commissioner, that the lien he claimed was only in respect of the note. I admit the case is not properly stated in the petition, as it has appeared in evidence; and, therefore, hope the court will permit it to be amended, or a supplemental petition to be presented. At all events, the court can direct an inquiry, calling on the assignees to account.

ERSKINE, C. J.—The substance of the case now relied on by the petitioner is, that Bidwill, having two securities for his debt, proves on one of the securities, and by collusion with Brake, gets him to prove on the other security, namely, the note for £200,—and, by so doing, procures himself to be chosen assignee, notwithstanding he had in his hands sufficient effects to pay that note. I will not say how far the evidence proves this, in the absence of any specific charge to that effect in the petition. The petition calls upon Bidwill to pay over the proceeds of the wines to a fresh assignee to be elected in his room; but does not charge, that by collusion and fraud he had transferred another security which he held. The court is not called on, therefore, by this petition, to act on any complaint of fraud or collusion against the assignee. Nor can I perceive any reason why the commissioner should have refused Brake to prove on the note, before I see what answer Bidwill would give to the charges that have been made against him, on a proper petition stating those facts.

Sir J. CROSS.—When the circumstances now relied on by the petitioner were disclosed by the assignee, the petitioner might have applied to amend his petition, or present a supplemental one. As the facts appear on the affidavits, I do not think that Bidwill acted rightly, by dishonouring the note. He ought to have said to the holder, I have got £108 and the remainder of the wines, which are appropriated for the payment of the note you hold. But instead of doing this, he procures proof to be made both on the bill and the note, which could not have been done, if all the circumstances had been disclosed. I am sorry that the petitioner was not able to shape his petition according to the facts which have since come out in evidence.

Sir G. ROSE.—It is impossible to attend to this petition, and to doubt, for one moment, of the propriety of this gentleman being continued as assignee; unless, indeed, I was prepared to go the length of saying, that every assignee should be removed from that office, where a creditor, having a security for his debt, has voted in the choice. There is not a shadow of imputation against this assignee; who, as I understand, has offered to give up to the estate the surplus of the proceeds of the secu-

rity, after satisfying the amount of the note proved by Brake. It is, I confess, new to me to be told, that where a solvent party holds a security for the payment of a note which he has endorsed to a third party, that party is not to be permitted to prove it under a commission against the maker. But, even put it that Bidwill had money in his hands for the payment of this note, what is to prevent Brake, the holder, from proving it under the fiat against Greenway?

Petition dismissed, with costs. (a)

(a) And see *Ex parte Perring*, ante, p. 458.

Ex parte BLANDY.—In the matter of FOSTER.—p. 286.

An order was obtained and served upon an assignee, that he should elect whether he would accept or decline an agreement for a lease, but he took no notice of the order; in consequence of which a fresh petition was presented for an order that the agreement might be rescinded, and the possession of the premises delivered up to the petitioner; which was ordered accordingly.

In this case the petitioner had obtained an order on the assignee to elect, whether he would accept or decline an agreement for a lease. The assignee had been served with this order on the 29th of August last, but had given no notice of his intention either one way or the other; in consequence of which the present petition was presented, which prayed for a declaration of the court, that the agreement should be rescinded, and that the possession of the premises should be delivered up to the petitioner.

Mr. *Swanston* appeared in support of the petition.

ERSKINE, C. J.—Surely the order you have already got is sufficient, without this petition. You have already an order calling the assignee to elect, and if he abandons the agreement, then to deliver it up, as well as the possession of the premises. If he has elected to abandon, you can put the former order in force, and call upon him at once to deliver up the agreement and the possession of the premises contained in it.

Mr. *Swanston*. It appears, that the assignee took no notice of the former order, before this petition was presented; but that shortly after he was served with this petition, he declined to take to the agreement.

ERSKINE, C. J.—It makes a difference, that the assignee only declined the agreement, after this petition was presented. What you now want from the court is, a declaration that he has abandoned the agreement.

Ordered as prayed.

Ex parte POTTER.—In the matter of POTTER.—p. 287.

One of several respondents, not having been served with the petition, the court ordered it to be reanswered, on payment of the costs of the day.

Mr. *Bethell* stated, that there were three respondents in the matter of this petition, and that only two of them had been served with it. He therefore applied to the court, that the petition might be reanswered, on payment of the costs of the day, to enable the petitioner to serve the third respondent.

The court made the order as prayed, on payment of the costs of the day.

**Ex parte JAMES HARTLEY, and MARY HANNAH HARTLEY, infants, by their next friend.—***In the matter of TRISTRAM.*—p. 288.

A bankrupt, to whom two estates were devised, charged with the payment of legacies, had mortgaged each of them separately; and the assignees sold the estates, subject to the unpaid legacies and the mortgages. One of the estates was sold for £1000 more than the amount of the mortgage-money with which it was charged, and which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it.

*Held*, on the application of the mortgagees of the last-mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate.

THIS was a petition, praying that certain legacies which were charged upon a portion of the bankrupt's real estate, might be paid out of another portion of such estate, on which they were not specifically charged; under the following circumstances:

By the will of Ellen Williams, dated the 13th April, 1805, the testatrix demised all her messuages, lands, and hereditaments in Settle and Giggleswick, in the county of York, unto the bankrupt Tristram, and his heirs, and bequeathed various legacies to other persons, to the amount of £2630. The testatrix also gave all the residue of her estate and effects to the bankrupt; and declared, that if her personal estate should fall short of paying the whole of the legacies, her real estate should be charged with the payment of such deficiency; and she appointed the bankrupt and two other persons her executors.

The testatrix died in 1826.

By an order of the Court of Chancery, made in April, 1826, in a suit in which the present petitioners were the plaintiffs, and the bankrupt the defendant, it was ordered, that the bankrupt should go before the master, and propose such security as the master should approve, for the sum of £2535, which had been previously ordered to be paid by the bankrupt into court. The bankrupt, in pursuance of this order, brought in before the master a state of facts, stating that he was seised in fee of a dwelling-house in Duke Street, Settle, and of two pieces of pasture-land, called Gowdy Land and Castlebar Pasture, in Giggleswick; and he proposed to deposit the title-deeds thereof in the master's office, for securing the said sum of £2535, and to execute a legal mortgage when required. The state of facts and proposal made no mention of any charges or encumbrances, as affecting those premises. The master reported, that the title-deeds were a sufficient security for the sum of £2535; and the bankrupt accordingly deposited the same in the master's office. The bankrupt, however, under the will of Ellen Williams, became entitled to other hereditaments, besides the lands called Gowdy and Castlebar; and which, together with such lands, were charged with the legacies mentioned in the will, and were in the possession of the bankrupt.

In 1828, the bankrupt, being desirous to mortgage the other hereditaments, wrote to his solicitor as follows:—"Castlebar and Gowdy Lands, and my mother's house, are security for £2500 and interest, to James Hartley's estate. The remainder of my Settle estate must now be subject to the legacies unpaid under my aunt's last will. Now, what sum can you raise me on this last property?" In pursuance of these instructions, the bankrupt's solicitor procured £1500 to be advanced to him, on mortgage, by Gilson and Batty.

In 1828, a receiver was appointed in the suit in Chancery; and in July, 1829, it was ordered that the bankrupt should within six weeks pay to the receiver the £2500,—or, in default, that the estates should be sold, and that the bankrupt should execute a mortgage for the balance, and that he should also execute all necessary conveyances to purchasers.

In December, 1829, the commission was issued against the bankrupt.

Default was made in payment of the £2500; and the house and lands mentioned in the state of facts were accordingly, in January, 1830, sold in four lots, namely, lot 1, being the house in Settle, was sold for £200; lot 2, composing the lands called Gowdy Lands, was sold to W. Birkbeck for £1300; and lots 3 and 4, being the lands of Castlebar, were sold to W. Bolland, Esq., for £985 and £105. Birkbeck, however, refused to complete his purchase, until all the legacies under Ellen Williams's will were satisfied.

In November, 1831, the property mortgaged to Gilson and Batty was sold, under the bankruptcy, for £1000 more than was sufficient to satisfy that mortgage.

The petitioners alleged, that the intent and meaning of the bankrupt, when he took in the proposal before the master, and deposited the deeds in the master's office, and when the bankrupt wrote as above-mentioned to his solicitor, was, that the hereditaments, other than the lands called Gowdy Lands and Castlebar, should be exclusively charged with, and constitute the fund to pay, the unpaid legacies under the will of Ellen Williams.

The prayer was, that the produce of the sale of the property mortgaged to Gilson and Batty, which remained after satisfaction of such mortgage, might be declared subject to the payment of the unsatisfied legacies; and that an order might be made for payment to Riddell, the receiver, of such part of the produce of such sale remaining after satisfaction of the mortgage to Gilson and Batty, as ought to be paid, or made good, in respect of the unsatisfied legacies and the interest thereof.

Mr. *Bethell*, and Mr. *E. Montagu*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *J. Russell*, contra. When the master reported that the title-deeds deposited in his office by the bankrupt were a sufficient security for the £2535, he must have known that the estates to which they related were charged with the legacies bequeathed by the will of Ellen Williams; for the abstract of the title must have been before him. Assuming that the petitioners could, as against the bankrupt and the legatees, have thrown the charge of the legacies upon the other portion of the estate, yet they cannot do so, as against the assignees; for the bankruptcy of the devisee makes a material difference. There is a great distinction between a lien on the estate, and a personal liability; in this case, the lien is personal, and is lost by the estate passing into other hands. And although the assignees of a bankrupt take his property, subject to any specific lien; yet, as there was no specific lien in this case, but merely a general charge on all the property, as long as it continued in the hands of the bankrupt, the moment the property passed from the bankrupt to the assignee, that charge became extinguished.

Mr. *Bethell*, in reply. The lien of the petitioners, on the Gowdy lands and Castlebar estates, was acknowledged by the petitioner, when he made the mortgage to Gilson and Batty. The bankrupt took all the estates, subject to the charge of the legacies; and the petitioners, having a security on a part of these estates, are entitled to have the charge

partly provided for out of the other portion of the estates. All equities, which bind a bankrupt's estate, bind also his assignee.

ERSKINE, C. J.—This is not a question between the legatees and the petitioners, but between the petitioners and the assignees. At the time of Tristram's bankruptcy, he possessed the equity of redemption in two estates, which had been severally the subject of charge and mortgage by him, both of which were charged with some legacies remaining unpaid under the will of Ellen Williams. Both the estates have been sold; and the assignees claim, that the unsatisfied legacies should be paid out of the purchase-money of one estate, in exoneration of the purchase-money received from the other. The petitioners, on the contrary, who are mortgagees of the other estate under a decree of the Court of Chancery, insist, that the legacies should be charged on the first-mentioned estate; on the ground that the proceeds of the sale of the estate mortgaged to them, would not pay their debt of £2535, if the legacies were charged on that estate; while the first-mentioned estate is well able to satisfy that charge, as well as the mortgage debt of Gilson and Batty.

If this were a question between an execution creditor and a mortgagee, and all the property of the bankrupt were seized under the execution, then, according to the doctrine laid down in *Aldrich v. Cooper*, 8 Ves. 383, the mortgagee of an estate seized under the execution would have a right to insist, in a Court of Equity, that the execution creditor should take to that portion of the property which, paying him, would leave the mortgaged estate to satisfy the debt of the mortgagee. (a) So, even where the crown by an extent has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour, by letting him stand in the place of the crown, upon other funds not comprised in his mortgage. (b)

If, in the present case, there had been a special contract by the petitioners to bear part of the legacies, they must have abided by such contract; but the whole contract, on their part, arises from the deposit by the bankrupt of the title-deeds creating an equitable mortgage, and must be considered the same as if a legal mortgage had been executed by the bankrupt. By the will, through which the bankrupt derives his title, the legacies are charged upon all the estates; and I am of opinion, that the petitioners may call on the legatees to take their legacies out of that estate which is able to satisfy them the amount of their legacies, without resorting to that estate which will barely pay the petitioners the amount of their debt; and that if the legacies had already been paid out of the estate pledged to the petitioners, then that the petitioners might have stood in the place of the legatees, *pro tanto*, against the other estate. The bankruptcy of the mortgagor makes no difference; for the assignees take, subject to all equities which were good against the estate before the bankruptcy. I therefore think, that the petitioners are entitled to have the surplus of the proceeds of the sale of the estate mortgaged to Gilson and Batty, after satisfying the amount of their mortgage, applied to the payment of the legacies, before resort is had to the property mortgaged to the petitioners.

Sir J. CROSS.—The question in this case depends altogether upon the allegation in the petition, "that the intent and meaning of Tristram,

(a) And see *Attorney-General v. Tyndall*, Amb. 614, cited by Lord Eldon in *Aldrich v. Cooper*, 8 Ves. 391.

(b) See Sir Samuel Romilly's argument in *Aldrich v. Cooper*, 8 Ves. 387.

when he took in the proposal before the master, and before and at the time when Tristram made the deposit, and when the master made his report, and when Tristram wrote the letter to Preston, was, that the hereditaments, other than the lands called Gowdy Lands and Castlebar, should be exclusively charged with, and the fund to pay, the unpaid legacies under E. Williams's will." Now, was that the contract of the bankrupt? This can only be collected from the circumstances of the case, as there was no express contract entered into on his part. Then, what are the facts? The master was to be satisfied of the value of the deposit; that value would depend on the amount of the encumbrance on the estate. The bankrupt made an affidavit, as to the sufficiency of the value, and did not mention a word about the encumbrances. It is very true, that the master must have perceived, from the contents of the will, that the legacies were charged on the property specified in the deeds; but he must have been satisfied and convinced, before making his report, either that the legacies were satisfied, or if not, that the charge was to be confined to some other estate. The bankrupt then sends instructions to his solicitor to effect a mortgage upon the remainder of his estates, which he declares his intention to subject to the legacies unpaid under his aunt's will. Where is this mortgage deed? Probably, it states the very fact. He executes a mortgage for £1500; and when the estate so mortgaged is afterwards sold, it produces a surplus of £1000, after satisfying the mortgage, which it appears is sufficient to discharge the unpaid legacies. This last fact convinces me, that the allegation in the petition is true; and that the bankrupt must have communicated his intent to the master, when he deposited the title-deeds, that the legacies were to be charged solely on the remainder of the estate. If the bankrupt, then, had the power to transfer the charge to the remainder of the estate, it appears to me, that he has exercised that power. As against him, therefore, it is clear, that the petitioners are entitled to an unencumbered charge on the estate which he pledged to them. Nor does his subsequent bankruptcy make any difference in the case, for the assignees can only take, subject to the equities that bind the estate of the bankrupt.

Sir G. ROSE.—The case presented for our consideration is not one, perhaps, which should have regularly come before this court, as it would more properly have been submitted to another jurisdiction; but I think the petitioners were wise in coming here, having adopted the shortest and cheapest course of proceeding. There is nothing in the arguments against the prayer of this petition. The bankrupt, having the entire interest in the estates devised by the will, takes them, subject to the legacies which the testatrix charged upon them. The difficulty was, how far the acts of the parties would exonerate a part of the estate, by throwing the charge on another portion of it. It appears, however, that the intent of the bankrupt was, that this charge should be transferred to a particular portion of the estate, and that other parties have acted on this understanding. The question is, then, how far the bankruptcy of *Tristram* alters the equitable rights of the parties interested. Now, the equity of the petitioners is not merely a personal equity against the bankrupt, but an equity against the estate. His assignees, therefore, who take by operation of law, take subject to all the equities which bound the estate, and are consequently bound, as the bankrupt would have been bound himself.

The order was made as prayed.

**Ex parte ROBERT WATKINS.—In the matter of RAMSAY  
RICHARD REINAGLE.—p. 296.**

The bankrupt contracted to purchase a factory, with a steam-engine and other fixtures, for £3600; and upon payment of £1000, the vendor delivered him possession. The bankrupt did not work the factory, or occupy it himself, but retained the same man to take charge of it, who had been employed for that purpose by the vendor. The remainder of the purchase-money not being paid, the bankrupt, on the day before he committed an act of bankruptcy, requested the vendor to resell the property, and pay himself what was due to him; and the vendor immediately took possession, and gave notice to the man in charge of the property, that he was thenceforth to take charge of it for the vendor, which he agreed to do:—*Held*, that the steam-engine and fixtures were not in the order and disposition of the bankrupt at the time of the bankruptcy.

THIS was the petition of a creditor for the sale of certain leasehold premises and other property, on which he claimed a lien, and for permission to prove for any deficiency.

The petitioner being possessed of a leasehold factory and buildings in the City Road, the bankrupt addressed a letter to him, dated the 24th September, 1834, in which he offered to purchase the same, together with the steam-engine, gas fittings, apparatus, and fixtures of all sorts, (except the moveable apparatus which was in the factory, connected with and intended for the manufacture of screws,) at the sum of £3600; proposing that one-half that sum should be paid down on handing over the lease, and that the remaining £1800 should be paid in two months. This offer the petitioner accepted, by a letter addressed to the bankrupt the following day. In pursuance of this agreement, the bankrupt was led into possession of the premises on the 8th October following. On the 27th February the bankrupt paid the petitioner £1000 in part of the purchase-money, and being afterwards pressed by the petitioner for the remainder, he deposited some valuable pictures with the agent of the petitioner, as a security for the residue of the purchase-money. The bankrupt being unable to complete the purchase, the petitioner was proceeding to retake possession of the property, when, to prevent the necessity of his so doing, the bankrupt entered into the following agreement:

“Memorandum of an agreement made and entered into this 18th day of May, 1835, between Robert Watkins, of Arundel, in the county of Sussex, Esq., of the one part, and Ramsay Richard Reinagle, of Fitzroy Square, in the county of Middlesex, Esq., of the other part. Whereas, in the month of September, 1834, the said Ramsay Richard Reinagle contracted to purchase of the said Robert Watkins the lease of a building called the Wenlock Factory, with the steam-engine, fixtures, and appurtenances thereto belonging, as held by the said Robert Watkins, and such purchase was to be completed within a month from the time of the said contract: And whereas the said Ramsay Richard Reinagle did, on the 8th day of October last, enter into possession of the said premises, and did, on the 27th day of February last past, pay the sum of £1000 in part of such purchase; and the residue of such purchase-money, and interest thereon, at the rate of £4 per cent., is still due: And whereas it has been agreed, that the said Ramsay Richard Reinagle shall complete such purchase, and shall be charged with interest: at the rate aforesaid on the residue of such purchase-money, from the 25th day of December last, and shall pay the ground-rent and out-



goings of the premises as from the 29th day of September now last past; and that the said Ramsay Richard Reinagle shall cause the sum of £600, part of such purchase-money, together with the sum of 38*l.* 18*s.* 10*d.*, being the amount of such last mentioned interest, to be paid to the said Robert Watkins by the following acceptances; that is to say, a bill dated the 11th day of May instant, at two months, for the sum of £100; a bill dated the same day, at three months, for the sum of £250; another bill, dated the same day, at four months, for the further sum of 288*l.* 18*s.* 10*d.*; and that the sum of £2000, residue of the same purchase-money, shall remain on mortgage of the said premises, and carry interest at £4 per cent. from this day: and whereas it has been agreed, and it is hereby declared, that the said acceptances, or these presents, shall not in any manner prejudice or effect the lien, right, and equities which the said Robert Watkins is entitled to in respect of the purchase-money and interest remaining unpaid: And whereas the aforesaid bills have this day been given by the said Ramsay Richard Reinagle: And whereas three pictures, described at the foot of these presents, have been deposited by the said Ramsay Richard Reinagle with the attorney of the said Robert Watkins, as a further security, in addition to the said lien and these presents: And whereas the agreement has been made upon the terms, and subject to the conditions, hereinafter mentioned. Now these presents witness, and it is hereby expressly declared and agreed, that if the said Ramsay Richard Reinagle shall make default in payment of any of the said several bills of exchange so accepted by him as aforesaid, or of any part of the money thereby secured, it shall be lawful for the said Robert Watkins immediately, and without the necessity of any proceedings at law, to enter upon and take possession of the said factory and premises, with the said steam-engine, fixtures, effects, and appurtenances, so sold to the said Ramsay Richard Reinagle, and peaceably to hold the same, and for that purpose to issue execution on a judgment in ejectment, which it is agreed shall be forthwith entered up against the said Ramsay Richard Reinagle; and the said Robert Watkins shall immediately thereupon, in his own name, and when and as he shall think fit, sell the said factory, steam-engine, fixtures, effects, and premises, and also the said pictures, if he shall think fit so to do, and shall receive the produce, and give absolute discharge to the purchasers, and shall apply the purchase-money, first, in payment of all costs, damages, and expenses he shall incur,—and then in payment of the arrears of ground-rent, rates and taxes, if any,—and then in satisfaction of the whole residue of the said purchase-money, with interest thereon at the rate aforesaid, and shall account for the surplus, if any, to the said Ramsay Richard Reinagle. And it is hereby expressly declared, that the said Robert Watkins shall not be answerable for any loss or damage that may happen, except the same shall be occasioned by his own wilful neglect or default.”

The three pictures, as described at the foot of the agreement, were, one by Rembrandt, one by Caracci, and the third by Guido Rhini.

The bills of exchange mentioned in the agreement were duly delivered to the petitioner, but were all dishonoured.

On the 20th May, 1835, the bankrupt requested the petitioner's attorney to resell the premises, and pay the money due to the petitioner; and the petitioner's attorney accordingly, on the same day, took possession of the premises; the whole of the £2600, with an arrear of interest,

being then and still unpaid. The petitioner was also obliged to pay the ground-rent, and the rates and taxes, that became due since the bankrupt took possession of the property.

On the 30th May, 1835, the fiat issued.

The petition prayed, that the factory, and also the three pictures, might be sold, and that the petitioner might be at liberty to bid for the same respectively; that out of the produce of the sale the costs of the petitioner, incidental to this application and the sale, together with the sums paid by him in respect of the rent, rates, taxes, and insurance of the premises, since the bankrupt took possession thereof, might be first paid, and the residue of such produce applied towards satisfaction of the sum of £2600, and of interest on the said purchase-money, at the rate of £4 per cent., from the 25th day of December last, and the surplus, if any, paid to the said assignees; but, in case the residue of the produce of the sale should be insufficient for the payment of the £2600, then that the petitioner might be permitted to prove for the deficiency.

In answer to the allegations in the petition, the bankrupt swore, that he considered the sum of £2000 to be the purchase-money for the lease, and £1600 for the fixtures, steam-engine, and appurtenances; that he continued in possession of the factory and the fixtures until the issuing of the fiat, and that the fixtures were in his absolute order and disposition; that he took to pieces and repaired the steam-engine at an expense of £100; that the three pictures deposited with the petitioner were to be a collateral security for payment of the bills specifically, but were not a general security for the residue of the purchase-money; that at the time he entered into the agreement of the 18th May, he was in a state of insolvency, and had been for some time previously obliged to absent himself for fear of arrest by some of his creditors, who held his accommodation acceptances; and that on the 21st May he signed his declaration of insolvency, which was duly gazetted.

It was also sworn by the solicitor to the assignees, that when the messenger executed the warrant of seizure, on the 3d June, the bankrupt was in the undisturbed possession of the property, and that the only person upon the premises was one Edwards, an engineer, and servant of the bankrupt; that the payment of the rent by the petitioner was made by him, upon an understanding that the same should not prejudice either party; and that if the assignees were ultimately declared to be entitled to the fixtures liable to be distrained, they should reimburse the petitioner.

In reply to the statements in the bankrupt's affidavit, it was sworn by a Mr. Abraham, who negotiated the sale of the property for the petitioner, that there was not, at any time during the treaty for the purchase, any mention made either by the deponent or the bankrupt, or by any other person, of part of the £3600 being for the steam-engine and fixtures, and the other part for the lease of the factory; nor did the deponent, or the petitioner, ever give the bankrupt reason to consider that the purchase-money was to be so apportioned. The petitioner, also, and the solicitor for the petitioner, who had corresponded with the bankrupt as to the payment of the purchase-money, swore to the same effect; and that the bankrupt of his own accord, and without any letter or message, sent to Mr. Abraham, on behalf of the petitioner, the three pictures, as an additional security for the residue of the purchase-money remaining unpaid. The solicitor also stated, that on the 20th May the bankrupt

sent a letter to him, entreating him to proceed at once to adopt measures for re-selling the property to the best advantage, and expressing his conviction that the solicitor would use every endeavour to get the best price for it; and that he thereupon immediately entered into possession of the factory, as the solicitor of the petitioner, and gave notice to Edwards, who resided in the lodge, and who, at the time the bankrupt purchased the factory, kept it for the petitioner, and had been since continued there by the bankrupt, that he was thenceforth to occupy and take charge of the premises for the petitioner, which he agreed to do; that Edwards thenceforth accordingly held the premises, as the servant, and on the behalf of the petitioner, and had ever since been in the occupation thereof; and that the steam-engine and other fixtures were firmly affixed to the building, and that the boiler of the steam-engine was built up in a separate building erected for the purpose outside the principal factory.

Mr. *Bethell*, in support of the petition. It is presumed, that the assignees mean to insist, that the agreement of the 18th May, 1835, was entered into by the bankrupt after he had committed an act of bankruptcy, and within two months before the issuing of the commission; and secondly, that the £1000, which was paid by the bankrupt in part of the purchase-money, was in respect of the fixtures, and not for the factory, and that the fixtures consequently passed to the assignees under the fiat. Now, the act of bankruptcy in this case was not only committed after the date of the agreement, but after the 20th May, when the petitioner took possession of the factory and the fixtures. But the bankrupt was previously merely in possession of the premises as lessee; and the steam-engine and fixtures, being affixed to the freehold, could not be said to be in his order and disposition at the time of his bankruptcy; *Ex parte Loyd*, 3 Deac. & C. 765. The agreement of the 18th May does not create the equitable right of the petitioner, but is merely an admission of the bankrupt of a former right, which was vested in the petitioner as an unpaid vendor.

Mr. *Swanston*, for the assignees. The only question here is, whether the bankrupt was the reputed owner of such portion of the property, as in legal construction must be considered goods and chattels. [*ERSKINE*, C. J. The question is, whether, when Edwards was desired to take charge of the premises for the petitioner, he did not from thenceforth cease to be the agent of the bankrupt, and become the servant of the petitioner. In order to constitute reputed ownership, there must be possession of the property by the bankrupt, with the consent of the true owner; and therefore, if Watkins intrusted Edwards to keep possession for himself, he did not consent that the bankrupt should have the order and disposition of the fixtures, within the meaning of the act of Parliament, 6 Geo. 4, c. 66, s. 72.] The bankrupt swears, that he was let into possession of the factory on the 8th October, and that he continued in possession of it, by himself and his servants, up to the time of the issuing the fiat. There was no apparent change of possession on the 20th May; for Edwards, who had been employed by the bankrupt, was still continued in the occupation of the property. Edwards, therefore, must be considered as still continuing to be the servant of the bankrupt. The bankrupt further swears, that on the 27th February last he paid £1000 in part of the price for the fixtures, and deposited the pictures as a security for the remaining £600, and that he agreed to purchase the factory itself for £2000; so that after he was let into possession of the pro

perty, he became the absolute owner of the fixtures. He also swears that he committed an act of bankruptcy prior to the 18th May. [Sir J Cross. Can the bankrupt prove his own act of bankruptcy?] The bankrupt is bound to inform the court when he committed an act of bankruptcy, in answer to the claim of an equitable mortgagee; and the court is bound to act on such information. The agreement, contained in the bankrupt's letter of the 20th May to the petitioner's solicitor, to let the petitioner resume possession of the property, is not evidence of any prior intention of the bankrupt, nor does it purport to be so; it does not, in fact, purport to be evidence of a past agreement; and the bankrupt was then incompetent to make a new agreement, for it was after he had committed an act of bankruptcy. The bankrupt was the real owner, and in possession of the property before the 20th May, and there was no apparent change of possession up to the issuing of the fiat. It cannot be denied, therefore, that reputed ownership must follow the real ownership, when accompanied with possession.

Mr. *Bethell*, in reply, was stopped by the court.

ERSKINE, C. J.—The court are unanimous in opinion, that the petitioner is entitled to the order which he seeks. (His honour here referred to the facts, as alleged in the petition, and stated in the affidavits, and then proceeded as follows:—) It is contended by the assignees, that the sum of £2000 was to be paid by the bankrupt for the lease of the factory, and the sum of £1600 for the fixtures. But Mr. Watkins positively denies that there was to be any such appropriation. The bankrupt as positively asserts the contrary. To whom, then, are we to give credit? We find, by the agreement of the 18th May, that the bankrupt there expressly admits, that he had contracted to purchase of Mr. Watkins the factory, with the steam-engine and fixtures, for a gross sum, and that he had paid £1000 in part of the purchase-money. This admission, therefore, is quite at variance with his subsequent statement,—that the factory was purchased by him for £2000, and that the £1600 was the price of the fixtures alone. The assignees then say, that part of these fixtures would come under the denomination of goods and chattels, and that they were in the order and disposition of the bankrupt at the time he committed an act of bankruptcy; which, it is contended, was committed before the 21st May, the day when the bankrupt's declaration of insolvency was gazetted, and which was the act of bankruptcy on which the commissioner adjudicated. But then no evidence has been offered to us of any prior act of bankruptcy; and we must, therefore, take the act of bankruptcy to have been committed on the 21st May. Now, it appears, that on the 20th May the bankrupt wrote a letter to Watkins's solicitor, desiring him to take possession of the factory, which the solicitor lost no time in doing; for he swears, that he entered into possession of the property the very same day. It is then urged, that Edwards, the man whom the solicitor authorized to take charge of the premises for Mr. Watkins, was the same individual who had been employed for that purpose by the bankrupt during the period of his occupation of the property. But then it appears, also, that Edwards had been originally employed by Mr. Watkins to look after the property, and that he was merely continued in that charge by the bankrupt, when he was let into possession. It is therefore not like the case of a creditor suing out an execution against the bankrupt's property, and a servant of the bankrupt being put into possession, as a sheriff's officer

under the execution. In the present case, it appears to me, that the possession was effectually changed; and that there is nothing to show that the bankrupt was in the reputed ownership of the property, with the consent of the true owner, even supposing that the fixtures came under the description of goods and chattels. With respect to the pictures, there is no ground for saying, that they were deposited merely to secure the payment of the bills for £600; for the agreement of the 18th May expressly states, that they were deposited by the bankrupt, as a further security to Mr. Watkins for the remainder of the purchase-money generally, and in addition to his lien.

Sir J. CROSS.—What is the nature of the contract made between the bankrupt and the petitioner? It appears, that the bankrupt addressed a letter to the petitioner, proposing to purchase this property for one entire sum of £3600, and that the petitioner, by another letter, accepted his offer. The bargain was made by these two letters, that thus passed between the parties. When the bankrupt was let into possession, he found Edwards in charge of the property, as the agent of the vendor; and he agreed to continue him in the same employment, and to pay him for his services; but the bankrupt never himself assumed the actual occupation of the property, nor ever worked the machinery. Then, where is the reputed ownership? There does not appear to me a shadow of pretence for saying, that the bankrupt could ever have been reputed to be the owner of this property. Was any claim made by the assignees to these fixtures, as goods and chattels, when they sold the bankrupt's effects under the fiat? I have heard of none. Every thing appears to have been sold by them, but they made no attempts to take possession of these fixtures, with the other goods and chattels of the bankrupt. I do not recollect any thing, from any subsequent agreement or transaction between these parties, which contradicts the bargain they entered into by their two letters of the 24th and 25th of September in last year. And in regard to the pictures, there is no pretence for saying, that they were pledged for the specific sum of £600.

Sir G. ROSE.—I confess it appears rather strange to me, that this petition should have occupied so much time of the court; for the point which it involves is, to my apprehension, the clearest in the world. The petitioner at once displaces the title of the assignees, by the adverse possession which he took of the property on the 20th of May, and which was before Reinagle committed an act of bankruptcy. This fact is nowhere answered by the bankrupt; for, as to the allegation of there being any prior act of bankruptcy, there is not the slightest foundation for that assertion. The petitioner is, therefore, fully entitled to the order he asks in this petition.

Usual order,—with liberty for the petitioner to bid, and the assignees to have the conduct of the sale.

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Ex parte JAMES BRAND and Others.—In the matter of DUNCAN NEIL SMITH.—p. 308.

A petitioning creditor fraudulently sues out a commission, and prevails upon twelve persons to make proofs on fictitious debts, for the purpose of carrying the choice of assignees; which object was attained, in opposition to the *bonâ fide* creditors. These assignees are afterwards removed, but not till one of them absconds with a large sum belonging to the bankrupt's

estate; and when the whole fraud is at length discovered, the proofs are ordered to be expunged, and the dividends received on them repaid. Two of the parties, however, having become insolvent, are unable to repay the dividends, and the estate in other ways sustains considerable loss from the fraudulent proofs. The fresh assignees, who had been appointed under an order of the court, petitioned, that five of the parties, who had made such fraudulent proofs, might be ordered to make good the sum abstracted by the defaulting assignee, and all the other loss which had thus been occasioned to the estate.

- Semble*, 1. That as there was no proof of a general conspiracy among these parties to put any one fictitious debt on the proceedings, but merely a conspiring of each individual with the petitioning creditor to prove his own fictitious debt, the court could not make the order prayed for.
2. That, as it did not appear that any of the parties contemplated the abstraction of the funds by the defaulting assignee, at the time of their respective proofs, the court had no jurisdiction to order them to make good the loss experienced by his default, which was only a substantive ground of charge against him, in his character of assignee.
3. That the circumstance of a party having proved a debt under a commission, merely vests in the court a jurisdiction to the extent of the proof.

THIS was the petition of assignees, charging certain parties with having colluded to prove fictitious debts under the commission, and praying that they might be ordered to pay the costs incurred by the proceedings taken to expunge such proofs, and to indemnify the estate against other expenses and loss occasioned by the fraud. The petition stated the following facts, which were confirmed by affidavit.

The bankrupt had been, up to 1830, a clerk in the employ of Messrs. Beeston and Co.; but in January, 1831, he entered into business as a warehousman on his own account. His career, however, was but of short duration; for on the 17th of November, 1831, he was made a bankrupt; but, during this short period, no less than £60,000 worth of property passed through his hands, and there were several considerable creditors at Manchester and other distant places. To enable him to carry on his business, a capital of £2000 had been created for him by means of the exchange of bills between Vaughan, his father-in-law, and Mr. Beeston, his late employer; but it did not appear that the latter had given him any credit for goods. The commission was issued on the petition of Vaughan, as the holder of the bankrupt's note of hand for £500, the consideration for which, as Vaughan stated in his deposition, was money lent to the bankrupt. At the first public meeting on the 25th of November, 1831, one of the trustees, under a settlement alleged to have been executed on the marriage of the bankrupt with the daughter of R. Vaughan, claimed to prove for a sum of 2077*l.* 3*s.*; for principal and interest on a bond stated to have been given by the bankrupt on his marriage. The consideration of this proof was adjourned to the second public meeting, when it was finally admitted; but it was afterwards ordered to be expunged as a fictitious debt. It was alleged, also, that Vaughan was the holder of several bills with the bankrupt's name upon them, some of which were given after the issuing of the commission; and that he handed over these bills to various parties, for the purpose of proving them, and voting in the choice of assignees.

One of these parties, R. Beeston, proved a debt of 255*l.* 2*s.* on four of the bills, which had been passed to him by Vaughan; and he also obtained powers of attorney from three other persons, who were *bonâ fide* creditors, authorizing him to vote in the choice of assignees. The first account he gave of the transaction, in an examination before the commissioner on the 2d of January, 1834, was, that before the assignees were chosen, he was applied to by Vaughan to prove these bills, and that the cash he paid for them was paid back after the choice. His sub

sequent account, as appeared from the affidavit of the official assignee, stated, that he did not pay any cash for the bills; but that he merely gave a banker's check for them, which it was agreed should not be presented, and which was, in fact, afterwards returned. His own affidavit did not materially vary from this account; and he admitted, that he held the bills for the sole purpose of influencing the choice of assignees.

Richard Philpott proved a debt of £810,—34*l.* 3*s.* of which, he stated, was for money lent to the bankrupt, and the remaining 466*l.* 17*s.* as acceptor of a bill he had discounted for Vaughan.

Bernard Angle proved a debt of 509*l.* 16*s.*, as for money lent on two other bills; and in August, 1834, when he was examined on oath before the commissioner, he admitted, that he had never paid one shilling for these bills, and that he returned them to Vaughan after a dividend had been declared, together with the amount of the dividend.

Henry Baldwin proved a debt of 229*l.* 13*s.* on two other bills endorsed to him by Vaughan, the consideration for which, as he stated in his deposition, was money paid, and goods furnished to Vaughan.

There were similar proofs made, by seven other persons, to the amount altogether of 3252*l.* 17*s.*

All the debts, in respect of which these proofs were made, were fictitious, and the proofs were afterwards expunged. And it was alleged, that the parties who had made them, by concert and collusion with each other, voted in favour of H. Baldwin and E. Williams as assignees, in opposition to a larger number of *bonâ fide* creditors, who attended and voted for other persons. One of the assignees so elected, E. Williams, afterwards absconded with 348*l.* 6*s.* of the moneys belonging to the estate; and it was alleged, that H. Baldwin had received a sum of 112*l.* 5*s.* 6*d.*, which he had lent to Vaughan, and had omitted to give credit for it in the audit of his accounts. An order having been obtained for the choice of a fresh assignee in the place of E. Williams, Vaughan, Philpott, and Angle attended a meeting for that purpose, and by concert, as it was alleged, made choice of Angle, who afterwards acted as such assignee.

On the 19th of March, 1832, Vaughan proved a further debt of 4630*l.* 8*s.* 9*d.*, which, he stated, was for money paid and lent by him to the bankrupt in respect of various bills specified in the schedule to his deposition, and also for goods sold and delivered by him to the bankrupt. On a subsequent day, he also proved a further sum of £300 upon a bill for that amount. Both these proofs were also ordered to be expunged, as fraudulent.

On the 19th of March, 1832, a dividend of 2*s.* 4*d.* in the pound was declared, and was received by all these parties.

It was not till January, 1834, that some of these proofs were discovered to be fraudulent, by a person of the name of Welchman. It appeared, from his statement, that he had, at the bankrupt's solicitation, accepted two bills for him after the issuing of the commission, for the purpose of being proved, to carry the choice of assignees. One of these bills was proved by H. Baldwin, and, by virtue of this proof, he had voted in choosing himself one of the assignees. He was afterwards examined, as well as Vaughan, Philpott, and another witness, upon the subject of this bill, all of whom contradicted the statement of Welchman; but upon Baldwin's books being examined, the entries in them were

found to be inconsistent with his own statement of the facts; and the matter being adjourned into a Subdivision Court, the proof was ordered to be expunged as fraudulent. From this decision Baldwin appealed to the Court of Review; and there was also a counter-petition presented by two of the creditors and the official assignee, praying for the removal of Baldwin as assignee. The two petitions were heard together; when the order of the Subdivision Court was confirmed, and Baldwin was ordered to be removed from the office of assignee. Whilst these petitions were pending, Baldwin caused Welchman to be indicted for perjury, alleged to have been committed upon his examination before the commissioner; and upon the trial of the indictment, notwithstanding Baldwin, Vaughan, and Philpotts reswore against him the same facts to which they had deposed before the commissioner, the jury acquitted Welchman, without putting him on his defence.

On the 31st of July, 1834, James Brand, and William Lawrence, the petitioners, were chosen assignees, in the room of Baldwin. From some circumstances which transpired on the hearing of the petition of appeal, the court intimated, that Angle might have leave to resign his office of assignee. This permission, however, he refused to avail himself of; but when the fraudulent circumstances connected with the debt proved by him became known, he presented a petition for leave to resign the office; and on the 14th of November, 1834, an order was accordingly made for his removal.

The official assignee having discovered that the bankrupt had been carrying on business at a wharf under another name, his books and papers at this place were seized; and it appeared from them and subsequent inquiries, that Vaughan, the petitioning creditor, was indebted to the bankrupt, instead of the bankrupt being indebted to him; for in an account contained in these books, he was charged with various sums as received by him from Baldwin, Angle, Philpott, Beeston, and the other persons who had proved fictitious debts under the commission; which agreed, with some trifling variations, with the amount of the several dividends received by himself and the other parties from the bankrupt's estate, upon the several fraudulent proofs which had been made by them for the benefit of Vaughan and the bankrupt. Upon being questioned by the official assignee, Vaughan admitted that no debt was due to him from the bankrupt at the opening of the commission, and that no consideration was given by him for the note of hand for £500, on which he had sued out the commission against the bankrupt, and that the note of hand was in fact made by the bankrupt after he had stopped payment. He also admitted, that the several proofs made by Baldwin and Philpott, and by one H. Davies, were fictitious.

The petition alleged, that Beeston, Angle, Baldwin, and Philpott, and the other parties who had proved fictitious debts, acted in concert and collusion with each other, and in fraud of the *bonâ fide* creditors; that the whole of these debts had been expunged in consequence of the examination of the several parties before the commissioner, or in consequence of the admissions made by them after the facts had been discovered; and that Angle, Beeston, Philpott, and Baldwin had admitted, that they made their several proofs at the instance of Vaughan, or of the bankrupt, and had refunded to the official assignee the dividends received by them upon their fraudulent proofs. An order of court was also obtained against Vaughan, for payment to the official assignee of the



dividends received by him under his fraudulent proofs; but he declared his inability to repay them, and subsequently became bankrupt.

The petition further alleged, that in consequence of these fraudulent proofs, and the collusive choice of assignees consequent thereon, the bankrupt's estate had sustained the loss of the whole of the money fraudulently appropriated by Williams, and the expenses of removing him from the office of assignee; and that the costs, which had been altogether occasioned by the fraud of these parties, had been taxed at the sum of 668*l.* 5*s.* 7*d.*; that Welchman being a poor man, and unable to pay the costs of defending himself against the prosecution for perjury, the petitioners defended him, deeming such a proceeding necessary for the protection of the bankrupt's estate, and the exposure of the fraud; and that a dividend received by H. Davies, on one of the fraudulent proofs, amounting to 40*l.* 16*s.* 6*d.*, had never been refunded, in consequence of the death and insolvency of the party.

The petition prayed, that Baldwin, Angle, Vaughan, Beeston, and Philpott might be ordered to deliver up to the official assignee the several bills of exchange and promissory notes mentioned in their several depositions, and to pay him the sum of 348*l.* 6*s.*, which had been appropriated by Williams to his own use, with interest thereon, and also the sum of 668*l.* 5*s.* 7*d.*, for the costs occasioned to the estate by the several fraudulent proofs, and by the defence of Welchman; and that they might be further ordered to make good to the official assignee the amount of the dividends obtained from the estate, on the fraudulent proofs of Vaughan and Davies.

Of the five persons against whom the order was prayed, the only parties who appeared as respondents on the hearing of the petition, were Baldwin, Beeston, and Philpott.

In answer to the allegations contained in the petition, Beeston swore that he was a total stranger to the persons who were chosen assignees; that he never concerted with Vaughan, Baldwin, or any other persons, to put any fraudulent proof on the proceedings, for the purpose of carrying the choice of assignees; and that, on finding there was some fraud practised by the other parties, he consented to his proof being expunged, and returned the dividends he had received on it. Baldwin made no affidavit in answer to the petition, relying on the objection to the want of jurisdiction in the court to make the order prayed for.

Mr. *J. Russel*, Mr. *Bethell*, and Mr. *Anderdon*, were in support of the petition.

We contend, that Baldwin is answerable for the loss occasioned to the estate by Williams, his coassignee, and that he was privy to the appropriation by Williams of the 348*l.* 6*s.* to his own use. As Baldwin is able to make good to the estate the loss it has sustained by these fraudulent proofs, there is, perhaps, less occasion to press the case against the other parties. [Sir G. Rose. How much of your prayer can we grant you, even if every fact which you allege is true? There is one part of it we have just as much right to grant you, as any thing else you might choose to ask.] A great fraud has been practised under this commission by the parties whom we have brought before the court, in consequence of which the bankrupt's estate has suffered great loss; and we say, therefore, that the court has jurisdiction to grant all the relief we seek. If any individual is accessory to any fraud, either in issuing or prosecuting a commission, the Great Seal has always held, that the par-

ties were amenable to it for their conduct; and this court has now all the jurisdiction in bankruptcy formerly possessed by the Great Seal. [Sir G. ROSE. Has the lord chancellor ever done more, in a matter of this description, than to refer it to the Attorney-General, with an intimation that the case was a fit subject for prosecution by him?] [Sir J. CROSS. The way in which I understand the case is put is this,—that these parties having by fraud got into their hands the estate of the bankrupt, they are bound, after having so got it, to account for it.] We do not come here for vindictive proceedings, but to be indemnified for the loss occasioned to the bankrupt's estate. [ERSKINE, C. J. I understand your mode of reasoning to be this: You say, that as all these parties conspired to prove the fictitious debts, they are all amenable for the damage their fraud has occasioned to the estate. But is there any case, where the court has ordered a creditor to pay the expenses of expunging the proof of a fictitious debt? The 6 Geo. 4, c. 16, s. 60, only gives costs against the party making application to expunge the proof, but there is no provision of the kind against the creditor whose debt is expunged.] [Sir G. ROSE. With respect to the first part of the prayer of your petition, there is no doubt that you are entitled to have the bills delivered up; but in regard to the second part, in which you pray that the several parties may be ordered to pay the sum of 348*l.* 6*s.*, which had been appropriated by Williams, I entertain considerable doubt, whether this court has jurisdiction to make Baldwin pay for the default of Williams. As to the third part of the prayer, for payment of the costs, the court has no jurisdiction over costs, except when it is given by the statute. Then, as to directing the payment of the expenses of defending Welchman on the indictment for perjury, I cannot see how it is possible to contend that we can proceed to that result. In regard to the refunding of the dividends, however, there can be no doubt that we have authority to make an order to that effect.] In *Ex parte Conway*, 13 Ves. 62, Lord ERSKINE charged a solicitor with costs, for having by a false description obtained a docket contrary to Lord LOUGHBOROUGH's general order, which requires the names of two barristers to be inserted in the commission; and he also ordered the costs of a criminal prosecution to be paid by certain other parties, who had been indicted and convicted for a conspiracy in fraudulently suing out the commission. The case is clear, as against the assignees; who, as officers of the court, are answerable for any loss occasioned by their default. In *Wood v. Wood*, 4 Russ. 558, Lord ELDON laid it down, that a solicitor was answerable for a loss under similar circumstances. As against Baldwin, who was privy to all this fraud, we contend, that on the very principle on which the court exercises jurisdiction over assignees, Baldwin must be amenable for the whole of the costs occasioned by the fraud. And as to those parties who do not appear in a fiduciary character, it is the established practice of the Great Seal, that all who bring themselves within its jurisdiction by their own misconduct, are responsible for the costs which the estate sustains by reason of such misconduct. Thus, in *Ex parte Boyle*, Buck, 247, it was determined that the jurisdiction in bankruptcy extends to every person fraudulently engaged in issuing a commission. [ERSKINE, C. J. The question is, whether, upon expunging this proof, the creditor himself was liable for these costs?] The creditor has in this case acted under the jurisdiction of the court, and has affected the estate by his acts. Why, then, should he not be amenable to its jurisdiction?

Where the commissioner refuses to admit a proof, and the creditor comes here for redress, if the court orders the proof, it gives the costs occasioned by such refusal. The same principle applies to this case. The jurisdiction of the Great Seal extends over all those who interfere with the working of a commission, and much more so over those who come in and prove debts under the commission. It was decided in *Ex parte Hilton*, 1 Jac. & W. 467, that if a creditor has proved, it gives the court a jurisdiction quite different from that which it is authorized to exercise, where there has been no proof; and in *Ex parte Cowan*, 3 B. & Ald. 123, (5 E. C. L. R. 239,) it was held by the Court of King's Bench, that the lord chancellor had jurisdiction in bankruptcy over the assignees for all acts done by them in their character of assignees, by virtue or under colour of the commission. [Sir G. ROSE. I do not think that case will much assist you on the present occasion. The assignees in that case had, under the colour of a commission, which was afterwards superseded, wrongfully taken possession of property belonging to a third party; and the lord chancellor ordered that the assignees should account before the master in respect of the property taken. The present case is quite different from that; for the jurisdiction the court exercises over creditors, is not to the same extent as that to which assignees are liable. The court can only claim jurisdiction over a creditor to the extent of his proof. They may, indeed, go as far as this;—they may say, if you do not deliver up the bills you hold as security for your debt, you shall not receive dividends on your proof; or, if it is a fraudulent proof, they can order it to be expunged. But I have yet to learn, that they can make a creditor pay a sum, by way of damages alleged to be occasioned by an improper proof.] [ERSKINE, C. J. If both parties had been before us on a petition to expunge the proof, we could of course have ordered either party to pay costs. But the difficulty is, when the proof has already been expunged by the commissioner, without coming to this court. It seems impossible, therefore, to distinguish this case from the one already cited of *Ex parte Boyle*. Nothing was given there in the way of damages, but merely the costs incidental to taking out a fraudulent commission.] When the court orders costs against a stranger to the commission, it is on the ground of contempt, for improperly interfering with the proceedings of the court. But there does not seem to be any reasonable distinction between the case of an assignee or solicitor committing a fraud, and that of a stranger committing a fraud. To show that the court has jurisdiction over strangers, to compel them to do an act which is essential for working the commission, the case of *Ex parte Lund*, 6 Ves. 781, may be cited; where two witnesses, who had been summoned by the commissioners to prove the act of bankruptcy, having disobeyed the summons, Lord ELDON made a peremptory order for their attendance. But though it may be admitted, that this court has no power of bringing before it individuals who are not already before it, still, when once an individual has submitted to the jurisdiction, it has the same power as the Court of Chancery, and ought not to let the party escape from its jurisdiction, without doing substantial justice. In the present case, certain individuals have come in under the commission to take the benefit arising from the proofs. They are *in Curiâ*—they are not strangers—they have done acts within this very court. The estate under the administration of this court has been damnified by its curators, the assignees, and by other persons acting in league with them. There being no

remedy for this injury in a Court of Law, this court is bound to exercise its authority over these wrongdoers, for the sake of preventing injustice being done to various persons whose rights are submitted to its jurisdiction. Lord ELDON on such occasions repeatedly said, "if there is no precedent, I will make one." [ERSKINE, C. J. The difficulty in making these parties jointly liable for their wrongful acts is, that there seems to be no conspiracy to put any one fictitious debt on the proceedings; but the charge against them is, that they individually conspired with Vaughan, each to prove his own fictitious debt. If you could show, that any two or more persons conspired to put any one debt in particular on the proceedings, the difficulty would be removed; for then the costs would be incidental to the proof.] The case has a civil, as well as a criminal aspect. There is no need to introduce such allegations in this petition, as would be necessary in an indictment for a conspiracy, nor to prove the facts alleged with the same precision as before a jury. This is a case of civil fraud; and in order to show the common *unimius* between the parties, the court will not, on the present occasion, require such strict evidence as on the trial of an indictment. Each party here acts by a common agent, Mr. Vaughan; and one common purpose was to be answered. After the proofs are admitted, each party is subservient to his directions as to the choice of assignees, when they all concur in electing one, who, like themselves, had no interest in the bankrupt's estate. This is sufficient evidence for a court of civil jurisdiction, to infer concert and combination between these individuals. The intent must be presumed, from the concurrence of all the parties in one common act. There can be no doubt that the bankrupt's assignees are entitled to the property in the bills, which have been proved by the respondents, and are now in their hands. The bills were exhibited before the commissioner on the proofs made by Baldwin, Beeston, and Philpott; they were put into the hands of Vaughan by the bankrupt, after the bankruptcy, and were delivered by him to the parties, who proved them for a fraudulent purpose. Of these bills there are two classes,—some, which were drawn by the bankrupt, and which he had in his hands at the time of his bankruptcy,—and others, which were manufactured by him after his bankruptcy. [ERSKINE, C. J. The first class of bills, I presume, you apply to have delivered up, on the ground of property,—the others, for the purpose of being cancelled and destroyed.] So much, as to the liability of these parties to make good the sum of £668, the amount of the costs occasioned by their fraudulent proofs.

Next, as to the sum of £348, the amount of the loss occasioned by Williams. It must be remembered, that Williams was not a creditor of the bankrupt. He must, therefore, be taken to be the agent or attorney of the respondents; for he had no interest in the bankrupt's estate, and yet is chosen by them to be an assignee, for their own fraudulent purposes. In *Walker v. Symonds*, 3 Swanst. 77, it was decided, that trustees were amenable to the *cestui que trust*, for a breach of trust committed by their cotrustee. The receipt of Williams, therefore, of the £348 must be regarded as the receipt of the other individuals, who nominated him as their agent; for they are all parties to the same fraudulent conduct, and consequently each and every of them is, according to the doctrine in *Walker v. Symonds*, answerable for the consequences of the fraud. The principle of compelling wrongdoers to give indemnification to the estate, is also recognised in the cases of *Ex parte*

*Conway*, 13 Ves. 62; and *Ex parte Cowan*, 3 B. & Ald. 123, (5 E. C. L. R. 239,) already cited.

ERSKINE, C. J.—There appears to me to be great difficulty attending his case. It is, no doubt, a gross and scandalous fraud on the part of Vaughan, in putting these proofs on the proceedings. But the ground of this petition is, that the respondents had combined with Vaughan to put the proofs on the proceedings. If that charge had been clearly made out against them, I should then have thought they would have been all answerable for the immediate consequences of the act, and that the proof of the one must be taken as the proof of all. But the difficulty I feel at present is, that the evidence only goes to show, that Vaughan and the bankrupt had combined to effect the fraudulent object, and that the others made the different proofs, each independently of the other. Then, with respect to the delivery up of the different securities, there is no evidence *when* they were passed by the bankrupt into the hands of Vaughan. The remark I have already made applies to that part of the prayer, as to the refunding of the dividends received by the parties who have since become insolvent. There is no evidence of any conspiracy to put those particular proofs on the proceedings. With respect to the costs of the criminal prosecution, I cannot see on what ground this court can order the parties to pay those costs. And as to the money embezzled by Williams, if Vaughan was implicated with him in this transaction, then an application ought to be made against Vaughan. But I cannot see on what ground an application can be supported against the other parties, who were not aware that Williams would run off with the money. It seems to me that, on the present evidence before the court, there could only be an application against each of these persons individually, for the costs of expunging his own proof. But if the petitioners think they can make out a case of combination against all, so as to obtain a common order against them jointly, the court will have no objection to the petition standing over for this purpose.

Sir G. ROSE.—With respect to the damage occasioned to the estate by the fraudulent proofs on the proceedings, there can be no difficulty as to that part of the case; for every party who puts an improper proof on the proceedings, may be made amenable to the extent of his proof.

Mr. Kelly, and Mr. Keene, who appeared for Beeston, objected to any postponement of the further hearing; and insisted that the petition, as to him, must be dismissed with costs. Beeston is not an assignee; and whatever jurisdiction the court has over assignees, it can have none as against him. It is not suggested in the petition, that Beeston knew any one of these parties besides Vaughan. [Sir J. CROSS. Supposing there was no case of conspiracy, and that Beeston had solely proved a fictitious debt, which had carried the appointment of a fraudulent assignee, who had embezzled part of the bankrupt's estate,—would not he, who had proved for the fraudulent purpose of appointing the assignee, be amenable for the consequences?] We contend, that he would not. But in this case Beeston consented to his proof being expunged, when he was aware of the nature of the transaction, and returned the dividends he had received. He was not the cause of the assignees being appointed; they would have been appointed just the same, if he had not proved; for the amount of his proof did not turn the election of assignees. The petitioners have not even suggested, that Beeston

had the slightest suspicion that the assignees were not honourable men; and he swears, that he was a total stranger to them. He cannot be held amenable for persons over whom he had no control. [Sir J. Cross. It was not till January, 1834, that Beeston ever acknowledged that his proof was wrong, although it had been made as far back as 1831.] [ERSKINE, C. J. Was not the coincidence of your proving a debt which was found to be fictitious, with the proofs of the fictitious debts made by others, a circumstance to afford strong suspicion that Beeston was a party combining with the others, so as to prevent us from dismissing this petition against him with costs?] There ought to have been a separate petition against Beeston, and he ought not to have been connected by this petition with persons, who were perfect strangers to the commission. The petition is bad, on the ground of multifariousness.

Mr. *Temple*, and Mr. *K. Parker*, who appeared for Baldwin, admitted that the whole of his conduct could not be defended. But, as criminal proceedings have been threatened against him, the question is, whether the court will order the petition to stand over for the accommodation of the petitioners, or deal with it on the evidence now offered in support of it; for if the court order it to stand over, that circumstance might prejudice him on his trial, and would no doubt be taken advantage of by the prosecutor, to show that a petition of this nature was pending against him, which had been entertained by the Court of Review. There is no suggestion that he has any of these bills in his possession. The petition, therefore, ought not to be retained, but to be dismissed.

Mr. *Swanston*, for Philpott. The only reason why Philpott suffered his proof to be expunged was, that he preferred a quiet life to litigation. The dividends have been returned, and the bills have been destroyed, as they were not thought to be of any value. There is no distinct allegation in the petition of any particular act committed by him, but only general charges of fraud and conspiracy. The court ought not to encourage a criminal prosecution by these petitioners, in order to give them an opportunity of supporting a better title to what they ask by this petition; for this would be to prejudge the case.

Mr. *J. Russell*, in reply. It has been contended on the other side, that the whole case of the petitioners depends upon the proof of a conspiracy; but this is a total misconception of the case, the respondents being under three distinct liabilities. They had each done injury, and occasioned costs, to the bankrupt's estate; they had each lent themselves and become parties to Vaughan's fraudulent conduct; and there was disclosed a chain of circumstances displaying concert and co-operation, even if the distinct conspiracy was not proved. Baldwin must have discovered the frauds of Vaughan, and has failed in the duty imposed on him in his character of assignee, to counteract those frauds; he is, therefore, responsible for all the loss and damage which the estate has sustained. His removal from the office of assignee will afford him no protection, and he is liable for the amount of the dividends received by Vaughan under his fictitious proof; for, although an order has been obtained against Vaughan for the repayment of the dividends, nothing has been got under that order.

As to the objection raised to the petition on the ground of multifariousness, this should have been taken *in limine*, by way of demurrer to the petition; it is too late to make it, after the hearing has been pro-

ceeded with on the merits; *Ward v. Cooke*, 5 Madd. 123; *Wynne v Callender*, 1 Russ. 293.

ERSKINE, C. J.—The statement in this petition, on which the prayer is founded, is, that Vaughan and the bankrupt, fraudulently colluding with each other, sued out the commission; and that, in fraud of the *bonâ fide* creditors, they procured the present respondents to put fictitious proofs on the proceedings, for the purpose of paying the dividends over to the bankrupt, and carrying the choice of assignees. And the petitioners pray, that the respondents may be ordered to deliver up to the official assignee the several bills on which their proofs were made; and to pay to him the sum of 348*l.* 6*s.*, which had been embezzled by one of the assignees so chosen, as well as the sum of 668*l.* 5*s.* 7*d.*, for the costs which those fraudulent proofs have occasioned the estate, and the amount of the dividends obtained from the estate by the fraudulent proofs of Vaughan and Davis. It has been objected, that the prayer cannot be granted, because the court has no jurisdiction to make such an order. The jurisdiction of this court over the creditors of a bankrupt is not founded on any process which the court issues to bring the parties before it, but by the parties themselves placing themselves within its jurisdiction, by coming in to prove as creditors under the commission. In the present case, all the parties have so done, who are charged on this petition. But it does not follow, that this necessarily vests in the court the same jurisdiction, as would belong to a Court of Law or Equity, which makes use of process to bring parties before it. The circumstance of a creditor having proved a debt under a commission, as I apprehend, merely vests in this court a jurisdiction, as far as the proof is concerned,—that is, in expunging the proof, in restraining the payment of the dividends, or in other matters connected with the proof. But the relief prayed by this petition is more like that sought in an action on the case for consequential damages, occasioned by the proofs of these several parties under the commission, and by the misapplication by Williams of the funds which were under his control. I confess, I cannot see that this court has any jurisdiction to order these respondents to pay the money, which Williams has so misapplied,—an event which was wholly consequential, and not contemplated at the time of their proofs. That should have been made a substantive ground of charge against him, in his character of assignee. As to an order on them to pay the costs of defending Welchman on the indictment for perjury, that is still more out of our jurisdiction. Then, in regard to the delivery up of the different securities on which the proofs were effected, there is nothing in that part of the case. Beeston delivered them to Vaughan, and Vaughan received the dividends on them. The only ground on which they could be ordered to be delivered up would be to prevent any further use of them; but it appears that some of them have been destroyed.

With respect to the repayment by these respondents of the dividends obtained from the estate on the proofs of Vaughan and Davis, it must appear that the respondents combined with these two persons to put on the proceedings the proofs, in respect of which the dividends have been received. Now, I have not been able to discover any evidence of a combination between these parties to put the proofs of Vaughan and Davis on the proceedings, or indeed any other proof besides their own. At present, it appears that the several proofs were contrived by each

separate individual merely, in concert with Vaughan. There is nothing in the case to show, that Beeston knew that Philpott's proof was a fictitious proof, or *vice versâ*. To enable the petitioners to support this claim against the respondents, it must be shown, that each proof is not only that of the single individual whose proof it appears, but that it was effected by the combination of all. This therefore disposes of the whole petition, as far as relates to a joint order.

As to the costs incurred by putting these proofs on the proceedings, I have some doubt, whether the costs of expunging the different proofs ought not to be given against these parties, by ordering each separate creditor to pay the expense of expunging his own proof; especially, as Vaughan was the agent employed by all to put their respective proofs on the proceedings. I confess, at present it strikes me, that we should make an order for payment of these costs; but upon this the court are not quite agreed, one of the judges thinking that more might be done; the court will therefore confer, and decide whether they will make any and what order, or dismiss the petition. I think the circumstances that have been disclosed in this case, are not favourable to any of the respondents. Even Mr. Beeston knew, that he only got possession of the bills subsequent to the commission; and he did not receive them in the usual course of business, which might have formed some extenuation for his conduct; but it was stated at the time, that the object was to enable him to vote for Vaughan as assignee. This is sufficient to show, that it was a colourable transaction, in regard to him. Mr. Beeston, therefore, cannot complain, in the event of the petition being dismissed as against him, that he does not get any costs. The same observation applies to the other respondents, whose conduct has given equal or greater grounds for suspicion, and has caused them to be brought before the court.

Sir J. Cross.—I entirely agree, that this case is of so much importance, and at the same time one of so much complexity, that it requires a deliberate and not a hasty judgment. But in a case of this description, I think, if we do not go beyond the provisions of the act of Parliament from which we derive our authority, it is essential to maintain the jurisdiction of this court, for the sake of doing substantial justice. What are the undisputed facts? It is needless, however, to go into them on the present occasion. But I must say, they present a greater case of iniquity, than was ever before presented to this court. The bankrupt, the petitioning creditor, the assignees, and divers false creditors, in all no less than twelve persons, stand convicted of wilful and corrupt perjury; and the bankrupt's estate has been wasted, in consequence of their fraudulent and wrongful acts. I should certainly pause, therefore, before I could say, that this court has not jurisdiction to redress so great an evil. The illegal acts of the respondents, and the alleged consequences, are not denied; and it is now left for the consideration of the court, whether, after the fraudulent proofs and improper choice of most improper assignees, they should not be compelled to pay the costs arising from their misconduct. The question is, whether the parties here have co-operated to effect their fraudulent object. It appears to me, I own, according to my present impression, that they all combined their separate wicked acts to produce one common end. What that common end or purpose was, appears plain from the conduct of one of the parties concerned, who sends to Scotland for powers of attorney to vote in the



choice of assignees. The public ought to be satisfied, that we do not deny justice, if we can by any possibility do justice.

Sir G. ROSE.—I cannot add any thing to what I said yesterday, when I expressed my opinion, that the court must dismiss this petition, but without costs. It would be lamentable, indeed, at this point of time, to entertain any doubt of the extent of the jurisdiction of this court. I have often had occasion to remark, that, in my opinion, this court has no more jurisdiction in bankruptcy, than what the lord chancellor possessed before the passing of the Bankruptcy Court act; (a) and a reference of particular proceedings to the attention of another tribunal cannot, by any inference, be held to be a denial of justice. What we have to ask ourselves here, is, can we decide on the adverse issue presented to us on these affidavits? The prayer of this petition is, for an order on certain parties to deliver up the bills, on which they have effected improper proofs. If it was merely prayed that the petitioning creditor might be compelled to deliver up the bill on which he had issued a fraudulent fiat, then there would be no question but that the court could make such an order on the ground of contempt. But when it is put as a question of adverse property claimed by the assignees, it is decidedly out of our jurisdiction to make the order prayed for. There can be as little doubt, in regard to the claim for costs incurred by Welchman's defence; which appears, indeed, to have been abandoned at the bar. Then, as to the sum of £348 abstracted by Williams, if this had been put to us as a question of account, and the prayer had been for Baldwin to account for all sums received by himself or his co-assignee, there could have been no objection; for Baldwin is certainly liable to account. But as the claim has been urged as a question of damages, I should like to know, on what principle can this court reach creditors who have chosen a defaulting assignee. If a demand is made against them for *damages*, there are no means of getting at those in the administration of assets in bankruptcy. Assuming the facts to be as they are stated, it certainly appears that gross fraud has been committed; but, at the same time, we must not forget that there are affidavits on each side the question.

The last contested point is the sum of £668, for the costs occasioned to the estate by the proofs put upon the proceedings. But by whom were these costs taxed, and by the order of what court? Where is the jurisdiction of the court to compel the payment of these costs? The case of *Ex parte Conway*, 13 Ves. 62, has been cited in support of this part of the prayer of the petition. But that case forms an exception to the general rule, which regulates the court in the exercise of its jurisdiction, and is not, if properly examined, inconsistent with the practice of the court. Lord ERSKINE made the order in that case, on the ground of contempt. And it really appears to me, that unless the proofs of these parties under the commission can be considered as a contempt of the Great Seal, in the same way as a petitioning creditor commits a contempt by issuing a fraudulent commission, there is no principle on which the court can order the payment of these costs. What has been done before the commissioners? When the objectionable proofs were discovered, the parties were brought before the Subdivision Court, which having ordered the proofs to be expunged, and the dividends repaid, then came the question of costs. Now, if the £668 had been given as

(a) See note (a), post, 495.

costs against these parties, as being concerned in a joint act, then we might, perhaps, have made an order against each on a joint petition. But the proofs being expunged, what does the act of Parliament say? It declares, that the expunging a proof by the Subdivision Court shall be final, unless some matter of law or equity arise. If the claim then is put as damages, how can we deal with the damages? If as costs, the costs must have been occasioned by the particular proof of each party; for there is no mode in which the court can throw the payment of these costs on all the parties jointly. It appears to me, that the best way is, to let this petition take its course, and dismiss it without costs. If the petition were to stand over to allow time for a prosecution, or to submit the papers to the Attorney-General, the court might ultimately be enabled to put the question of costs in a different light; but the right course is to dispose of it in such a way, as will not prejudice either one party or the other. Upon the statement of facts in the affidavits, it was, no doubt, the duty of the assignees not to let public justice sleep over such a state of circumstances. I do not impute blame to the present assignees, who have acted with the very best intentions in very difficult circumstances; but it is much to be regretted; that on discovering the frauds now brought before the court, they had not then applied to it to supersede this commission, as fraudulently issued, with costs against the parties. If the court had known of these circumstances in November, 1834, when application was made to substitute another petitioning creditor's debt, it would then have superseded the commission, with costs against all the parties concerned in issuing it. I am anxious to say no more on the present occasion, after thus giving my reasons why I think we ought to dismiss this petition without costs.

The case stood over for final judgment.

In the interim, an indictment in the King's Bench, which had been preferred against these parties for a conspiracy, was tried at Guildhall, on the 5th July, 1836, before Lord DENMAN, C. J., when Vaughan, Smith, and Angle were found guilty, and Beeston, Philpott, and Baldwin not guilty; but the jury expressed the strongest censure on their conduct as being most irregular.

The case was put into the paper of to-day, (July 20, 1836,) for the purpose of being finally disposed of.

Mr. *J. Russell*, for the petitioners, said, that the sole remaining question was one of costs.

Mr. *Keene*, on behalf of Mr. Beeston, applied to the court for his costs, in the event of the petition being dismissed.

The court thought, that Mr. Beeston's interests would best be consulted by waiving such an application, and not eliciting any further comment.

Petition dismissed, without costs; those of the assignees to be paid out of the estate.

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#### In the matter of POCKLINGTON.—p. 335.

Before the passing of the 5 & 6 Will. 4, c. 29, s. 5, a preliminary order had been obtained under the 6 Geo. 4, c. 16, s. 110, with a view to the distribution of certain unclaimed dividends among the bankrupt's creditors; but no final order had been made for their distribution:

*Held*, that the court had no power, after the passing of the 5 & 6 Will. 4, c. 29, to make such final order.

IN April last, the usual preliminary order was made in this matter, as to certain unclaimed dividends, under the 110th section of the 6 Geo. 4, c. 16, reserving all further directions. Since that order was made, the recent statute of 5 & 6 Will. 4, c. 29, (a) was passed, by the 5th section of which the former provision as to unclaimed dividends is repealed; and by the 6th and 7th sections it is directed, that all unclaimed dividends shall be paid into the Bank of England to the credit of the accountant in bankruptcy, subject to the order of the lord chancellor, the Court of Review, or any commissioner of that court, for the payment thereof of any dividend due to any creditor, and subject also to the order of the lord chancellor for the investment thereof in government securities; and new directions are given as to the disposal of such dividends.

Mr. *Swanston*, on behalf of the assignees, now applied to the court for an order, that the dividends might be distributed among the other creditors, the usual time having elapsed for the creditors, on whose debts the dividends were payable, to come in and claim them under the commission. [Lord *ERSKINE*, C. J. The first order in this case was not for any distribution of the dividends, but merely for the advertisement of a notice to the creditors; nor is any power even given by the new act to the lord chancellor, to distribute the dividends among the other creditors.] The 6th section directs, that all unclaimed dividends shall be paid into the Bank of England, "subject to the order of the lord chancellor, or of the Court of Review, in bankruptcy, or of any commissioner of the said court, for the payment thereof of any dividend or dividends due to any creditor or creditors." So that it would seem from this enactment, that this court has still the power of ordering the distribution of unclaimed dividends among the other creditors. The words of the 7th section are very singular. It directs, that if any assignee "shall know that there is or are in the hands, or subject to the order and disposition of himself and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of £20, or any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided among the creditors of any bankrupt, amounting to the sum of £20," such assignee shall, within a certain period, either pay the dividends to the creditors entitled to the same, or cause a certificate thereof to be filed in the bankrupts' office; and shall, in like manner, as to any such undivided surplus,—not as in the alternative given in the case of unclaimed dividends, *either pay such surplus to the bankrupt entitled to the same, or* "cause a certificate, stating the full and true amount of such surplus, to be filed in the office of the Secretary of Bankrupts,"—but the assignee is merely required to file the certificate in the bankrupts' office. He is further directed, within one year after filing such certificate, to pay into the Bank of England, in the name of the accountant in bankruptcy, the full amount, not only of the unclaimed dividends, but also "of such undivided surplus as aforesaid;" both of which are directed to form a fund to be applied, not for the benefit of the creditors or the bankrupt, but for other purposes. Now, if these words were to be strictly construed, they take away from the bankrupt all the benefit of his surplus. The court therefore would, no doubt, put a liberal, and not a literal construction on the words of that section, in order to do away with any absurdity, which could never have been contemplated by the legislature, and which

(a) See Append. 4 Deac. & C.

would necessarily follow by too literal a construction of it; and with equal reason, they may put a liberal construction on the words of the 6th section; more especially when the words themselves are susceptible of a liberal construction. [ERSKINE, C. J. We must look to the plain object of the statute; which was to take away all power from this court to distribute the unclaimed dividends among the other creditors, and to transfer them to a particular fund for a particular purpose.] It is not necessary to argue, that this court has the same jurisdiction, as if the act in question had never passed; but it would be better to treat the enactment as a nullity, than to suffer it to work an injustice. The court may deal with it in two ways: by holding, either, that the former jurisdiction still remains,—or, that the legislature did not intend to interfere with pending proceedings. If the words of the statute were capable of only one construction, then it is admitted, that the court could not interfere; but the words are capable certainly of more than one construction. I contend, however, that even a literal construction of the statute is not inconsistent with the order now prayed, although it would certainly more accord with a liberal construction of it. But, taking it either way, we are within the terms of this enactment; which the court is bound so to interpret, as to make it consistent with the justice of the case.

ERSKINE, C. J.—There appears to me to be really no doubt on the question, which has just been submitted to our consideration. The 6 Geo. 4, c. 16, s. 110, for the first time, gave the lord chancellor power to order a distribution of all unclaimed dividends among the other creditors; and the recent statute of the 5 & 6 Will. 4, c. 29, s. 5, repeals that enactment. But then it is said, that the words of the 6th section of the last-mentioned act are so general, that we have still the power to order the unclaimed dividends to be paid to the other creditors. But that would, in effect, be repealing the previous section, which expressly takes away such power, and would be even extending the provision of the 6 Geo. 4, c. 16, s. 110; for it would then confer the power on any *commissioner* to order the distribution of the unclaimed dividends among the other creditors,—a thing which could never have been intended. As to what has been said about the act depriving the bankrupt of his right to the surplus, the court will have to deal with that question when it comes properly before it. All that we have to do at present is, to decide on the disposal of the unclaimed dividends.

Sir J. CROSS.—It appears, that in April last, when the preliminary order was made, this court had power to order the distribution of the unclaimed dividends among the other creditors; but now we are deprived of that power. There is no ground for the present application.

Order refused.

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Ex parte ABBOTT.—In the matter of SYKES.—p. 338.

The court has not power to order a trustee, who refuses to submit to the jurisdiction, to convey an estate to the assignees, which was devised to the trustee for the absolute use of the bankrupt's wife.

THIS was a petition of assignees, praying that a trustee for the bankrupt's wife might be ordered to pay over to them a sum of money, to which she was entitled under a will, and to convey to them a small free-

hold property, to which she was also absolutely entitled; the assignees undertaking to make such provision out of this property, for the support of the wife, as the court might think just. The property in question was altogether of very trifling value, and the bankrupt's estate had proved so unproductive, as scarcely to repay the expenses of working the fiat.

Mr. *Deacon*, in support of the petition, said, it would be very desirable, as the property was so small, that the court would make the order prayed for; to which, as he was instructed, the trustee, as well as the bankrupt's wife, would both consent.

Mr. *Ellis* appeared on the part of the wife, and consented to any order the court might make.

But Mr. , for the trustee, objected to the jurisdiction of the court to make any order binding on the trustee.

The court thought, that the objection was fatal to the petition, and that the only course was to file a short bill in equity against the trustee, to compel him to perform his trust; but on further consideration made the following

Order, that the petition should stand over for six months; and that, on the trustee consenting to sell the freehold property, and pay the proceeds into court, subject to any debts of the testator, or claims of the trustee, and to abide by such order as the court should direct, the trustee should then be at liberty to have his costs out of the proceeds of the sale, with liberty for any of the parties to apply to the court.(a)

(a) It certainly appears a strange inconsistency, that in the case of short bills, the court should order assignees to give them up to a party claiming adversely to the fiat, on the ground that they were not the property of the bankrupt,—and yet should refuse to order a party to give up to the assignees, what is the undisputed property of the bankrupt, upon which the holder claims no lien, and which is not shown to be subject to the lien or claim of any other party. The intent of creating the new jurisdiction in bankruptcy was, according to the preamble of the 1 and 2 W. 4, c. 56, “to the end that the rights, as well of the bankrupts themselves, as of their creditors, might be enforced with as little expense, delay, and uncertainty, as possible.” If the assignees or creditors, therefore, must still have recourse to an action at law, or a suit in equity, to enforce a right, this is not very conformable with the intention thus expressed. But it is said, that the operative sections of the act give the Court of Review no further jurisdiction in bankruptcy, than what the lord chancellor formerly possessed. This construction, however, would be equally contrary to the intent expressed in the preamble; for the rights of the bankrupts themselves, as well as those of their creditors, could not, under the old jurisdiction, be enforced on many occasions, without considerable expense and delay. But let us see what are the words of the section, which define the jurisdiction of the Court of Review. The second section declares, that the judges of that court “shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority, to hear and determine, order and allow, all such matters in bankruptcy, as now usually are, or lawfully may be, brought by petition or otherwise, before the lord chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided; and also to investigate, examine, hear, and determine all such other matters in the jurisdiction of the Court of Bankruptcy, as are by this act, or may be by the said rules and regulations, assigned and referred to the said Court of Review.” Now, it seems plain, from the words of this section, coupled with the words of the preamble, that *some more power* was intended to be given to the Court of Review, in administering the estates of bankrupts, and determining the questions touching the same, than what the lord chancellor had previously possessed; for the power and jurisdiction of the lord chancellor are *superadded* to the authority given to the court by the previous part of the section, which declares that the court “shall have superintendence and control in all matters of bankruptcy.” The only question is, therefore, whether a disputed claim to property in the right of the bankrupt is, or is not, a matter of bankruptcy. But the section still further says, that the Court of Review may also investigate all such other matters within its jurisdiction, as might be, by its own rules and regulations, assigned and referred to the court; which, it must be admitted, is rather an ambiguous, as well as unnecessary provision; for, if the court may, by its own rules and regulations,

**Ex parte THOMAS DIGBY and JOSEPH JONES.**—In the matter of **GEORGE BLENKIN**:

and

**Ex parte JOHN BUCKTON.**—In the matter of **GEORGE BLENKIN** and **WILLIAM SHACKLETON.**—p. 341.

A separate fiat impounded to give effect to a subsequent joint fiat, with a special order as to the transfer of proofs, and the continuance of the assignees under the separate fiat.

An arrangement made by A. B., with C. D., to give him a moiety of the profits in the business, instead of a previous salary, for his services, constitutes him a partner.

THESE were two petitions which came on together; one being presented by the assignees under a separate fiat, to annul a joint fiat; and the other being presented by the assignee under a joint fiat, to supersede the separate one. The separate fiat had issued previously to the joint one. The question was, whether Shackleton was a partner with Blenkin. It appeared, that the business was carried on in the sole name of George Blenkin, and that Shackleton had been retained by him as a clerk, or agent, at a salary of £100 a year; but that afterwards, by a new arrangement between the parties, Shackleton was to have a moiety of the profits of the business, as a compensation for his services. There was, however, no agreement in writing constituting him a partner, nor any entry in the books of the business, from which that circumstance could be implied: and it did not appear that he brought any capital into the concern, or had any interest in the stock in trade, which was purchased with the separate money of Blenkin; and while the alleged partnership was going on, Shackleton carried on a separate trade on his own account, as a dealer in hops. There was contradictory evidence with respect to Shackleton's own declarations on the subject; he sometimes said, he was a *partner* in the business, and at other times, that he was only an *agent* of Blenkin. But it appeared, that subsequent to the new arrangement made with him, by Blenkin giving him a share in the profits of the business, he acted as a referee in a matter of controversy between Blenkin and a customer of the house, and received a fee from Blenkin for so acting.

Mr. *Swanston*, and Mr. *Mylne*, appeared in support of the petition to annul the joint fiat. It has been often held, that a share in the profits of a business, given as a mere compensation for services, does not constitute a partnership, where the party is not to bear any share of the loss. The case on the other side amounts to a constructive partnership

refer to itself any matter, it would certainly seem to follow, that it might "also investigate, examine, hear, and determine," such matter. The main object of the act, however, the saving of expense and delay, would be in a great measure defeated, if nothing was given to the court but the old jurisdiction before the lord chancellor, which, Lord Eldon frequently lamented, did not enable him to decide the rights of parties, without the aid of a Court of Law, or a bill in equity; and it was, no doubt, in consequence of an inconvenience which had been so often felt, that the first section of the act expressly declares, that the Court of Review "shall be and constitute a Court of Law as well as a Court of Equity." If it should still be thought, that the words of the act are too loose, and too obscure, to confer on the court a greater jurisdiction than what belonged previously to the lord chancellor, and that whatever the intentions of the legislature may have been in this respect, *quod volu t non dixit*.—it would seem very desirable that a declaratory act should be passed, to enlarge and explain the jurisdiction of the Court of Review in bankruptcy; more especially, when there has been some talk lately in the senate, of giving this court a jurisdiction in matters quite foreign to the purpose of its original construction.

only, and that these two persons, by their dealings, were rendered jointly liable to third persons. But there is a great distinction between a partnership giving a joint interest in the property, and one that merely renders the parties liable to third persons. Thus, in *Smith v. Watson*, 2 B. and C. 401, (9 E. C. L. R. 122,) it was held, that an agreement between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should even bear a proportion of the losses, did not vest in B. any share in the property so purchased, or in the proceeds of it, although it might render him liable as a partner to third persons. In the present case, we have the legal fiat, and are entitled to maintain it, if the court are satisfied that there was no joint estate. If there was any partnership between these parties, it was a dormant partnership; and therefore Shackleton, the dormant partner, could have no property in the stock in trade; for it would be in the order and disposition of the ostensible trader, Blenkin; notwithstanding all the creditors of this dormant partnership would have a right to prove their debts, *pari passu*, with the other creditors of Blenkin; *Ex parte Chuck*, Mont. 364, 457. It is admitted, that the court will sometimes, in the exercise of its equitable jurisdiction, impound a separate fiat, for the purpose of giving effect to a subsequent joint one, where it is more convenient that the bankrupt's effects should be administered under a joint fiat. But in these cases, the court must be satisfied that the joint fiat is legally issued, and on a good foundation; for if a considerable time is suffered to elapse before the joint fiat is issued, or if there are not any joint effects, in either of such cases, the joint fiat will be superseded, and the separate one preferred; *Ex parte Hamper*, 17 Ves. 403; S. C. nom. *Ex parte Rowlandson*, 1 Rose, 89. Now, in the present case, whatever the court may think as to the question of the partnership, it is quite clear, that there is no joint estate; and, that being so, the court will decide in favour of the legal fiat.

Sir G. ROSE.—There is no legal right, as to the maintaining of one fiat, or the other. In determining which shall continue in operation, the court proceeds on the principle of the equitable distribution of the property among the joint and separate creditors. The case cited of *Ex parte Hamper*, is distinguishable from the present; for there there were two separate commissions. If, in this case, there had been two separate commissions, then the court might have acted according to the prayer of the petition, and have superseded the joint fiat; because all the creditors of these two parties might, in that case, have proved either under one fiat, or the other. But here there is an affidavit, that the effects could be more conveniently administered under the joint fiat, than under the separate one; and it does not appear, that either of the bankrupts will be injured by the joint fiat going on, or that any of the creditors will be injured. As long as we are pressed by the joint creditors to continue a joint fiat in operation, on the ground that there is a partnership, and partnership property, we cannot supersede the joint fiat to give a separate one. Whether there is a joint property or no, is entirely a question for a jury.

ERSKINE, C. J.—According to the facts, as stated in support of this petition, it appears to me, that there was a partnership between these two bankrupts; for Shackleton, who had at first a yearly salary of £100, was afterwards given a moiety of the profits of the business.

There can be no doubt, that this arrangement constituted a partnership, as to their liabilities to third persons. The joint fiat, therefore, is good in law. In the case of *Ex parte Hamper*, there were two separate commissions; and Lord ELDON thought, that the most convenient course there was, to administer the estate under one of them. It is not urged here, that any inconvenience would attend the working of the joint fiat. If the first fiat is a legal one, there can be no injury to any parties in the working of the joint fiat.

Mr. *Swanston*. Here there is ground laid before the court for upholding the separate fiat, and for annulling the joint one. The object of the jurisdiction given to this court was, not to drive parties to another tribunal, and compel them to go before a jury. The petitioners are, therefore, entitled to a decision of this court, as to the fact—is there, or is there not, joint property? If the court think, that there is not sufficient evidence of the negative of this fact, all that we ask is, that there may be a *vivâ voce* examination of the parties who have made affidavits in the matter of this petition, the better to satisfy the court as to the truth of that fact. There is no case in which a joint commission has been supported, where there has been no joint property.

ERSKINE, C. J., suggested an order, superseding the joint fiat as to Blenkin, but giving the assignees under that fiat the power of administering the joint estate.

Mr. *Ching*, and Mr. *J. Russell*, for the assignees under the joint fiat. If the court supersede the joint fiat as to Blenkin, the assignees under that fiat would then have no title to sue at law, as assignees of the joint estate of the two bankrupts; for any defendant in an action brought by them, might plead in abatement, that he contracted the debt with both the bankrupts jointly, and not merely with one. The order of the court cannot bind third persons, who are strangers to the fiat, such as parties who have contracted joint debts with both the bankrupts. The proper course will be, to dismiss this petition, if the court is satisfied that Shackleton was ostensibly a partner.

Mr. *Duckworth* appeared for Blenkin.

Mr. *Ellis*, for Shackleton.

ERSKINE, C. J.—I have still no doubt, that the effect of the arrangement between Blenkin and Shackleton constituted a partnership between them, as to third persons. If the court were to leave the fiat against Blenkin in full operation, it would occasion the expense of working two fiats, when the property would be more conveniently and more economically administered under one,—more especially as a doubt is raised, whether Shackleton had any property. But all difficulty will be got rid of, by permitting the assignees under the separate fiat to have the management of the separate estate. In the case of *Ex parte Hamper*, Lord ELDON did not wish to keep up both a separate and a joint fiat.

Sir J. CROSS concurred.

Sir G. ROSE.—If in this case there had been two separate fiats, the court would, as Lord ELDON did upon the occasion referred to, have refused to supersede both those separate fiats. It seems here, that at all events it was a doubtful question, whether there was a dormant partnership or not; and it is impossible to deny, that where the question of partnership, or no partnership, has been involved in doubt, Lord ELDON has never superseded a joint commission in favour of a separate one, without sending the disputed fact of the partnership to be determined



by a jury. It is, no doubt, proper that the party, who asserts there is joint property, should prove that fact. But I never knew, in the course of my experience, that, under a joint commission, the mere absence of joint property was held to be a reason for superseding it. If this fiat, however, is to be disposed of on the simple question, whether there is joint property, or not, I must say, that in this case it appears to me, there was joint property. It is the duty of the court to see how far the rights of all the creditors may be preserved; and the way in which the court has always acted on these occasions is, to get the separate fiat out of the way of interfering with the joint fiat, or impeding the administration of the joint assets for the general benefit of the joint creditors. His honour then suggested the following order, which was finally adopted by the court.

Order, that the separate fiat should be impounded in the registrar's office, with liberty for the assignees, under that fiat, to apply to the court for its production for all necessary purposes; that the several proofs, and other proceedings, had and taken under the separate fiat, should be transferred to the joint fiat, without prejudice to their validity or invalidity; that the assignees under the separate fiat should continue to act in respect of the separate estate of Blenkin, and that his separate creditors might choose other assignees, as occasion might require; that the commissioners under the joint fiat might hold a meeting to take the surrender of William Shackleton under such fiat, as well as his last examination, and should enter on the proceedings the reason which prevented him from surrendering and finishing his examination, within the time before appointed for that purpose; and that the creditors, who should then be present, might interrogate and examine the bankrupt Shackleton, touching the disclosure and discovery of the estate and effects; that the costs incurred by the petitioner, to supersede the separate fiat, should be paid by the petitioner in that petition named, and that the expenses of prosecuting the joint fiat, except as to all matters which should relate exclusively to Blenkin's separate estate, should be also paid by such petitioner; with liberty for him to retain the several costs and expenses out of the joint estate, or the separate estate of Shackleton, as the commissioners under the joint fiat should think fit; and that the assignees under each fiat should bear their respective costs of the petition to supersede the joint fiat, out of the respective separate and joint estates, but that the costs of Blenkin and Shackleton, occasioned by such petition, should be paid out of the separate estate of Blenkin.

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Ex parte HALL.—In the matter of HALL.—p. 348.

Although a fiat is annulled, on the ground of its being taken out fraudulently and maliciously, yet the court will not recommend the lord chancellor to assign the bond, without a previous inquiry as to the damage the party has sustained from the fiat; and the proper course to adopt in the prosecution of such inquiry seems to be, to refer it to one of the officers of the court, to ascertain and report the amount of such damage.

THIS was a petition by the bankrupt, praying, that the bond given by the petitioning creditor might be assigned to him, on the ground that the

petitioning creditor had issued the fiat without any just cause, and well knowing that the bankrupt was not legally indebted to him. The circumstances of the case came before the court on the 30th July last, when an order was made to annul the fiat, with costs. (a)

Mr. *Swanston*, and Mr. *Dixon*, were in support of the petition.

ERSKINE, C. J.—The object of the statute, (b) in enabling the court to assign the bond, is, to give the party injured the damages he has sustained by the issuing of the commission. Now, as the assignment of the bond is conclusive on the subject of damages, the question is, whether there should not be a previous inquiry as to the real damages sustained. For the object is, not so much what one party shall pay by way of punishment, as what compensation the other party shall receive for the damages he has sustained.

Mr. *Swanston*. The inquiry as to damages would be productive of delay; nor has the court ever instituted such a previous inquiry. And though the court is not to consider the assignment of the bond in the light of a penal visitation, yet if it is satisfied that the fiat in this case was issued wilfully and maliciously, the court is bound to assign the bond. The reason why this mode of proceeding has been so seldom adopted is, that the party, against whom the commission has been taken out, would have more than adequate damages. But no one can say, under the circumstances of this case, that £200 is too great a sum to be awarded to the bankrupt, as a compensation for the injury inflicted on him by the party, who fraudulently issued the fiat which the court has annulled. The only defence of the petitioning creditor in this case is, not that the damages were excessive, or that there are extenuating circumstances, but that he was wrongly advised by an unprincipled professional man.

Sir J. CROSS.—It seems to have been forgotten, that this is not the old jurisdiction in bankruptcy, but a new Court of Law and Equity, established for the purpose, as the act of Parliament, 1 & 2 Will. 4, c. 56, s. 1, expresses it, “that the rights as well of the bankrupts themselves, as of their creditors, may be enforced with as little expense, delay, and uncertainty as possible.” The question is, whether there is now any necessity for assigning the bond, and whether this court is not, *proprio vigore*, competent to award the party damages, without any such proceeding. The 13th section of the 6 Geo. 4, c. 16, declares, that if the petitioning creditor’s debt “shall not be really due, or if, after such commission taken out, it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, and it shall also appear that such commission was taken out fraudulently or maliciously, the lord chancellor shall and may, upon petition of the party or parties against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him or them for the damages by him or them sustained; and, for the better recovery thereof, may assign such bond to the party or parties so petitioning.” It was, therefore, for the better recovery of the damages awarded by the lord chancellor, that power was given to him to assign the bond; as the party might perhaps have had no other remedy for enforcing the payment of those damages.

ERSKINE, C. J.—I take it that the lord chancellor could, under the circumstances of this case, have made an order for the payment of ”

(a) See ante, p. 426.

(b) See 6 Geo. 4, c. 16, s. 13.

sum of money by the petitioning creditor, as damages, and might have committed him for contempt, if the money was not paid. The assignment of the bond, I consider, was intended as a cumulative and more speedy remedy, to compel the payment of the damages which the lord chancellor had awarded. By the act of Parliament, the lord chancellor is not bound to assign the bond. He may either order a sum of money to be paid for the damages sustained, or assign the bond.

Sir G. ROSE.—There is no doubt as to the propriety of our assigning the bond, if you can satisfy us of the malice of the petitioning creditor. The grounds, on which we are justified in assigning it, are, a compound of the malice of one party, and the damage sustained by the other.

Mr. Swanston. In *Ex parte Gayter*, 1 Atk. 144, where the case was attended with flagrant circumstances, Lord HARDWICKE said, that he would not, by a previous inquiry into the damages sustained by the party against whom the commission was issued, prevent him from seeking an immediate satisfaction by an assignment of the bond. And, in *Ex parte Stevens*, 6 Ves. 2, Lord ELDON ordered the bond to be assigned, without any previous inquiry as to the damages.

ERSKINE, C. J.—The circumstances are not stated in *Ex parte Stevens*, that induced the lord chancellor to assign the bond. It is merely an observation of the reporter that the chancellor did do so, without giving any details of the case. A precedent of a previous inquiry into the amount of the damages has already occurred in this court, in the case of *Ex parte Clarke*, which came before it in 1832, where the court ascertained the damages at £28, and ordered the bond to stand as a security for that sum. Surely, your first step is, to satisfy us that your damage amounts to £200, before we can advise the lord chancellor to assign the bond. Suppose the bankrupt has not sustained damage to the amount of more than £100, I, for one, could never advise the chancellor to assign the bond, to enable the bankrupt to recover £200. The court must, in the present instance, consider itself as placed in the situation of a jury, on the trial of an action on the case. If we are satisfied that the bankrupt has sustained damage to the amount of £200, then, and not till then, can we assign the bond.

Mr. Swanston. The damage itself is no element in the jurisdiction given to the chancellor to assign the bond, but merely the absence of any petitioning creditor's debt, and the fraud or malice of the petitioning creditor.

ERSKINE, C. J.—Then, would not the legislature have directed in positive terms, that whenever a commission is taken out fraudulently or maliciously, the bond shall be assigned? But they have said, that the lord chancellor shall examine into the same, and order satisfaction to be made to the bankrupt for the damages he has sustained. It would be a gross perversion of the act of Parliament, if, with these words before us, we were told, that wherever there was fraud or malice in issuing a fiat, we are bound to assign the bond, without any previous inquiry as to what damage has been sustained by the party against whom it is taken out. Without fraud or malice, the chancellor had no power to assign the bond; but it does not follow, that where there is fraud or malice, he is compelled to assign it.

Mr. Swanston. The words of the 13th section are, that, "where it shall appear that such commission was taken out fraudulently or maliciously, the lord chancellor shall and may, upon petition of the party,

*examine into the same.*" There is nothing, therefore, in the act of Parliament, which directs the lord chancellor to examine into any circumstances but those of fraud or malice, nor is any inquiry directed as to the damages. The court has no right to form an opinion, as to the amount of the damage, if fraud or malice is proved; *Ex parte Lane*, 11 Ves. 415, (a) and *Ex parte Rimene*, 14 Ves. 600. (b) To prevent an improper construction being put upon the present application, the bankrupt does not ask for a greater compensation than for the damage he has experienced; but the proposed inquiry would be so injurious and harassing to him, that it would be hardly worth his while to prosecute it.

ERSKINE, C. J.—The petitioner in this case applies to the court for an assignment of the bond, which has been given to the lord chancellor by the petitioning creditor for the due prosecution of the fiat. The petitioner, who is the party against whom the fiat issued, applied to this court for an order that it might be annulled, on the ground that there was no petitioning creditor's debt, and that the fiat was fraudulently and maliciously issued by the petitioning creditor; as the bankrupt had previously entered into a composition with his creditors for payment of their debts, to which the petitioning creditor was himself a party. The petitioning creditor however alleged, that the bankrupt had subsequently agreed to pay the balance left unpaid by the composition, and had given a promissory note for the amount of this balance, viz. for the sum of £107. Upon the former hearing, the court were satisfied, that the note in question was the note of the bankrupt's father, and not of the bankrupt; and that the petitioning creditor knew that fact, when he issued the fiat. The charge of fraud and malice against him was therefore sufficiently established, so as to authorize the lord chancellor to assign the bond, and to justify this court in recommending that proceeding to the lord chancellor. But then, it is contended by the bankrupt's counsel that wherever fraud or malice is found, on an occasion of this description, the chancellor has no discretion left him, to order a previous inquiry into the amount of the damages, and that he is bound to assign the bond, without any such inquiry. I should be much surprised, I confess, if, by any mode of reasoning, the words of the 13th section of the act of Parliament could bear that construction. For the statute declares in positive language, that he *shall* examine into the matter, and order satisfaction for the damages; but that, for the better recovery of such damages, he *may* assign the bond. It seems to me, therefore, that there is nothing more clear, than that the chancellor may inquire into the damages, and assign the bond, or not, as he thinks proper. And this appears plain, even from the case of *Ex parte Gayter*, 1 Atk. 144, where Lord HARDWICKE said, it was in the breast of the court, either to direct an inquiry before the master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law; and that, after the damages were settled, the court might then, for the better recovery

(a) In this case Lord Eldon said, "If I assign the bond, I not only decide that there was a malicious motive, but I cannot measure the damages; the petitioner must have the £200; he cannot have more or less. I will either direct an issue *quantum damnificatus*, or an inquiry before the master, or let him bring an action, as he chooses."

(b) The observation of Lord Eldon in this case was, that he had some difficulty as to assigning the bond; yet that he would have no objection to direct the bond to stand as a security for the costs, to be ascertained in an issue *quantum damnificatus*. And the order made was, that the bond should stand as a security for £30, the amount of the costs incurred by the bankrupt.

thereof, order the bond to be assigned. In *Smith v. Broomhead*, 7 T. R. 300, also, Lord KENYON recognised the doctrine laid down by Lord HARDWICKE, and said, that the lord chancellor might either assess the damages, or enable the bankrupt to recover the whole penalty of the bond. And in *Smithey v. Edmonson*, 3 East, 22, which was an action by an assignee of the bond, after the lord chancellor had made an order for a sum to be refunded by the petitioning creditor, Lord ELLENBOROUGH thus expresses himself: "It is clear, that the lord chancellor may, *proprio vigore*, ascertain the amount of the damages sustained by the party grieved, without any suit instituted for the purpose, or the intervention of a jury; and for the recovery thereof, he is authorized to assign the bond of the petitioning creditor; the reason of which was, that the order of the lord chancellor upon the party to pay the damage so ascertained would only attach upon his person, and not upon his estate; and therefore, in case of his contumacy, it was thought expedient to have effectual means of enforcing such order, by giving a remedy at law, which would bind his property." It seems to me, that all the authorities coincide in the interpretation of the meaning of the legislature, namely, that the lord chancellor may either assign the bond, or may order a less sum than the amount of the bond to be paid, and direct the bond to stand as a security for the amount of the lesser sum. Now, in the present case, as there are no facts brought before us to satisfy me, that the bankrupt has sustained damage to the full amount of the penalty of the bond, I could not concur in any recommendation to the lord chancellor to assign the bond, for the purpose of enabling the bankrupt to recover the whole of the £200. The ascertaining of the damage sustained by the bankrupt may be effected by various modes, and the court will adopt the least expensive one, by referring the inquiry to the deputy registrar; and when he has made his report, the court can then make a proper order, after it has thus ascertained the damage.

Sir J. CROSS.—The only question now before the court is, whether we *must* assign the bond, if fraud or malice be proved against the petitioning creditor. In the argument in support of the petition, the counsel, as it seems to me, has paid more regard to cases, than to the act of Parliament by which this court is constituted. I look to the act of Parliament, 1 & 2 Will. 4, c. 56, under which this court derives its authority, and which declares that it "shall be and constitute a Court of Law and Equity,"—"to the end," as is stated in the preamble, "that the rights, as well of the bankrupts themselves, as of their creditors, may be enforced with as little expense, delay, and uncertainty as possible." Has the bankrupt, then, any *right* in this case, within the meaning of the act of Parliament? And is it a question of bankruptcy? My present impression is, that, independently of any jurisdiction in regard to the bond, this court may inquire into any damage which the bankrupt has sustained from the improper conduct of the petitioning creditor, and may award it to him, with as little expense and delay as possible. But the bankrupt prefers, as it seems, another course, relying on the old jurisdiction in bankruptcy, and never attending to the new, and comes to this court, calling on us to assign the bond. But, has the court any power to do this? The bond is given to the lord chancellor. It is said, however, that we can transmit a recommendation to the lord chancellor, to that effect. But this is not one of the judicial functions of the court. We sit here to enforce our own judgments; and we should have no power

to do so, in this instance, if the lord chancellor did not attend to our recommendation. But, supposing the court possessed the power of assigning the bond, we must then refer to the terms of the 13th section of the 6 Geo. 4, c. 16, which gives this power to the lord chancellor. That section declares, that if it shall appear that the commission was taken out fraudulently or maliciously, the lord chancellor may—do what—not assign the bond in the first instance, but *examine* into the matter, and order satisfaction to be made to the bankrupt, for the damages by him sustained; and, *for the better recovery thereof*, may assign the bond. And yet we are now called on, in the first instance, to assign the bond, without any previous inquiry into the damage which the bankrupt has sustained. Are we to disregard the words in the act of Parliament, which direct us to *examine* into the matter, and order satisfaction for the damages? I am clearly of opinion, that what has been contended for to-day, on the part of the petitioner, is not well founded; and that the court is not bound, upon proof of fraud or malice, to assign the bond, without any further inquiry. Then, what is to be done upon this petition? The petitioner ought to have been fully prepared with his case to-day, and to have made it appear to us, what damages he has sustained from the fraud or malice of the petitioning creditor, in issuing the fiat. But, if he has been misled in the matter, and is not prepared now to prove the amount of the damage, he may have an opportunity of laying further evidence before the court at some future hearing. If the parties agree to refer the matter to another court, or another officer, it is not for me to object to their adopting any such course. But, as this is a question of a good deal of nicety, and ought to be a landmark, in future, to the proceedings of this court, I should doubt the propriety of the court referring it to one of its own officers, instead of taking the duty of the investigation on itself.

Sir G. ROSE.—After the able exposition of his honour the chief judge, I should have thought it unnecessary to say any thing further on the matter of this petition, if my abstaining from doing so might not give rise to the supposition that there was some difference of opinion among the members of the court. No man can doubt but that this court has ample jurisdiction to determine the question, as to the assignment, or non-assignment of the bond; the court acting on this occasion, (as it does on questions of supersedeas, and the bankrupt's certificate,) by a recommendation to the lord chancellor, who alone has power to carry the intentions of the court into effect. The vice-chancellor acted in like manner, under the former jurisdiction in bankruptcy; having no power in himself to supersede a commission, or to allow the bankrupt's certificate, but by a recommendation to the lord chancellor to that effect. If this court, therefore, should think that the bond ought to be assigned, there can be no question that the proper mode of proceeding is to transmit a recommendation for that purpose to the chancellor. Whether the proper mode of examining into the amount of the damages sustained by the bankrupt, is an inquiry before the court itself, or before one of its officers, is not now necessary to be determined; nor does the court lay down any specific rule on the subject. As the petitioner is not now prepared with his evidence of the damage he has sustained, it seems to be the more convenient course to refer the inquiry to the deputy registrar, who will make his report on the subject, and the ultimate result will be the act of the court itself.

The order was, that, the bankrupt undertaking to comply with the order of the court, it should be referred to Mr. Gregg, the deputy registrar, to ascertain what damages the petitioner had sustained from the issuing of the fiat against him, and to report accordingly; that the bond should stand as a security for the amount of such damages; and that the question of costs should be reversed.

Ex parte RICHARD EDWARD VANHEYTHUSEN.—In the matter of GEORGE PHIBBS.—p. 360.

A contingent annuity, granted by the bankrupt to C. D., in case she survived A. B., may be proved before the happening of the contingency, under the 54th section of the 6 Geo. 4, c. 16. But if such an annuity is not proveable under the 54th section, it is not proveable under the 56th section.

THIS was the petition of a trustee, praying, on the part of his *cestui que trust*, to prove the value of an annuity, under the following circumstances. The bankrupt's father, who was a wine merchant, in November, 1830, agreed to sell to him all his stock in trade, and other effects connected with his business, and certain leasehold messuages and premises in Bond Street, where the trade was carried on, and also the good-will of the trade, for an annuity of £400, to be paid to the father, and for one of £200 a year to be paid to his mother, in case she survived his father. In pursuance of this agreement, by a certain indenture bearing date the 18th November, 1830, and made between William Henry Phibbs, the bankrupt's father, of the first part; the bankrupt, of the second part; the said William Henry Phibbs, and Jane his wife, of the third part; and the petitioner, of the fourth part. It was witnessed, that for the consideration therein mentioned, the bankrupt bargained, sold, and confirmed unto the said William Henry Phibbs, and his assigns, for and during his natural life, an annuity of £400, and unto the said Jane Phibbs, in the event of her surviving the said William Henry Phibbs, and her assigns, for and during the then remainder of her natural life, an annuity of £200: To hold the said annuity of £400 unto the said William Henry Phibbs, and his assigns, for and during the then remainder of the term of his natural life; and so hold (in the event of the said Jane Phibbs surviving the said William Henry Phibbs) the said annuity of £200 unto the said Jane Phibbs and her assigns, for and during the then remainder of the term of her natural life, to be paid and payable to her and her assigns, at the times and in manner therein mentioned. The petitioner was then appointed a trustee of the leasehold premises, stock in trade, and other effects thereby assigned, for the purpose of securing the payment of these annuities, in case the said bankrupt should refuse or neglect to pay the same.

The fiat was issued on the 24th August, 1835, when the sum of 441*l.* 16*s.* 7*d.* was due and owing to William Henry Phibbs, for arrears of the annuity of £400.

The petitioner caused a valuation of the annuity of £400 payable to William Henry Phibbs, and of the contingent annuity of £200, payable to Jane Phibbs, in the event of her surviving her husband, to be made by the actuary of the Equitable Assurance Office, for the purpose of

proving the amount against the bankrupt's estate. The value of the annuity of £400, for the life of William Henry Phibbs, was estimated at £1897; and the value of the contingent annuity of £200, payable to Jane Phibbs in the event of her surviving her husband, amounted to the sum of £905.

The petitioner, as the trustee on behalf of Mr. and Mrs. Phibbs, applied to prove for the sum of 441*l.* 16*s.* 7*d.*, the arrears of the annuity, and for the sum of £1897, the estimated value of such annuity for the life of William Henry Phibbs, as well as for the sum of £905, being the estimated value of the contingent annuity of £200, for the life of Jane Phibbs, in the event of her surviving her husband; when the commissioners admitted the proof for £1897 for the value of the annuity for £400, but refused to admit the proof for the sum of £905, for the value of the contingent annuity of £200; on the ground, that the clause in the statute, directing annuities to be valued for the purpose of proof, did not apply to *contingent* annuities.

The petition prayed, that the commissioner might be directed to admit the proof for the sum of £905, the estimated value of the contingent annuity.

Mr. *K. Parker*, in support of the petition. The question in this case is, whether a contingent annuity comes within the meaning of the 54th section of the bankrupt act. That section declares, that "any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there was or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain." If, therefore, the annuity is such as can be valued, the party is entitled to prove for the amount of such value. Now, in the present case, a value has been set on this annuity by a very competent person, namely, by the actuary of the Equitable Assurance Office; but the commissioner says, that the act of Parliament does not authorize the proof of a contingent annuity. The act, however, expressly declares, that "*any annuity creditor*," generally, shall be entitled to prove; without confining the right to any particular class of annuity creditors. But, if the petitioner is not entitled to prove within the terms of the 54th section, he has clearly a right to prove under the 56th section, which enables contingent debts to be proved. The words of that section are, "if any bankrupt shall, before the issuing of such commission, have contracted any debt payable on a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained." In *Ex parte Tindal*, 1 Deac. & C. 291, not only was it determined, that a debt payable on a contingency could be proved, but that a contingent debt, contracted long before the 6 Geo. 4, c. 16, came into operation, could also be proved; giving the act of Parliament therefore a retrospective effect.

Mr. *Bird*, for the assignees, took the following preliminary objections to the petition. 1. That the petitioner assumed a character which did not belong to him, viz. that of a trustee entitled to receive this annuity, although there was no covenant on the part of the bankrupt to pay the annuity to the petitioner. 2. That if he was a legally constituted trus-



tee, he could not petition to prove, without the *cestui que trust* joining in the petition. 3. That there was no evidence that the *cestui que trust* was alive at the time of presenting the petition.

The court overruled the objections, saying, that the *cestui que trust* must be taken to be alive, in the absence of any evidence to the contrary; and that the court would give leave to the trustee to amend the petition, by adding the *cestui que trust* as a petitioner.

Mr. Bird then addressed himself to the general point. The 54th section can only apply to annuities in possession, and not to those in expectancy; for it says, that the value of an annuity may be proved, "whether there were, or not, any arrears of such annuity due at the bankruptcy." Now, there can be no arrears due, of an annuity payable on a contingency; and therefore the intention of the act is, evidently, to limit the right of proof to a party entitled to an annuity in possession. The section also goes on to direct the commissioners, in ascertaining the value of the annuity, to have regard to the original price given for it, "deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time, since the grant thereof to the date of the commission." Now, the only annuity which can be subject to any diminution in value, is one in possession. [ERSKINE, C. J. Those words are introduced into the act, not for the purpose of qualifying the right of proof to any particular species of annuity, but for the purpose of reducing the amount of the proof, in case the annuity has been diminished in value by the lapse of time.] Can the petitioner, however, in any way be considered as a creditor of the bankrupt? The act says, that "any annuity creditor" shall be entitled to prove. Can he therefore be held to be a creditor, when the annuity is not in possession? There must be a debt existing at the date of the fiat to entitle a party to prove; *Yallop v. Ebers*, 1 B. & Adol. 698, (20 E. C. L. R. 477.) So, in *Ex parte Marshall*, 3 Deac. & C. 120, the chief judge, in commenting on the terms of the 56th section, says, "it is clear, that that section means the debt contracted by the bankrupt to be a debt existing antecedent to the commission."

Mr. K. Parker, in reply. The circumstances of this case plainly show, that the sum for which the petitioner seeks to prove, was in the nature of a debt contracted.

ERSKINE, C. J.—Before the passing of the 6 Geo. 4, c. 16, the courts, in deciding the rights of annuity creditors under a deed of covenant, took a distinction between an annuity where arrears were due, and one where no arrears were due, at the time of the bankruptcy; in the first case holding, that there was a proveable debt; and in the last, that there was no legal debt existing which was capable of proof. The 54th section of the 6 Geo. 4, c. 16, was intended to provide for the proof of the value of an annuity, although it might not be a legal debt. And the question is, whether we are to look at the word "creditor," occurring in that section, in the same way as in the other clauses of the act of Parliament; and whether we should not construe the 54th section too closely, by holding, that it did not include annuities, where the annuitant was not strictly a creditor at the time of the bankruptcy. With respect to the 56th section, I think, if a party is not entitled to prove as an annuity creditor under the 54th section of the act, he cannot prove in respect of an annuity under the 56th section. As at present advised, the court entertains no doubt, that the petitioner, with the concurrence of the

*cestui que trust*, is entitled to prove for the value of this annuity. But as the point is new, we will look into it before the order is drawn up.

Sir J. CROSS concurred.

Sir G. ROSE.—It seems to me, that the term “annuity creditor,” in the 54th section, is tantamount to the expression of “debt contracted,” which occurs in the other sections of the act of Parliament.

It does not appear, that the court found, subsequently, any reason to alter their opinion.

The order was, that the petitioner be admitted a creditor, in respect of the contingent annuity, for such amount of proof, as to the commissioner should seem right; but that any dividends in respect of such proof should be retained, subject to further order, upon the application of any party interested in such dividends.

### Ex parte GOMM.—In the matter of GOMM.—p. 366.

The hearing of a petition referred for *scandal* will be stayed; *aliter*, of a petition referred merely for *impertinence*. But if certain affidavits only are referred for scandal, and the party can proceed without them, the hearing may proceed.

WHEN this petition was called on, which was to annul the fiat, on the ground of an insufficient petitioning creditor's debt and act of bankruptcy, it appeared, that five affidavits in support of the petition had been previously referred for scandal; and the question was, whether the petition should be heard pending the reference for scandal.

Sir G. ROSE.—When a petition is referred merely for *impertinence*, the court will not stop the hearing of it; but where it is referred for *scandal*, the hearing is always stayed. And the same rule applies to the affidavits in support of it, unless the petitioner can go on without them.

ERSKINE, C. J., then put it to Mr. *Swanston*, who appeared in support of the petition, whether he could go on without using the affidavits in question.

Mr. *Swanston* said, that he could substantiate the petitioner's case, independently of those affidavits.

The hearing of the petition was then proceeded with, and the fiat was eventually ordered to be annulled; but the court would only allow the petitioner the costs of the petition, and one affidavit in support of it.

Mr. *Swanston*, and Mr. *Ayrton*, for the petitioner.

Mr. *Anderdon*, and Mr. *Bethell*, for the petitioning creditor.

### Ex parte HOLYLAND.—In the matter of ELLIOTT.—p. 367.

Although the period of six calendar months from the last examination of the bankrupt may have elapsed, without the accounts of the assignees being audited, the commissioners have nevertheless authority to appoint a meeting for that purpose.

THIS was a petition of the assignees, praying that the court would order the commissioners to appoint a meeting for auditing their accounts. It appeared, that the assignees were not ready to have their accounts audited within the period specified by the 6 Geo. 4, c. 16, s. 106, which

directs the commissioners to "appoint a public meeting, not sooner than four calendar months from the issuing of the commission, nor later than six calendar months from the last examination of the bankrupt, whereof, and of the purport whereof, they shall give twenty-one days' notice in the London Gazette, to audit the accounts of the assignees." As a period of more than six calendar months had elapsed since the bankrupt's last examination, the commissioners thought they had not power now to appoint a meeting for the audit, and declined to do so, without the sanction of an order from this court.

ERSKINE, C. J.—Although the statute specifies the period of six calendar months for auditing the accounts of the assignees, yet it is merely directory, and does not prohibit the commissioners from appointing any meeting for that purpose, after the expiration of the six calendar months. Indeed, if that construction was to prevail, the creditors could never have a dividend declared by the order of the commissioners, where the accounts had not been audited within the period specified; for the 107th section says, that "no dividend shall be declared, unless the accounts of the assignees shall have been first so audited as aforesaid." There is no necessity for an order on the subject.

The court accordingly directed, that it should be intimated to the commissioners, that they could appoint an audit, without the order of this court.

**Ex parte ERASMUS PHILIPPS.—In the matter of JOHN PHILIPPS.—p. 368.**

An agreement of the assignee to allow the solicitor interest on the amount of his bill of costs, does not bind the bankrupt's estate; nor does a resolution of creditors, at a meeting held for this purpose, bind those who are absent.

THIS was a petition of the bankrupt's heir at law, praying that a sum of 498*l.* 18*s.* 11*d.*, which formed part of the bankrupt's surplus, might be paid over to the petitioner, under the following circumstances:

The commission issued in 1807, when a suit in Chancery was pending between the bankrupt and his partner; and shortly after the bankruptcy, two other suits in equity were commenced against the assignee. These suits were proceeded with for several years; and on the 17th October, 1818, the solicitor delivered to the assignee his bills of costs in such suits, and also his bill for sundry matters connected with the estate of the bankrupt, amounting in the whole to 749*l.* 17*s.* 3*d.*; which the assignee acknowledged the receipt of by a letter of the same date, promising to pay the amount, with interest from the time of the delivery, as soon as he got possession of effects sufficient for that purpose. In August, 1820, a meeting of creditors was held, pursuant to notice in the Gazette, when they came to the following resolution:

"We consent and agree, and hereby authorize and empower the assignee to allow and pay, out of the money to be received from the estate and effects of the bankrupt, to Mr. Potts, the solicitor to the commission, interest on his bills of costs, for business done for the bankrupt's estate and effects, from the time of the delivery thereof respectively. And we do also further consent and agree, and hereby authorize the said assignee to retain, to and for his own use, interest on such sum or

sums of money, as he has already paid, or shall hereafter pay, out of his own moneys, to the solicitor to the said commission, on account of his bills of costs, for business done on account of the estate of the said bankrupt, or to the accountant, or other person or persons to be employed by him, or the solicitor to the said commission, in making out, arranging, and passing the said partnership accounts, or relating thereto, from the respective times of paying the same."

This acknowledgment was merely signed by Charles Dignum, the assignee, and another creditor, whose debts did not constitute a majority, in value, of the debts proved.

Four other bills of costs, signed in the proper mode, were delivered to the assignee on the 4th November, 1820, the 8th November, 1821, the 17th October, 1822, and the 3d December, 1824; and another was delivered to his executor after his decease, viz., on the 28th September, 1827. There was another bill, also, which had never been delivered. On the 10th April, 1823, Mr. Potts's house and office were destroyed by fire, when most of the papers in the different suits in equity, and of those connected with the commission, were on that occasion burned, and the remainder damaged; and the copies, which Mr. Potts had retained, of all the bills delivered up to that period, were likewise consumed. In consequence of this calamity, the original bills, which had been delivered to the assignee, were lent by him to Mr. Potts, for the purpose of being re-copied; and the copies so made were re-signed by Mr. Potts, as of the same day and year, as the bills delivered appeared to have been signed. The letter, also, in which the assignee promised to pay interest, having been likewise destroyed, Mr. Potts requested the assignee to write him a similar letter; who accordingly wrote to him as follows:

"I have received your bills of costs on account of Philipps's bankruptcy, the first part of which was delivered 17th October, 1818, the remainder at different periods since, which I promise to pay, with interest, from the time of delivery, when I get possession of money on account of the said Philipps's estate. I am yours, &c.

18th Oct., 1823.

CHARLES DIGNUM."

And on the 3d December, 1824, upon the delivery of other bills by Mr. Potts, and his pressing for some money on account, he received from Mr. Dignum a similar acknowledgment and promise.

The bankrupt was dead; and the commission had been subsequently superseded, on the application of the present petitioner; since which the commissioner had directed the sum of 498*l.* 18*s.* 11*d.* to be retained, to satisfy Mr. Potts's claim for interest on the bills delivered on the 17th October, 1818, subject to an inquiry, whether the assignee had duly contracted to pay such interest, and whether the suits, in respect whereof the costs were incurred, had been properly conducted.

The petitioner complained, that he was deeply aggrieved by such retention; that the sum retained was calculated from the 17th October, 1818, before the bills had been subjected to any taxation; and that the bills were only taxed within the last three months. The petitioner contended, that the contract entered into by the assignee, did not bind the estate belonging to the creditors, and still less the surplus belonging to the bankrupt.

The prayer was, that the said sum of 498*l.* 18*s.* 11*d.* might be paid over to the petitioner, and that Mr. Potts might be ordered to pay the costs of the petition

Mr. *Swanston*, and Mr. *J. Russell*, appeared in support of the petitioner. Mr. *Ching* and Mr. *Bethell*, on behalf of the solicitor. An assignee has power to administer the estate of the bankrupt for the best interest of the *cestui que trusts*, and at the least possible expense; and if he has managed the estate for their advantage, the court will confirm any contract he has made; if it is not beneficial, the court will repudiate it. The mere naked question, whether a solicitor is entitled to interest on his bills of costs, it is admitted, is not, *per se*, sustainable. But the question is, whether, under the circumstances of this case, the assignee was not justified in agreeing to pay interest to the solicitor? When the commission issued in 1807, the bankrupt's estate was liable to various suits pending in the Courts of Chancery and Exchequer; and the result of these suits, which were conducted by Mr. Potts, has been so beneficial to the estate, that all the creditors have been paid in full, and this surplus arises after such payment. In 1818, after a period of eleven years from the issuing of the commission, the solicitor delivers his bill, when the assignee says, I have no funds of my own, nor any assets of the bankrupt; but if the result of the suits is favourable, and any funds are recovered which come to my hands, I will pay interest from the time of the delivery of your bill. All the cases, as to solicitors' bills of costs, involve two points: first, costs already incurred; and, secondly, costs to be incurred. Future costs cannot, it is granted, be the subject of a contract; but costs already incurred may, as in the case of *Williams v. Piggott*, Jacob, 598; where it was held, that a mortgage by a client to his attorney, for costs due and to become due, was a valid security for the costs then due. A solicitor, therefore, has a right to demand his by-gone costs, and is justified in taking security for them. The interest which the solicitor claims, in this case, is not on an untaxed bill, but on one already taxed. If the assignee had paid the amount of this bill, the solicitor would have had the beneficial use of the money. Whenever a contract made by an assignee is for the benefit of the bankrupt's estate it is binding upon the bankrupt, and those who are entitled to the surplus. [Sir G. ROSE. The real point is, certainly, is there a contract binding on the estate? It cannot be on the ground of lien, for there can be no lien of a solicitor on the bankrupt's estate for his bill, after the choice of assignees. As to the agreement of the assignee being sanctioned by the creditors, I take upon myself to say, that even if there had been a meeting of the creditors to determine the point, whether the solicitor should be allowed interest or not, and the meeting had determined that he should, no creditor would be bound but those who were present at the meeting, and actually agreed to allow interest.] In this case, the assignee contracts with the solicitor, that if the solicitor will but go on with the suits, without insisting on the immediate payment of his bill, he shall receive interest on the amount of it. The only mode which the assignee possessed, of recovering the estate and effects of the bankrupt, was by continuing the suits which had been conducted by the solicitor; but he is unable to do so, for want of money to pay the costs; and the solicitor consents to advance these out of his own pocket, in addition to his professional labour. Is not this a contract of a trustee, which, under all the circumstances, is beneficial to the interests of the *cestui que trusts*? Would not a trustee under a will, who borrows money upon interest to prosecute a suit, in which he recovers the property of the testator, be allowed this payment for interest in an account against his

*cestui que trust?* In the present instance, all the property of the bankrupt was locked up in the Court of Exchequer; and it was not till 1834, when the various suits were brought to a termination, that the fund was obtained from out of the Court of Exchequer. It is quite plain, that, but for those suits, the money would never have been recovered. At whose costs were the suits carried on? At those of Mr. Potts. Why did he incur this large expenditure? Because the assignee had contracted to pay him interest on his costs.

In all accounts between a trustee and the *cestui que trust*, the trustee is entitled to all just allowances; and the charge for interest, made in the present instance, can only be considered, under the circumstances, as a just allowance. For, even admitting that the contract was entered into out of a personal consideration to the assignee,—what is the result of it, and the nature of the contract? The benefit of the bankrupt's creditors, the *cestui que trusts*. It is the practice in the Court of Chancery, where a trustee has not the strict power to enter into a contract relating to the estate, and he applies for the sanction of the court to do so, the court refers it to the master, to inquire whether it is for the benefit of the *cestui que trusts*. And even if the trustee, without any such previous reference, had entered into a contract, and the result prove beneficial to the estate, the court will confirm the contract. It must be determined, therefore, upon equitable considerations, whether the charge for interest is a just allowance, or not. The solicitor here could not have been compelled to go on with these different suits, without the payment, at least, of the costs he personally incurred in conducting them. In *Cooke v. Setree*, 1 Ves. & B. 126, Lord ELDON said, it was a fair transaction on the part of an attorney, in the progress of a suit, to say to his client, that his situation was such, that he could not go on without payment of his costs, and that he therefore presented his bill, desiring either payment, or security in part.

Mr. J. Russell referred to the case of *Lord v. Wormleighton*, Jacob, 590, where Lord ELDON said, "I have no doubt that where a solicitor discharges himself, he cannot prevent his client from having the use of the papers; for, when he begins the cause, I apprehend that he engages to continue to act till the end of it."

ERSKINE, C. J.—The circumstances, under which this question arises, would have induced me to assist the respondent, as far as I possibly could; for it appears a hard case, that the solicitor should have been prevailed on to continue the conduct of these suits, through the engagement of the assignee to allow him interest on the amount of his bill of costs, and that he should not be able to avail himself of such agreement, after bringing the suits to a successful issue. The claim seems to be founded on a resolution of the creditors at a meeting held in 1830, when they authorized the assignee to allow interest to the solicitor on his bills of costs; and if those creditors had been justified in binding the others, who were not present at the meeting, this question would not have arisen. In 1823, Mr. Potts's papers having been consumed by fire, he applies to Mr. Dignum, the assignee, for a duplicate of the letter written by the latter to him in 1818, wherein he engaged to pay Mr. Potts interest on his costs. Mr. Dignum complies with his request, and re-engages to pay him interest on his bills of costs from the time of delivery, as soon as he gets possession of money on account of bankrupt's estate. The question we have now to determine is, whether the

estate is bound by this undertaking of Dignum. If the charge for interest had been allowed on the audit of the assignee's accounts, then the bankrupt, or his representative, would have no right to dispute it, as it was a just allowance within the meaning of the act of Parliament.<sup>(a)</sup> The assignee is certainly bound to manage the estate in the best way he can, for the rest of the creditors. But if he thinks that he has not sufficient funds in his hands, to go on with any pending suits relating to the estate, he may either consult the creditors, or come to this court for assistance. It appears, however, that the assignee in this case, with a view of releasing himself from the legal pressure of the solicitor, to whom he was personally liable, undertook to pay him interest, originally, without the previous sanction of any of the creditors. I think the bankrupt's estate is not bound by this undertaking. But it is suggested, that the assignee might have borrowed money on interest, in order to carry on the suits; and that the engagement he has here entered into with the solicitor, is precisely the same in effect. Whether that be so or not, it is unnecessary to inquire; it is sufficient to say, on the present occasion, that there is here no *contract* of that kind between the solicitor and the assignee, nor any thing appearing in the case to show, that the solicitor refused to go on with the suits, unless interest was allowed on his bills of costs. I am therefore of opinion, that the assignee had no power to bind the bankrupt's estate by this agreement, and that any of the creditors might have objected to this item for interest being charged in his accounts. It is, however, a case of great hardship on the solicitor, and I think he ought to retain his costs out of the fund.

Sir J. Cross.—The foundation of this claim for interest on the part of the solicitor, is a document which purports to be a resolution of the creditors, in which it is stated, that they "authorize and empower the assignee to allow and pay, out of the money to be received from the estate and effects of the bankrupt, to Mr. Potts, the solicitor to the commission, interest on his bills of costs, for business done for the bankrupt's estate and effects, from the time of the delivery thereof respectively." Now, who are the parties to this document? Who authorizes and empowers the assignee to allow interest to the solicitor? The document appears to be an authority from the creditors to the assignee; but it is, in fact, only signed by one creditor besides the assignee, and these two debts do not constitute even a majority of the debts proved. The bankrupt is no party to this document; and therefore he, at all events, is not bound by it. What is the result? The creditors receive the whole of their demands, besides interest, on their respective debts; and although they, according to this document, have agreed to allow the solicitor interest on his bills of costs, yet they now, as it appears, dispute their own liability to the solicitor, and try to throw the payment on the only person who was not a party to the contract, namely, the bankrupt. I think, that the solicitor has no lien whatever on the bankrupt's surplus, for interest on his bills of costs; and that the petitioner is entitled to have the sum in question paid over to him, without any deduction in respect of such interest.

Sir G. Rose concurred.

The order was, that the sum should be paid over to the petitioner; subject to the payment of the costs of the solicitor, as between solicitor and client.

(a) See 6 Geo. 4, c. 16, s. 106.

**Ex parte JOSHUA POWELL, and TIMOTHY POWELL, Executors of JOSHUA POWELL, deceased.—In the matter of SAMUEL LORYMER.—p. 378.**

A. agrees to be responsible to B. for the due payment to him by C. of £24,000, by yearly instalments of £1200. B. afterwards agrees to accept six joint notes of A. and C., for £2000 each, and delivers up the original agreement to C.; but only one of these notes is paid. *Held*, that B. could not prove, under a fiat against A., the original debt of £24,000, but only the amount of the five notes remaining unpaid.

THIS was a petition to prove a sum of £24,000, under the following circumstances:

On the 19th January, 1829, James Lorymer, the brother of the above-named bankrupt, being indebted to the above-named testator, Joshua Powell, in the sum of £24,000, for money lent, entered into an agreement with him, which, after reciting the debt, proceeded as follows:—

“It is mutually agreed between the said parties, that for the due discharge of the sum of £24,000, the said James Lorymer, his heirs, executors, administrators, or assigns, shall pay, or cause to be paid, to Joshua Powell, Esq., his heirs, executors, or administrators, the sum of £1200 each and every following year, until the whole be discharged; the same to be paid in four equal instalments, viz. on the 19th April, the 19th July, the 19th October, and the 19th January, in each and every year; the first payment to be made on the 19th April next ensuing. And it is also agreed, that the said James Lorymer, his heirs, executors, administrators, or assigns, shall pay, or cause to be paid, to the said Joshua Powell, his heirs, executors, or administrators, on the days herein mentioned, viz. on the 19th April, the 19th July, the 19th October, and the 19th January, the full and lawful interest, at the rate of £5 per cent. per annum, upon the whole of the principal that may be then due. And it is also further agreed between the said parties, that if the said James Lorymer, his heirs, executors, administrators, or assigns, shall well and duly pay, or cause to be paid, unto the said Joshua Powell, his heirs, executors, or administrators, the instalments, together with the interest, as herein mentioned, the said Joshua Powell, his heirs, executors, or administrators, shall not demand from the said James Lorymer, his heirs, executors, administrators, or assigns, the said sum of £24,000, or any part thereof, that may be due, till regularly discharged in the course of time, according to the conditions and agreements herein specified.

(Signed)

JOSHUA POWELL.  
JAMES LORYMER.”

“It is also agreed, that Samuel Lorymer, of the city of Bristol, starch-maker, shall be responsible for the due payment of the above amount, as specified herein.

(Signed)

SAMUEL LORYMER.”

Nothing was ever paid on account of principal or interest, under this agreement, either by James Lorymer, or Samuel Lorymer.

In the month of July, 1831, upon the joint representations of James Lorymer, and Samuel Lorymer, that they were unable to pay all their then creditors 20s. in the pound, unless relieved from part of Joshua Powell's claim upon them, and that, after paying all their other debts,



they should have left about £12,000, Joshua Powell consented to accept that sum in full for his debt; and to take the notes of Samuel Lorymer and James Lorymer for the same, at long dates, and without interest. In pursuance of this arrangement, six joint and several promissory notes of James Lorymer and Samuel Lorymer, dated respectively the 14th of July, 1831, for £2000 each, payable to Joshua Powell, the testator, at one, two, three, four, five, and six years after date, were made and delivered to Joshua Powell, who thereupon delivered up the agreement to James Lorymer. The first of these notes was paid to Joshua Powell, but the other five remained wholly due.

Joshua Powell died on the 3d day of September, 1834, having first duly made and published his last will, whereby he appointed the petitioners his executors, who duly proved the same.

On the 18th of September, 1835, two separate fiats were issued against James and Samuel Lorymer, under which they were both respectively found bankrupts. The petitioners tendered a proof under each of the fiats for £24,000, and interest, for which they were admitted to prove only under the fiat against James Lorymer; the commissioners under the fiat against Samuel Lorymer having refused to allow any proof, except on the remaining five notes; upon the ground, that as Samuel Lorymer's liability was that of a surety, merely, and was founded, not upon the original consideration of money lent, but upon the agreement, the delivery up of that instrument, upon the substitution of the six notes, was a complete discharge of the original debt, as against Samuel Lorymer.

The petitioners contended, that, by the default in payment of the instalments payable under the agreement, the debt had become absolutely and immediately recoverable at law against Samuel Lorymer, and the consent, on the part of the testator, to take a part for the whole, was therefore without consideration, and void; and that, as the notes furnished no new consideration for the release or discharge of any part of the original debt under the agreement, the agreement remained in full force, as well against Samuel Lorymer, the surety, as against James Lorymer, the principal debtor.

Mr. *Twiss*, and Mr. *Koe*, in support of the petition. The only grounds on which a surety is discharged are, 1st, That the original debt is extinguished by a subsequent agreement;—or, 2d, That the creditor has entered into a subsequent agreement with the principal, which would prejudice the surety. But in the present case, as the second agreement was made with the consent of the surety, if the creditor is remitted to his original debt against the principal, he is remitted to it also against the surety. A subsequent contract with the principal does not release the surety, if it be stipulated, that the remedy against the surety shall be reserved; *Ex parte Glendinning*, 12 Ck. 517; or if the subsequent contract does not operate to the prejudice of the surety; *Whitcher v. Hall*, per LITTLEDALE, J., 5 B. & C. 269, (11 E. C. L. R. 224.) The first agreement was only delivered up conditionally. Mr. Powell, the testator, was to be remitted to his rights under the first agreement, if default was made in the performance of the second. [ERSKINE, C. J. Is not the delivering up of the first agreement tantamount to its being cancelled? By the second agreement, the surety undertakes to do more than he engaged to do by the first agreement; for, by the first, he only undertook that James Lorymer, the principal, should pay; but by the second, he undertakes to pay, absolutely, the several notes for £2000.] It can

not be supposed, that Mr. Powell would have given up his claim for £24,000, for a mere chance of getting £12,000; for he obtained no better security for the payment of the smaller than of the larger sum. No third person was added as surety for the payment of the £12,000; he could not, therefore, have meant to abandon all claim against the surety under the first agreement, in case the second was not fulfilled. The question is, whether a promise to pay a smaller sum is a good consideration for the extinguishment of the original debt, either as against the principal, or the surety.

Mr. *Swanston* and Mr. *J. Russell*, *contrà*, were stopped by the court.

ERSKINE, C. J.—There is no difficulty in determining this point. Samuel Lorymer originally owed Mr. Powell nothing; but by the agreement of January, 1829, he made himself responsible for the due payment by James Lorymer, not of the sum of £24,000, but of the sum of £1200 yearly, until the former sum was discharged. His contract, then, amounts to this—if James Lorymer does not pay £1200 per annum, I will; his liability, therefore, is nothing but that of a surety, for the payment of his annual sum. Then, in 1811, the parties came to a second agreement. Now, it is quite clear, that if this second agreement had been entered into, without the consent of Samuel Lorymer, the surety, the latter would have been entirely discharged; because it would have prevented the creditor from suing the principal, on the first agreement. But, was it a condition in the second agreement that the first should still stand good? No, on the contrary, the second agreement was quite another independent contract, and was evidently substituted in the place of the first. By the last agreement, Samuel Lorymer binds himself *absolutely* to pay to Mr. Powell £2000 a year, which seems to be a good reason for releasing him from his former *conditional* engagement to pay only £1200 a year; and yet it is contended, that the first agreement was not intended to be abandoned. But the petition itself states, that the original agreement was delivered up to James Lorymer. It seems to me, then, quite clear, that Powell agreed to abandon the first agreement as to the £24,000. For the whole liability of Samuel Lorymer, as surety, depended upon that agreement; and when that agreement is delivered up, by the party with whom it was entered into, to the principal debtor, I think no judge or jury could be induced to say, that that agreement was not abandoned.

Sir J. CROSS.—The question is, whether the first agreement was delivered up absolutely, or conditionally. It appears to me, that it was delivered up absolutely; for there was no condition expressed at the time, that the surrender of it was subject to any qualification. The very statement in the petition is an answer to this application: it is there alleged, that Samuel Lorymer became responsible for the due payment of the amount specified in the first agreement. Whether he was responsible for the whole sum of £24,000, in case of default being made by James Lorymer in payment of any instalment, or only for the instalment in respect of which default was made, may be a question. But take it, that he was to pay the principal,—what does Joshua Powell do by the second agreement? He says, you shall enter into a positive engagement to pay half the debt;—instead of being merely responsible for the payment of it by James Lorymer, you shall become a principal for the half, instead of a surety for the whole. I am of opinion, therefore, that the

petitioners can only prove for the sum of £10,000, the amount of the five notes remaining unpaid, under the second agreement.

Sir G. ROSE.—The question is a very simple one, on which the court has to decide in this case. What is the effect of Powell giving up the first agreement, when he took the joint notes of Samuel and James Lorymer? Was the delivering up of the first agreement intended to be an extinguishment of it, or not? Was any condition expressed at the time to qualify such delivering? As nothing whatever appears to show that there was any condition annexed to the delivery up of the first agreement, the surrender of it by Powell, when he took the six notes, must be taken to be an abandonment of it.

Petition dismissed, with costs.

Ex parte ABEL SMITH, and THOMAS HUGHES ANDERDON.—

In the matter of WILLIAM MANNING, FREDERICK MANNING, and JOHN LAVICOUNT ANDERDON.—p. 385.

M. and A. being in partnership, A. marries M.'s daughter, upon which occasion M. gives to four trustees a bond for payment of £5000 at the expiration of a twelvemonth after his decease, and A. also agrees to pay to the trustees £5000 by instalments, subject to the trusts of the settlement, namely, to invest the money in the funds, and pay the interest of one moiety to A., and the other moiety to his wife, for her sole use, with remainders over to the children, &c. M. and A. became bankrupt, only one instalment of £1000 having been paid by A.; and two of the four trustees are resident abroad. *Held*, that the two other trustees might, without the concurrence of those abroad, prove against the separate estate of M. on the £5000 on his bond, and the balance of £4000 against the separate estate of A., and receive the dividend, subject to further order.

One of several trustees cannot prove, without an order of the court; *aliter*, one of several executors.

THIS was a petition of two of four trustees, to make certain proofs against the separate estates of William Manning, and John Lavicount Anderdon, under the following circumstance.

In the year 1816, a marriage being agreed upon between John Lavicount Anderdon and Anna Maria Manning, spinster, one of the daughters of the said William Manning, it was agreed, that William Manning should invest the sum of £5000 in the purchase of £3 per cent. consolidated bank annuities, as the immediate portion of Anna Maria Manning, and secure the further sum of £5000, to be paid at his decease; that John Procter Anderdon, Esq., the father of the said John Lavicount Anderdon, should secure the sum of £5000, to be paid at the decease of him the said John Procter Anderdon; that John Lavicount Anderdon should secure the sum of £5000, to be paid by instalments; and that the three last-mentioned sums of £5000 each should be paid, or secured to be paid to the petitioners and the said Frederick Manning and Butler Thompson Claxton, Esq., and that they should stand possessed thereof, as well as of the said £3 per cent. consolidated bank annuities, and the dividends, interest, and annual produce of the same respectively, upon certain trusts, to be declared in an indenture intended to be executed between the parties.

In pursuance of this agreement, William Manning invested the sum of £5000, in the purchase of 8113*l.* 12*s.* £3 per cent. consolidated bank annuities, in the names of the petitioners and the said Frederick Manning and Butler Thompson Claxton, and on the 2d of March, 1816, gave

to them a bond for £10,000, conditioned for the payment, by the heirs, executors, or administrators of the said William Manning, to the petitioners and the said Frederick Manning and Butler Thompson Claxton, of the sum of £5000, at the expiration of twelve calendar months from the decease of the said William Manning, with interest for the same, at the rate of £5 per cent., to be computed from his decease.

John Procter Anderdon, also, in pursuance of the agreement on his part, gave and executed a bond for securing the payment of the sum of £5000, in manner therein mentioned; and John Lavicount Anderdon, likewise, on the 2d of March, 1816, gave to the petitioners and the said Frederick Manning and Butler Thompson Claxton, a bond for £10,000, conditioned for the payment by John Lavicount Anderdon to the petitioners and the said Frederick Manning and Butler Thompson Claxton, of the sum of £1000, on the 1st May, 1819, and the same sum on the 1st May in each of the four following years, with interest on the same sums respectively, from the day on which the same respectively should become payable, unless the said John Lavicount Anderdon should depart this life before any of such sums should become payable; and which event had not happened.

By an indenture, bearing date 2d March, 1816, and made between John Procter Anderdon, of the first part, John Lavicount Anderdon, of the second part, William Manning, of the third part, Anna Maria Manning, of the fourth part, and the petitioners, and the said Frederick Manning and Butler Thompson Claxton, of the fifth part, it was declared, that after the solemnization of the said then intended marriage, the petitioners, and the said Frederick Manning, and Butler Thompson Claxton, should stand possessed of the said 3 per cent. consolidated bank annuities, and of the said three several sums of £5000 each, upon trust, among other trusts therein expressed, that the petitioners, and the said Frederick Manning, and Butler Thompson Claxton, should, as and when the said three several sums of £5000 each, or any part or parts of the last mentioned sum of £5000, should respectively become payable, call in and receive the said sums respectively, and invest the same in the purchase of 3 per cent. consolidated bank annuities, in the names of the petitioners, the said Frederick Manning, and Butler Thompson Claxton, with power to alter and vary the same, as often as they should deem it expedient, with the consent in writing of the said John Lavicount Anderdon, and Anna Maria Manning. And, upon further trust, during the joint lives of the said John Lavicount Anderdon, and Anna Maria Manning, to pay the interest, dividends, and annual produce of one moiety, or half part, of the said trust-moneys, to the said John Lavicount Anderdon, and his assigns, for his and their proper use and benefit; and to pay the interest, dividends, and annual produce of the remaining moiety to the said Anna Maria Manning, for her sole, separate, and peculiar use and benefit, independent of the said John Lavicount Anderdon, her intended husband, who should not intermeddle therewith, or with any part thereof; nor should the same, or any part thereof, be in any manner subject or liable to his disposal, control, debts, or engagements. And after the decease of either of them, the said John Lavicount Anderdon, and Anna Maria Manning, then, upon trust, to pay the interest, dividends, and annual produce of the whole of the said trust moneys to the survivor, for his or her own proper use and benefit; and after the decease of the survivor, upon certain trusts, in

favour of the children of the marriage, and the issue of such children. And in default of such children or issue, then as to one equal half part of the said 8113*l.* 12*s.* 3 per cent. consolidated bank annuities, and of the said sum of £5000 secured by the bond of the said William Manning, and the securities in which the same should be invested, in trust for such persons as the said Anna Maria Manning should, in manner therein mentioned, direct and appoint; and in default of such appointment, in trust for the persons who, at the time of her decease, would, under the statutes for the distribution of the estates of intestates, be entitled to the personal estate of the said Anna Maria Manning, if she had died intestate, without having been married. And as to the other moiety of the said 8113*l.* 12*s.* 3 per cent. consolidated bank annuities, and of the said sum of £5000 secured by the bond of the said William Manning,—and as to the sums of £5000 and £5000 so severally secured by the bonds of the said John Procter Anderdon, and John Lavicount Anderdon, and the securities in which the same respectively should be invested, in trust for the said John Lavicount Anderdon, his executors, administrators, and assigns, for his and their proper use and benefit.

The marriage between John Lavicount Anderdon, and Anna Maria Manning, was shortly afterwards duly had and solemnized, and they are both now living, having several children. Mr. John Lavicount Anderdon duly paid to the petitioners, and the said Frederick Manning, and Butler Thompson Claxton, the first instalment of £1000 mentioned in the bond executed by him; but the remaining four instalments remained due and unpaid.

The sum of 8113*l.* 12*s.* 3 per cent. consolidated annuities was, in pursuance of the powers contained in the settlement, sold; and the sum of £5000, part of the produce thereof, was laid out and invested, by way of mortgage, on the security of certain estates in the county of Kent, and still remained so invested. The remaining funds subject to the settlement consisted of £1800 exchequer bills.

William Manning departed this life on the 17th April, 1835; but John Procter Anderdon was still living.

On the 5th September, 1831, a commission of bankruptcy issued against William Manning, Frederick Manning, and J. L. Anderdon.

The petitioners were desirous of proving against the estate of William Manning, the value of the said sum of £5000, secured by his bond; but their co-trustee, Butler Thompson Claxton, was resident in Italy, and Frederick Manning was in Paris, and not expected to return to England for some time.

The petitioners claimed to receive and retain the life-interest of John Lavicount Anderdon, in the funds, subject to the settlement, in and towards payment of the sum of £4000, the balance of the sum of £5000 secured by his bond; and also to prove against his separate estate for the balance, after deducting the value of his life-interest in such funds.

The prayer was, that the petitioners might be permitted, without the concurrence of Frederick Manning, and Butler Thompson Claxton, to prove against the separate estate of William Manning, the said sum of £5000 so secured by his bond; and that it might be declared, that the petitioners were entitled to a lien or charge upon such portion of the dividends, interest, and annual produce of the said sum of £5000 so secured on mortgage, and of the said sum of £1800 exchequer bills, and the funds to arise from the bonds of William Manning, and John Proc-

ter Anderdon, for and during the life of John Lavicount Anderdon, as the said John Lavicount Anderdon would have been entitled to; and that it might be referred to the commissioners to ascertain the present value of the interest of J. L. Anderdon in the said several sums of money; and in case such value should not amount to the sum of £4000, then that the same should be deducted from the said sum of £4000 still remaining due and unpaid on the said bond of J. L. Anderdon; and that the petitioners might be allowed to prove against his separate estate for the deficiency, without the concurrence of the said Frederick Manning, and Butler Thompson Claxton; and that the petitioners might be at liberty, during the life of J. L. Anderdon, to retain the annual income to be produced by any dividends on such proof, until they should have received the said sum of £4000, residue of the £5000 secured by J. L. Anderdon's bond.

Mr. *G. Richards*, and Mr. *Reynolds*, in support of the petition. The object of the petitioners is, that they may go in and prove, and have half the dividends accumulate, until they amount to a moiety of £4000, the balance due from J. L. Anderdon on his bond. *Ex parte Turpin*, 1 Deac. & C. 120; *Ex parte King*, 1 Deac. Rep. 143.

ERSKINE, C. J.—Should not all the dividends be paid into court, and be permitted to accumulate, until the whole sum of £4000 is raised, with liberty for either party to apply? The assignees can, of course, have no claim to any part of the dividends, until the whole sum is made up, which the bankrupt was bound to pay.

Mr. *Richards* objected to more than half of the dividends accumulating, as the wife was, under the terms of the settlement, absolutely entitled to a moiety of the interest.

Mr. *Swanston*, who appeared on behalf of the assignees, said, he did not dispute the right of proof as to the £4000; but there did not seem to be any necessity for an order of the court to enable the petitioners to make such proof. As to what is to be done with the dividends, that is a question for a court of more competent jurisdiction, in regard to the parties interested, who are not now before the court.

ERSKINE, C. J.—I have always understood the practice to be, that one of several executors may go in and prove, on behalf of himself and his co-executors; but that the commissioners refuse to permit one of several trustees to prove, without an order of this court. If that is so, it became necessary in the present case, as some of the trustees are abroad, that the others should apply for an order. And if the order we are now going to make would preclude the wife from receiving the interest to which she is entitled, I should be very far from assenting to it. But it is the duty of this court to take care, that the fund is secured for the benefit of all the parties interested. It therefore appears to me, that the two petitioners should go in and prove for the sum of £4000, and pay the dividends into court, subject to future order.

Sir J. CROSS.—I feel some difficulty, in this case, as to the terms of the order. The bankrupt's wife may have nothing to subsist upon, while the dividends are locked up in this court. I do not exactly see, then, why the court should not permit the wife to receive the money to which she is entitled, without the delay and expense of being obliged to come again to this court.

Sir G. ROSE.—The order now made is merely the same, which the

court makes in all similar cases. The assignees cannot touch one farthing of the dividends, until the whole £4000 is made good.

The order was, that the petitioners, without the concurrence of Frederick Manning and B. T. Claxton, the two other trustees, might prove against the separate estate of William Manning, the sum of £5000 secured by his bond, and also the sum of £4000 against the separate estate of J. L. Anderdon, and might retain their costs out of the dividends; that the surplus of the dividends should be paid to the petitioners and F. Manning and B. T. Claxton, subject to further order; and that the assignees might retain their costs out of the general estate; with liberty for either party to apply.

Ex parte NUNN.—In the matter of JARMAIN.—p. 393.

The agreement for an equitable mortgage must be free from all taint and suspicion; otherwise the court will not make the usual order for the sale of it.

THIS was the petition of an equitable mortgagee, for the sale of his security and the usual order. It appeared, that the bankrupt had in 1830 deposited a lease with the petitioner, to secure the payment of a then existing debt, as well as future advances. The bankrupt, however, had made an affidavit in answer to the application, stating that the transaction was tainted with usury; that he agreed to give a *bonus* to the petitioner, besides the annual interest, as a consideration for the loan; and that at the end of the first year after the deposit of the lease, he paid the wife of the petitioner £2, in addition to the interest.

Mr. *Walker*, for the petitioner. The transaction on which the charge of usury is set up, occurred some time after the deposit of the lease; and therefore, if the charge could be supported, it cannot affect the rights of the petitioner by virtue of such deposit. But in reply to the bankrupt's affidavit, the petitioner swears, that the bankrupt never agreed to give a *bonus*, or any thing more than £5 per cent. for the loan; and that the £2 alleged to have been paid by the bankrupt to the petitioner's wife at the end of the first year, was not a payment by way of *bonus* to increase the interest, but was intended by the bankrupt as a present to the wife. At all events, the court will not think of cutting down the petitioner's security on mere suspicion.

ERSKINE, C. J.—When a petitioner comes to ask for the interference of the court, to order a sale of a security deposited with him by way of equitable mortgage, the evidence as to the agreement between the parties must be free from all taint. Here, to say the least of it, there is great suspicion. And if there is any suspicion in the mind of the court, is not that an answer to the present application? This is not an application by the assignees to expunge your proof, but an application, on your part, for the extraordinary interposition of the court in your favour.

Sir J. CROSS concurred.

Sir G. ROSE.—You are talking of our cutting down your security on mere suspicion. We do no such thing. We leave your security exactly where it was, and express no opinion now on its validity, or invalidity. At

the same time, I cannot help saying, that I think the right thing for you to do, is, to give up your security to the assignees, on their consenting to admit your proof for the amount of your debt, with legal interest. But I merely fling out this, as a matter of future arrangement between the petitioner and the assignees.

Petition dismissed, with costs.

**Ex parte JEFFERY GRIMWOOD.**—In the matter of **MATTHEW BARNARD HARVEY**, and **JOHN WHITTLE HARVEY**.  
—p. 394.

An assignee, anticipating that the bankrupt's estate would pay 20s. in the pound, is induced to make up that sum to a creditor who has already received a dividend of 14s. in the pound. The assignee becomes bankrupt, the creditor is chosen assignee in his room, and the estate does not pay more than the dividend already declared:—*Held*, that the party was liable to refund the surplus above 14s. in the pound, on the petition of a creditor who had proved under the commission; and he was accordingly ordered to pay the amount into court.

THIS was the petition of a creditor, praying for an order, that one of the assignees might be directed to account for moneys received by him, and be charged with £20 per cent. for moneys retained in his hands, under the following circumstances, as stated in the petition.

The commission was issued on the 8th July, 1814; the bankrupts had carried on the business of bankers, in partnership, at Rochford and Bilericay, in Essex. On the 9th August following, Daniel Harvey, Philip Youngman, and Daniel Nash, were chosen assignees; but of the assignees so chosen, only Philip Youngman was living, Daniel Harvey and Daniel Nash being both dead.

On the 14th March, 1825, P. Youngman became a bankrupt.

On the 25th April, 1826, Daniel Whittle Harvey was chosen assignee, he being the party against whom the present application was made.

Previously to the bankruptcy of Youngman, it had been found by an audit, that he had then in his hands, and was accountable for, the sum of 1059*l.* 3*s.* 1*d.*, belonging to the separate estate of Matthew B. Harvey.

Emanuel Reeves, who married a daughter of M. B. Harvey, on the 5th April proved a debt of 246*l.* 10*s.* against his separate estate.

On the 11th March, 1815, a dividend of 14s. in the pound was declared on the separate estate of M. B. Harvey.

On the 25th December, 1816, the then assignees paid E. Reeves the sum of 172*l.* 11*s.*, being the amount of the dividend of 14s. in the pound on his said proof of 246*l.* 10*s.*

On the 29th April, 1826, the petitioner, as executor of his late father, was admitted to prove for 1021*l.* 2*s.* 10*d.* against the separate estate of M. B. Harvey, but had not been able to obtain any dividend under the commission.

The petitioner alleged, that he had discovered that D. W. Harvey had, before the bankruptcy of Youngman, the surviving assignee of those originally appointed, received from him the several sums of money, and at the several times, stated in the following account, which was furnished by D. W. Harvey himself.



			£	s.	d.
1822.	May 2.	To cash received of Mr. Youngman,	74	2	0
	August 22.	To ditto. - - - - -	1185	0	0
	September.	To ditto. - - - - -	300	0	0
	November.	To ditto. - - - - -	500	0	0
1823.	April 5.	To ditto. - - - - -	681	13	4
	November.	To ditto. - - - - -	300	0	0
			<hr/>		
			3040	15	4

All these sums were in the hands of P. Youngman, in his character of assignee, and formed part of the separate estate of M. B. Harvey. It was alleged by D. W. Harvey, that he received these sums from Youngman, by way of a dividend on the proof made by E. Reeves, and also on account of another debt of 3783*l.* 8*s.* 4*d.*, alleged by him to be due from M. B. Harvey to E. Reeves and E. W. Reeves, his wife; although, at the time of the receipt of such sums, no further proof had been made than the sum of 246*l.* 10*s.*, as above mentioned; and he insisted, that he was entitled to receive the amount of the dividend in respect of the debt of 3783*l.* 8*s.* 4*d.*, by virtue of some assignment to him of such debt; but no such assignment was ever produced or exhibited by him, nor was any reference made to it in the proceedings under the commission. In addition to the foregoing sums so received from P. Youngman, the petition charged, that D. W. Harvey, on the 13th February, 1827, had in his hands, as the balance of moneys received by him as assignee under the commission, the sum of 440*l.* 4*s.* 9*d.* belonging to the separate estate of M. B. Harvey, which he had never paid or accounted for.

On the 15th April, 1826, D. W. Harvey, on behalf of Mr. and Mrs. Reeves, made a claim, which on the 25th April, 1826, was converted into a proof, for the sum of 3783*l.* 8*s.* 4*d.* The dividends upon this sum, at the rate of 14*s.* in the pound, would amount to 2648*l.* 7*s.* 10*d.*; which being deducted from 3040*l.* 15*s.* 4*d.*, the moneys charged to have been received by D. W. Harvey from Youngman, would leave in his hands 392*l.* 7*s.* 6*d.*, making, together with the said sum of 440*l.* 4*s.* 9*d.*, the sum of 832*l.* 12*s.* 3*d.* applicable to the payment of a dividend on the petitioner's debt.

The petitioner had summoned D. W. Harvey before the commissioner, to charge him with the sums so received and retained by him; but the commissioner was of opinion, that as all the sums stated to have been received from Youngman, according to the above-mentioned account, had been received by D. W. Harvey before he became assignee, the commissioner could not make any order respecting them.

The petition alleged, that D. W. Harvey, by retaining the sum of 440*l.* 4*s.* 9*d.*, had received altogether 832*l.* 12*s.* 3*d.*, beyond what he was entitled to receive for the dividend of 14*s.* in the pound on Reeves's proof for 3783*l.* 8*s.*; and that he was now accountable for the said sum of 832*l.* 12*s.* 3*d.*, together with interest thereon for such time as he had retained the same; that it was the duty of D. W. Harvey to have prosecuted the accounts of Youngman as such assignee, but that he wrongfully and improperly neglected so to do, through the apprehension that it would have thereby appeared, that he himself had received the before-mentioned sums from Youngman; that D. W. Harvey never proved against Youngman's estate the said sum of 1059*l.* 3*s.* 1*d.*, so found by

the audit to be in his hands, or took any means to recover or obtain payment of the same, and that this sum was wholly lost to the separate estate of M. B. Harvey; and that D. W. Harvey had improperly prevailed on Youngman to pay him these sums, who had now obtained his certificate under his commission, and all his estate and effects had been applied and paid away under the same.

The prayer was, that D. W. Harvey might be ordered to account for the several sums so received by him from Youngman, as part of the estate of M. B. Harvey,—or, at all events, for the sum of 392*l.* 7*s.* 6*d.*, the excess beyond the amount of the dividend of 14*s.* in the pound on the said debt of 3783*l.* 8*s.* 4*d.*, and also for the said sum of 440*l.* 4*s.* 9*d.*, so received by him as such assignee as aforesaid, together with interest on the said sums respectively, and that he might be ordered to pay the same forthwith to the official assignee; that it might be referred to the commissioner to take an account of all sums of money, which D. W. Harvey had received for or in respect of the separate estate of M. B. Harvey, and that he might be directed to charge D. W. Harvey with £20 per cent. per annum, or with £20 per cent. on the whole, or otherwise with yearly interest at the rate of £5 per cent. per annum, upon all such moneys as should be found to have been so received and retained by him; that the commissioner might be directed to inquire what loss had occurred to the estate of M. B. Harvey, by reason of the neglect of D. W. Harvey to prosecute the account of the receipts of Youngman, and to prove under his commission for the amounts for which he would have been found accountable, and in particular for the said sum of 1059*l.* 3*s.* 1*d.*, and that D. W. Harvey might be ordered to account for and make good such loss; that the petitioner might be let into the benefit of a dividend of 14*s.* in the pound, upon and in respect of his said debt of 1021*l.* 2*s.* 10*d.*, so proved as aforesaid, together with interest thereon, from and out of the moneys for which D. W. Harvey should be so found accountable; that D. W. Harvey might pay the costs of this application, and of the several meetings under the commission incident thereto; and, if necessary, that the petitioner might be at liberty to examine *vivâ voce* D. W. Harvey, P. Youngman, and such other witnesses as might be necessary, on the hearing of the petition.

Mr. *Swanston*, Mr. *Anderdon*, and Mr. *Bacon*, appeared in support of the petition. [Sir G. ROSE. Before you go into all the details of this case, had you not better satisfy the court that it has jurisdiction to compel a gentleman to account for, or pay over, moneys received by him before he became assignee? I have a strong impression, I confess, that we have no jurisdiction to deal with the sum so received.] Mr. D. W. Harvey having become assignee after the receipt of this money, must be taken to be a trustee, and accountable for it to the creditors under the commission; and, in his character of trustee, he is liable to every one of the *cestui que trusts*; but their remedy lies in a Court of Equity, and not in a Court of Law. It appears that Mr. D. W. Harvey obtained from Youngman money belonging to the bankrupt's estate, under the pretence that he had a right to receive it, but without taking any steps for this purpose as a creditor under the commission; he gets part of a fund, under the administration of the court from a defaulting assignee; and thus obtains the bankrupt's estate in his hands, by means of the commission. [ERSKINE, C. J. The question is, whether D. W. Harvey, after having taken an assignment of Reeves's debt, and received by

anticipation from Youngman, as a creditor, previous to his proof, more money than he was eventually entitled to in respect of his dividend, can be called to account in this court; or whether it is not a question entirely between the creditors and Youngman, the assignee, and whether Youngman ought not alone to be held accountable.] Harvey was liable, as a creditor, to refund any excess of dividends which he had improperly received; and he is not the less liable because he afterwards unites the character of assignee with that of creditor. Is D. W. Harvey to be protected for having done that irregularly, which, if he had done regularly as an assignee, he would have been clearly responsible for? But, at any rate, Youngman was guilty of a breach of trust, and D. W. Harvey, in the character of a *cestui que trust*, was a party to his default. With respect to the charge of interest, the rule is, according to the practice which governs Courts of Equity, that where a trustee is guilty of a breach of trust, and one of the *cestui que trusts* is benefited by the act, he is bound to indemnify the estate against any loss of interest which would otherwise have accrued. [ERSKINE, C. J. You put it, then, that where one *cestui que trust* is privy to a breach of trust by the trustee, he is liable to account to another *cestui que trust*.] That is our position. But what has been already said, relates to D. W. Harvey as a creditor. We have still to consider him in his character of assignee.

In this last character, namely, that of assignee, he retains money in his hands, which he had previously received as a creditor. It is immaterial how the money came to his hands; it was his duty to deal with it afterwards as assignee. [ERSKINE, C. J. Suppose some other person had been chosen assignee, instead of Mr. D. W. Harvey, would such assignee have a right to come to this court, and make Harvey account for the surplus received by him, as part of the bankrupt's estate?] In the present instance, the fund must be considered to be in court, it being in the hands of Harvey, the assignee, who is now the officer of this court. The moment Harvey became the officer of this court, he gave the court jurisdiction over him, for every purpose affecting the trust-funds. The *cestui que trust* can single out the officer of the court, at any time, before a court of competent jurisdiction. No Court of Equity will permit a trustee, who has part of the trust-fund in his hands, to say that it did not come to his hands as trustee, and that it is not in his possession as trustee. Then, if this fund is in Mr. Harvey's hands as trustee, it is in his hands as a defaulting trustee; for he ought to have paid it into a banker's, and not have retained it, and employed it for his own benefit. He is therefore liable, under the 104th section of the 6 Geo. 4, c. 16, to be charged with £20 *per cent. per annum* on the amount so retained, so long as he kept it. For that section is not to be construed with the same strictness which is adopted in construing a penal clause of an act of Parliament; and as the word *interest* occurs in it, this shows that the £20 *per cent.* was not intended so much in the way of a penalty, as in the nature of an implied contract of an annual payment for forbearance. In *Ex parte Lowe*, 1 Deac. & C. 137, one of the judges of this court was of opinion, that the charge of 20 *per cent.* was intended by the statute to be 20 *per cent. per annum*, during the whole period of the retention of the money by the assignee, and not a single charge merely, of 20 *per cent.* upon the gross sum retained.

Finally, it was the duty of D. W. Harvey, when Youngman became bankrupt, to prove the amount of the balance due from him under his

commission. The sum then owing from Youngman to the estate was £1059, which Harvey neglected to prove; and he is therefore clearly liable for any loss occasioned by his default. [ERSKINE, C. J. Nash was an assignee also, at the time of Youngman's bankruptcy, and therefore the neglect was his, as well as Harvey's.] If there had been any misappropriation of moneys by one of several trustees, then, we admit, that the co-trustee ought to be a party to the proceedings, for the purpose of contribution. But this is such a misfeasance, as does not admit of contribution; a trustee being only entitled to contribution from his co-trustee, where there is a misappropriation of the trust-fund.

Mr. J. Russell, *contra*. All those parts of the petition, which call upon the court to order Mr. Harvey to render an account of the moneys received by him, may be disposed of by one observation,—namely, that the proper tribunal where such account ought to be prosecuted is, before the commissioner, and not before this court. And as to the other parts of the petition, requiring him to refund what he has received beyond the amount of the dividend, to which he was entitled under the separate estate of Mr. M. B. Harvey, no such order can be made. For where an assignee, who *bonâ fide* thinks that the bankrupt's estate will pay 20s. in the pound, makes up that sum to a creditor, beyond the amount of the dividend already received by him, this court has no jurisdiction to compel the creditor to refund the money so paid, in the absence of all fraud or collusion between the parties. In the present case, the money advanced was that of Youngman, and Harvey was only amenable to him; and upon their subsequent dealings, and payments made to him by Harvey, it will be found that Youngman proved to be Harvey's debtor. Put the case of an executor, who, in the administration of assets, pays more to a residuary legatee than the share he is entitled to, and the executor afterwards makes default in the payment of the shares of the other parties entitled to the residue,—can any other person but the executor compel the party to refund? No other party possesses an authority to that extent, unless where specific funds or stock have been transferred. Previous to Harvey's appointment as assignee, he was not in any way accountable to the estate; and after he becomes assignee, the estate has no remedy against him, which it had not before. Then, as to the charge of £20 per cent. [ERSKINE, C. J. I think you may be relieved from arguing that point.] The only remaining point is, the charge made against Mr. Harvey for neglect, in omitting to prove under Youngman's commission the amount of the balance due from him to the estate of Mr. M. B. Harvey. But this was more the duty of Nash, the other assignee, than of D. W. Harvey. For Youngman became bankrupt in March, 1825, and D. W. Harvey was not appointed assignee until April, 1826. Besides, it does not appear that any loss has been occasioned to the estate by the omission to make such proof.

ERSKINE, C. J.—According to Mr. Harvey's own account, it appears, that he received from Youngman 3040*l.* 15*s.* 4*d.*, which is 758*l.* 5*s.* 6*d.*, more than he was really entitled to, in respect of the dividend of 14*s.* in the pound. This money was received by him as a creditor under the commission, and he has subsequently become an assignee. He would have been liable, as a creditor, to refund what had been improperly received by him to the existing assignee; but as he cannot sue himself I think he is accountable in this court.

Sir J Cross concurred.

Sir G. ROSE.—My mind is perfectly satisfied, that the moneys, charged in this petition to have been received by D. W. Harvey, were the moneys of the estate. Put the case of an assignee paying the solicitor, or the messenger, more than what either is entitled to receive,—the court has always thought it its duty to interfere in such case, on the application of any creditor, and compel the solicitor or messenger to refund. In like manner, the court orders a party to refund dividends, when his proof has been expunged; and when an adverse claim is set up by the assignees against the creditor, the court fastens on the dividend; thus working out substantial relief, to the extent of the dividend on the proof. The immediate order of the court must be, therefore, for the payment by Mr. Harvey of the 75*l.* 5*s.* 6*d.* into court; with a reference to the officer to take an account of any other moneys received by him as assignee, and the costs to abide the event of taking the account.

The order was, that D. W. Harvey should, on or before the second day of Easter Term next, pay the sum of 75*l.* 5*s.* 6*d.* into the bank, with the privity of the accountant in bankruptcy, to be laid out in the purchase of 3 per cent. stock; that it be referred to Mr. Gregg, to take an account of the separate estate of M. B. Harvey, which had come to the hands of D. W. Harvey, as assignee, making all just allowances; and with liberty to state special circumstances, at the request of either party; further directions and costs to be reserved; with liberty for either party to apply.

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Ex parte CROSFIELD.—In the matter of SAMUEL COOPER.—  
p. 405.

A. and B. enter into a joint promissory note for the debt of B., and A. becomes bankrupt. The payee may prove the amount of the note against the estate of A., unfettered by the rule that applies in the case of partnerships, where it must appear that there is no solvent partner, and no joint estate.

THIS was the petition of a creditor claiming to prove as the payee of six promissory notes, which had been made by the bankrupt jointly with one Charles Cooper. The proof had been rejected by the commissioners, because it was not established before them when the proof was tendered, that there was no joint estate of Samuel and Charles Cooper. It appeared, that the notes had been entered into by Samuel Cooper, as surety for Charles Cooper; and that after the application had been made to prove against Samuel Cooper's estate, Charles Cooper became a bankrupt.

Mr. *Swanston*, and Mr. *Dixon*, appeared in support of the petition.

Mr. *J. Russell*, *contra*. The notes in this case, being the joint notes of Charles and Samuel Cooper, cannot be proved against the separate estate of Samuel Cooper; for, a joint note cannot be treated as a several one. The petitioner now swears, that there is no joint estate; but he did not allege that fact, when he applied to prove before the commissioners. If he had no right to prove then, he has acquired no greater right by the subsequent bankruptcy of Charles Cooper. In *Ex parte Pinkerton*, 6 Ves. 814, note (a), where a party applied to prove under a separate commission, upon a bill of exchange drawn by two persons,—one of whom was solvent, but abroad, and not likely to return, and the

other was the bankrupt, and they were merely connected in this transaction,—although Lord ELDON allowed the petitioner to prove on the bill, the order expressly recited, that it was admitted there was no joint property. So, in *Ex parte Kensington*, 14 Ves. 447, a joint creditor was not admitted to prove under a separate commission, for the purpose of receiving dividends with the separate creditors, although there was no joint property; there being a solvent partner. And in *Ex parte Sadler*, 15 Ves. 52, joint creditors were only admitted to prove under a separate commission, on the ground that there was no joint estate, nor any solvent partner. The payee of a joint note has, therefore, no right to prove the amount against the separate estate of one of the makers, unless he can show that both the makers are insolvent, and that there is no joint estate. [Sir G. ROSE. I think you cannot find that that rule is laid down in any case, except in the case of partners.] In *Ex parte Pinkerton*, the application to prove was on a mere promissory note, independently of any partnership. In *Rawstone v. Parr*, 3 Russ. 539, where a promissory note, signed “J. and J. Ewing, James Parr, surety,” was given to a creditor of the firm of J. and J. Ewing, and James Parr died, and J. and J. Ewing became insolvent: it was held by Lord ELDON, reversing the previous decision of the Master of the Rolls, that the note must be considered as the joint note of the parties who had signed it, and that the holders of it had no claim against the separate estate of James Parr. The commissioners decided right, when the matter was before them; and if the petitioner has now any better right to prove, he ought to have gone before them again, without coming to this court.

Mr. *Swanston* was stopped, in reply.

ERSKINE, C. J.—When the case came before the commissioners, the other maker of the note, who, it appears, was the principal debtor, had not become a bankrupt; and therefore the commissioners might deem it right, before the creditor was admitted to prove against the estate of the surety, that he should first go against the principal. The notes, however, are the joint notes of Charles and Samuel Cooper, without any partnership subsisting between those persons, and were intended to be a joint security to the petitioner for the payment of the sums for which they were given. The present case is quite different from that of a joint creditor applying to prove against the separate estate of one partner, where the other is solvent.

• Sir J. CROSS.—The law is, that in an action against two defendants, on a joint security, the plaintiff may levy the amount of the debt on the effects of either party; and the same principle appears to me to govern this case.

Sir G. ROSE.—Whenever a party has a right to a separate commission, he has a right to a separate proof; this consequence is inevitable. The rule that has been so much dwelt upon in the argument, only applies to the case of partnership.

Order made, as prayed, each party paying their own costs.

**Ex parte VALENTINE KNIGHT.**—In the matter of **WILLIAM LEWIS.**—p. 408.

A creditor of a bankrupt who has absconded with his books of account, and has never surrendered to the fiat, applies to prove on two bills, one for £200, and the other for £123, the consideration for which the creditor alleges to be goods sold by him to the bankrupt; but no entry appears in the creditor's books of the sale of those goods, nor does he adduce any evidence of the fact, beyond his own statement: *Seem*, that the commissioner was, under the circumstances, justified in rejecting the proof.

*Quære*, whether the commissioner is justified in rejecting a proof, merely on the ground of the non-compliance of the creditor with a general rule, which the commissioner has adopted for his own practice, namely, not to permit the proof of a debt, unless the books of the party applying to prove contain satisfactory evidence of the debt.

THIS was the petition of the holder of three bills of exchange accepted by the bankrupt, praying to prove for the amount. One of the bills was for the sum of £200, another for £123, and the third for 95*l.* 5*s.* 9*d.*; and the consideration, which the petitioner stated he gave for these acceptances of the bankrupt, was a quantity of gold watches, gold dials, cameos, and emeralds, alleged by the petitioner to have been sold by him to the bankrupt at various times between September, 1834, and March, 1835; the petitioner being a gold watch-dial maker in Clerkenwell, and the bankrupt having carried on the business of a merchant at Liverpool. When the petitioner applied to prove before the commissioner, the commissioner desired to know, whether there was any account in the petitioner's books of these transactions between him and the bankrupt; upon which the petitioner stated, that the bills were entered in his bill-book, but that there were no entries of the gold watches, cameos, and emeralds, inasmuch as those articles were not manufactured by the petitioner, or immediately connected with his trade of a gold dial-maker, and that it was not his practice to enter any account of such like matters; but that there was an account entered of the gold dials, which were manufactured by the petitioner, and which formed the consideration for the last-mentioned bill of 95*l.* 5*s.* 9*d.* Under these circumstances, the commissioner refused to permit the petitioner to prove any part of his demand, except the bill for 95*l.* 5*s.* 9*d.*, saying that he had made it a rule never to permit the proof of a debt before him, unless the books of the party seeking to prove contained satisfactory evidence of the debt.

It appeared from the affidavits in answer to the petition, that previous to the issuing of the fiat, the bankrupt had absconded from England, with all his books and papers, and had never surrendered to the fiat; and that when the petitioner applied to prove, the commissioner alluded to this circumstance as a reason for requesting the petitioner to produce his books, the assignees having no books to guide them in the admission of claims on the bankrupt's estate; and at the same time told the petitioner, that he would wait until the petitioner could return home, and bring his books, or any other evidence, to satisfy him that consideration had been given for the bills. The petitioner went and brought his books; upon inspecting which the commissioner said, as no entries whatever appeared in the petitioner's books as to the consideration alleged to have been given by him for the two bills for £200 and £123, he should require further evidence, before he could admit the petitioner to prove on those bills; but that the petitioner might prove

on the bill for 95*l.* 5*s.* 9*d.* The petitioner replied, that he would prove for all or none.

Mr. *Swanston*, and Mr. *Bacon*, in support of the petition, contended, that the commissioner had rejected the proof for an insufficient reason; for that he had no right to make such a rule, as that of refusing the proof of a debt, unless the books of the party applying to prove contained satisfactory evidence of it; and that as the petitioner could recover in an action at law on the bills, without producing his books to prove the consideration for them, so he had a right to prove the amount of them under a fiat, although no entry of the consideration might appear in his books.

Mr. *Deacon*, and Mr. *Keene*, contrà, urged, that the circumstances of the case were altogether so suspicious, that the commissioner was fully justified in rejecting the proof on the two bills for £200 and £123; that the reason assigned by the petitioner, for having no entries in his books of the consideration alleged by him to have been given for these two larger bills, was any thing but satisfactory; that it was usual for tradesmen, dealing *bonâ fide*, to enter in their books an account of *all* their sales, not only of the goods manufactured by them, but of all other goods,—and more especially when the latter description of goods, as in the present case, were more than three times the value of the manufactured goods; and that great benefit had resulted from the rule adopted by the commissioner, in the prevention of fraudulent proof.

ERSKINE, C. J., desired to see the petitioner's account-book, in which he entered an account of goods sold by him; after inspecting which, his honour said:—I think that the court in this case ought not to interfere with the decision of the commissioner; for I cannot say, speaking for myself, that the evidence offered by the petitioner was of that satisfactory nature, which would have induced me to admit his proof. The petitioner applies to prove a debt against the estate of a bankrupt, who has absconded with all his books, and has never surrendered to the fiat. Under these circumstances, the commissioner is not bound to give implicit credit to any verbal statement that may be made to him of a party applying to prove, although even verified upon oath; but I think it is his duty to investigate the matter strictly, in order to be satisfied that the petitioner gave a good and valuable consideration for the bills; for the petitioner's mere statement is not decisive proof of the fact. Besides, it appears from an inspection of the petitioner's books, that the books themselves furnish an answer to the reason he has assigned for there being no entry of the goods, alleged to have been given by him as a consideration for these bills; for there *are* entries, in several instances, of other goods than gold dial-plates having been sold by him to different persons. I think, therefore, that this petition must be dismissed.

Sir J. CROSS.—I confess I should have been better satisfied, if the creditor had been presented to this court for a *vivâ voce* examination; and the inclination of my opinion is, that the commissioner should rehear this matter. The commercial public are, no doubt, much indebted to the commissioner for his endeavours to protect the estates of bankrupts from fraudulent proofs; but I think the commissioner ought to have sworn the petitioner on oath, and have taken his deposition in proof of his debt, unless the truth of it could have been impeached by those who opposed the proof.

Sir G. ROSE.—I am of opinion, that the court would not be deciding



the question either one way or the other, as to the propriety or impropriety of the rule which it is stated the commissioner has laid down for his governance, by dismissing this petition; for I should have felt it my duty to have rejected the proof, on similar evidence. If the commissioner, however, rejected the proof, merely on the ground of the non-compliance of the petitioner with the general rule, which the commissioner has adopted in the practice of the proof of debts, then it should be intimated to him, that the court does not think him justified in rejecting the proof solely on that ground. But if he refused to admit the proof on the bills, because he was not satisfied with the evidence of the consideration alleged to have been given for them, that is another way of putting it; and the court then cannot say that he has done wrong. I think it is better that one of the judges should see the commissioner, to know the grounds on which he proceeded.

The order was made, that the matter should be referred back to the commissioner, with liberty for the petitioner to tender his proof, and submit to be examined upon oath in support of it; and that the question of costs should be reserved.

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**Ex parte JOHN SMITHER and others.—In the matter of RICHARD GOWETT and JOHN LEIGH.—p. 413.**

**A creditor, at the solicitation of a certificated bankrupt, executes a power of attorney to A. B. to receive the dividends on his debt for the bankrupt's use, the bankrupt undertaking to pay the debt in full, and for that purpose giving the creditor a bill of exchange, which is, however, never paid. A second commission issues against the bankrupt, under which the assignees claim to be entitled to the dividends under the first commission, by virtue of the power of attorney.**

**Held, that the power of attorney was revocable by the creditor, the consideration failing for which it was given; and that the creditor, and not the assignees under the second commission, was entitled to the dividends.**

THIS was the petition of the assignees of a creditor, and the representatives of other creditors, for the receipt of a dividend, under the following circumstances.

The commission issued on the 11th of September, 1823. West and Doren proved a debt of £256 for goods sold and delivered, against the joint estate; and Joseph West also proved a debt of 119*l.* 15*s.* for goods sold and delivered to John Leigh, against Leigh's separate estate. Leigh was likewise separately indebted to D. Currie in the sum of £200, for goods sold and delivered.

On the 24th of March, 1824, Leigh obtained his certificate under this commission.

On the 25th of March, 1825, Leigh applied to West and Doren, and to D. Currie, to execute a deed-poll, for the purpose, as Leigh represented, of superseding the commission; which they were both induced to do, under a promise made by Leigh to pay them their respective debts in full, and that in the event of the non-payment thereof the deed should be void. This deed-poll was a power of attorney to Joseph Fry, to consent with what banker the moneys of the estate should be deposited,—to vote in the choice of assignees,—to receive dividends, “and good and sufficient releases, receipts, or other acquittances, in our and each and every of our names or name respectively, or in his name,

to make, sign, seal, execute, and give, but to and for the use and benefit of the said John Leigh ; and generally to do all other acts, deeds, matters, and things, that may hereafter be necessary under the said commission, for enabling the said John Leigh to supersede the said commission, and that as fully and effectually in every respect as we ourselves, or any of us, jointly or severally, might or could do, if personally present ; hereby ratifying and confirming all and whatsoever our said attorney shall do, or cause to be done, in or about the premises."

On the 26th of April, 1826, another commission of bankrupt was issued against Leigh, under which he was duly found and declared a bankrupt.

On the 28th of October, 1825, a commission of bankrupt was issued against West and Doren, under which John Sard and John Griffiths were appointed assignees; but John Griffiths having subsequently taken the benefit of the insolvent act, and John Sard having become bankrupt, the petitioner, John Smither, was, on the 17th of March, 1829, appointed assignee in their stead.

On the 17th of November, 1832, a fiat in bankruptcy was issued against D. Currie, under which he was duly found a bankrupt, and two of the petitioners were chosen his assignees.

On the 16th of March, 1830, a dividend was declared of Leigh's separate estate, under the first commission against him, and the petitioners applied to the assignees for payment of it; but they refused to pay it, on the ground that they had notice of the above-recited deed-poll, and that the assignees, under the second commission issued against Leigh, claimed to be entitled to the dividends, by virtue of the above-mentioned deed-poll.

The petition alleged that neither West and Doren, nor D. Currie, before their respective bankruptcies, nor any of the petitioners since, had received any payment, satisfaction, or security for their respective debts, except certain bills of exchange, which had been dishonoured, and remained wholly unpaid; and that several of the separate creditors of Leigh had executed the above mentioned deed-poll, under similar circumstances.

The prayer was, that the assignees under the first commission against Leigh might (notwithstanding the deed-poll of the 25th March, 1835,) be at liberty to pay to the petitioners, and the rest of the separate creditors, or their personal representatives, who signed such deed, the dividends in respect of their respective proofs against Leigh's separate estate.

Mr. *Swanston*, in support of the petition. The power of attorney, that was given by the creditors to Joseph Fry for the benefit of Leigh, was executed by them without any consideration, and, therefore, does not bind the parties who executed it. It was, moreover, obtained from them by a promise on the part of Leigh, which has never been fulfilled. This, of itself, is a species of fraud, which is sufficient to annul the deed. Besides, when Leigh applied to these creditors to execute the deed, he expressly undertook, that in case their respective debts were not paid in full, the deed should be void.

Sir G. *ROSE*.—What is the value of a power of attorney, authorizing the bankrupt to vote in the choice of assignees, or to receive dividends, when the party giving the power of attorney afterwards comes forward, and says, "I will receive the dividends, and do the acts myself,

which I authorized you to do?" What is the value of such a deed, on which the assignees rely?

Mr. *Swanston* was then stopped by the court.

Mr. *Twiss*, for the assignees under the first commission, said, that they were willing to act in obedience to any order which the court might think proper to make.

Mr. *Rogers*, for the assignees under the second commission. Leigh obtained his certificate on the 24th March, 1824, which was a year before the power of attorney was executed; and he gave various bills of exchange, as a consideration for the execution of it by the different creditors who were parties to it. It was not, therefore, a mere power of attorney, giving a bare authority to do certain acts, which may be revoked at the will of the party giving it; but it conferred an authority coupled with an interest, and, being given for a valuable consideration, became irrevocable; *Gausson v. Morton*, 10 B. & C. 731, (21 E. C. L. R. 157.) In the present case, the party to whom the power of attorney was given, was authorized to receive the dividends, not for the benefit of the creditors, but for the use and benefit of Leigh. In a Court of Equity, it is admitted, that the petitioners might have a claim, if the promise was not fulfilled on the part of that party, for whose benefit the power of attorney was given; but, at law, it is an absolute assignment of the dividends for the use of Leigh. No counter-notice of any claim to the dividends was given by these petitioners to the assignees under the first commission; they must, therefore, be taken to have been in the order and disposition of Leigh, at the time of the second commission being issued against him; and, consequently, go to his assignees under that commission.

ERSKINE, C. J.—The instrument on which this question turns is, in its nature, a revocable instrument; although it might have become irrevocable, by the performance of the contract on the part of Leigh, in consideration of which the power of attorney was given. But Leigh having made default in the payment of the bills, which were given by him as a consideration for the power of attorney, it still remains a revocable instrument. With respect to the point made of order and disposition, the dividends were not in the order and disposition of Leigh, but of Fry, the party appointed to receive them. There was no actual assignment or transfer of the dividends to Leigh, nor had he any right to receive them from the assignees. I am, therefore, of opinion, that the parties, who gave the power of attorney to Fry, having now revoked it, the dividends should be paid to them, and not to the assignees under the second commission.

Sir J. Cross.—I am of the same opinion. Leigh was no party to the deed-poll, but merely the persons whom the petitioners represent, and Fry. Whatever contract took place between those parties and Leigh, it was a parol contract, and was never performed on the part of Leigh. The bankrupt could, therefore, derive no title to the dividends from this power of attorney, which was a mere authority to Fry to receive the dividends, and hand them over to the bankrupt.

Sir G. Rose.—There is no difficulty whatever in this case. How can it possibly be contended, that this power of attorney operates as an assignment of the dividends? A power of attorney, which is given for a valuable consideration, would no doubt be irrevocable. But when

the consideration fails, a Court of Equity would in all cases interfere for the relief of the party, who might be legally bound by it.

The order was made as prayed; the assignees under the first commission to have their costs out of the dividend fund; and the petitioners and the assignees under the second commission to have their respective costs out of the bankrupt's estate under the second commission.

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Ex parte FIFE.—In the matter of PHIBBS.—p. 418.

On a petition to stay the bankrupt's petition certificate, for having lost £20 at play, where the affidavits are contradictory as to the fact, the court will direct an issue.

THIS was the petition of a creditor to stay the bankrupt's certificate, on the ground of his having lost in one day £30 by gaming at *rouge et noir*. It was positively sworn by the petitioner, and by a person of the name of Morris, who had made an affidavit in support of the petition, that the bankrupt had lost this money at a gaming-house, No. 10, King Street, St. James's, on the 18th June last. On the other hand, the bankrupt swore, that he had no acquaintance with Morris,—that he did not lose the sum of £30, as stated in Morris's affidavit,—that he never played at *rouge et noir* at No. 10, King Street, nor was ever at that house,—that he never lost money by gaming at any other time,—and that on the evening in question he was at a public-house at Knightsbridge, where he remained till eleven o'clock at night, and then went home; and the landlady of the public-house made an affidavit confirming this statement. In reply to this statement, there were affidavits of three persons, who swore that they saw the bankrupt at the gaming-house in question from eight o'clock in the evening till twelve.

Mr. Keene appeared in support of the petition.

Mr. J. Russell, and Mr. Bird, who appeared for the bankrupt, took a preliminary objection to the petition, that it purported to be the petition of two persons, Fife and Green, and that it was only signed by Fife, notwithstanding it did not appear that those two persons were partners. [But the court overruled this objection.] They then contended, that the affidavits in reply ought to have been confined to the facts stated in the original affidavits, and that no additional facts ought to have been alleged; *Ex parte Cundell*, 1 G. & J. 37, *Ex parte Dodson*, Buck, 178. Where the affidavits are conflicting, as to the fact of the bankrupt's having lost money at play, the certificate goes; *Ex parte Kennet*, 1 Rose, 331. And the court will be disposed to lean against a petition of this description, where the petitioner lay by until the last day, when the bankrupt would have been entitled to his certificate.

Mr. Keene, in reply, maintained, that the affidavits in reply did not introduce any new matter, but merely confirmed the original affidavits in support of the petition.

ERSKINE, C. J.—There is an express allegation in this petition, that the bankrupt did, on the 18th June, lose at one time more than £20, by gaming at *rouge et noir*, which is confirmed by several affidavits. Now, if the bankrupt lose more than £20 at any one time, notwithstanding he afterwards wins hundreds, that is sufficient to induce the court to stay the certificate. Then the bankrupt swears, that he never played

or lost any money at No 10, King Street; but he does not swear, that he did not lose it at any other house in King Street, or anywhere else. Now, we all know, that the numbers of houses of this description are frequently changed; and the bankrupt may have lost his money at some other number in the street, although not at No. 10. The affidavits, however, are so contradictory, as to the bankrupt being there on the evening in question, that even if we were to give time to him to answer the affidavits in reply, we should not then be able to decide the fact. The bankrupt may have an issue, if he chooses.

Sir J. Cross.—It is sworn by five witnesses, that the bankrupt actually did lose his money at No. 10. The bankrupt certainly denies having been at No. 10, on the evening of the 18th June; but he swears that he never lost money at play at *any other time*, not that he did not lose it at *any other place*. This satisfies me, that he purposely avoided swearing that he did not game at any other place.

Sir G. Rose concurred.

The order was accordingly made for the issue, and the bankrupt to have the conduct of the order.

*Note.*—The petitioner did not appear, when the issue was called on for trial in the following term; the bankrupt, therefore, finally obtained an order for his certificate.

Ex parte EDWIN PEMBERTON.—In the matter of GEORGE STOKES,  
and

Ex parte JOSEPH HANCOX and GEORGE TALBOT.—In the same matter.—p. 421.

A., B., and C., dissolve their partnership, by A. retiring, and assigning his share and interest in all the partnership property to B. and C., who continue to carry on the business. By the deed of dissolution, B. and C. covenant to pay £49,600 to A., by instalments of £3000 annually; and it was provided, that if any instalment should be in arrear for sixty days, A. might enter and take possession of all the partnership property for his own use; and that from and after such entry, the assignment thereby made of A.'s share should be void; and B. and C. further covenanted, that immediately after such entry, "or in lieu of such entry, so soon as any such right of entry should arise" they would re-assign all the partnership property to A. B. afterwards retires from the concern, and assigns his share to C., who subsequently becomes bankrupt; and the instalments fall into arrear; some of which, however, continue to be paid to A. by C.'s assignees after his bankruptcy; and the assignees, also, receive some of the debts owing to the original firm of A., B., and C.:—*Held*, that these debts were not to be considered as left in the order and disposition of C. at the time of his bankruptcy, with the assent of A., and that the assignees were accountable to A. for the amount received.

THE first of these petitions was that of a creditor, for an order on the assignees to pay certain moneys to the petitioner, pursuant to a report of the commissioners. The second was a cross-petition of the assignees, praying that such report might not be confirmed. Both petitions were originally presented to the lord chancellor in December, 1831, and were now brought on for hearing, by way of motion, before the Court of Review.

The petition of *Ex parte Pemberton* stated, that on the 15th of May, 1826, Pemberton presented a former petition to the lord chancellor, which contained the following facts:—The bankrupt had carried on the business of an iron-master at Coseley, in Staffordshire, in partnership

with Samuel Pemberton, (the father of the petitioner,) and Benjamin Stokes, and Thomas Stokes, under the firm of Pemberion and Stokes. In August, 1803, Samuel Pemberton died; after which his executors continued to carry on the partnership business until January, 1806, when Benjamin Stokes retired from the concern, and assigned his share to the continuing partners. In the same year, Samuel Pemberton's executors also retired from the copartnership; when the bankrupt and Thomas Stokes became the purchasers of their share in the freehold, copyhold, and leasehold estates of the partnership, and all other the joint effects, for the sum of £49,600, which, by indenture of the 3d of October, 1807, was secured to be paid to the executors by instalments of £3000 per annum, with interest. By this deed, the bankrupt and Thomas Stokes covenanted to pay all the debts owing by the partnership; in consideration of which, the executors conveyed and assured all their share and interest in the partnership business and effects, to the bankrupt and Thomas Stokes, subject to the payment of the purchase-money and interest, and the partnership debts, which the bankrupt and Thomas Stokes covenanted to pay, and charged upon their respective shares in the partnership estate and effects. In this deed were contained the following provisos and covenants:

After a covenant by George and Thomas Stokes to pay the instalments of £3000 on the 24th June in every year, it was declared, that as well the share, or shares, and interest, of the executors of Samuel Pemberton, of and in the partnership estates and property, leasehold premises, and mines, situate and being at Coseley, as also the present shares and interest of the said George Stokes and Thomas Stokes, of and in the same and every part thereof, should be from thenceforth subject and liable to the payment of the said sum of £49,600 and interest, by the instalments before mentioned, "but that all other partnership estates and property should be free from the payment of the same." A power of distress and sale was given to the executors, as to the partnership estate and property at Cosely, in case default should be made in the payment of any of the instalments, for the space of thirty days after the same should become due; and then came the following clauses.

"Provided likewise, that in case any or either of the said instalments, and all arrears thereof, shall not be fully paid or satisfied, within sixty days next after the same shall accrue due or become payable as aforesaid, although no actual demand shall have been made, then and in such case it shall and may be lawful to and for the said Mary Pemberton, Thomas Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, or any or either of them, or for any person or persons on their behalf, or by their or any or either of their order or direction, to enter into and upon all the said late partnership estates and property, leasehold premises, and mines at Coseley aforesaid, or any part thereof, in the name of the whole, and to seize and take possession of all minerals, and the forges, foundries, mills, engines, and other erections and conveniences, in like manner in all respects as if the said George Stokes and Thomas Stokes had granted, assigned, and conveyed the same estates and property unto the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, their heirs, executors, administrators, and assigns: And also to seize and keep, to and for their or his sole use and benefit, all buildings, engines, whimsies, stock, and other movable or fixed property

whatsoever, then being upon the said premises, without rendering any account for the same, and the profits arising and to arise from the same premises, and every part thereof, to receive and take to and for the sole use and benefit of the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, without giving or rendering any account thereof, or being compellable to permit the book or books of account of the reckoning bailiff or bailiffs, to be examined or inspected by the said George Stokes and Thomas Stokes: And from and after such last-mentioned entry shall be made, the assignment hereby made, and every covenant and agreement herein contained, which is now intended to be performed by the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, shall then cease, determine, and be utterly void, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding: And also, that from and after such last-mentioned entry shall be made, the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, their executors, administrators, or assigns, shall not on any account, or under any pretence whatsoever, be accountable for, or be compelled to refund or repay to the said George Stokes and Thomas Stokes, any of the instalments, or sums of money, which shall have been then paid by them in part of or towards the purchase-money, for the said share or shares of the said partnership estates and property hereby assigned: And the said George Stokes and Thomas Stokes do hereby, for themselves respectively, jointly, and severally, and for their joint and several heirs, executors, administrators, and assigns, further covenant, promise, and agree, to and with the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, their heirs, executors, administrators, and assigns, in manner following; (that is to say,) that they the said George Stokes and Thomas Stokes, and all and every person or persons seised or possessed of the said partnership estates and property, or of any part thereof, to the use of or in trust for them, or either of them, shall and will, immediately after such last-mentioned entry shall be made on the said partnership estates and property, or any part thereof, or in lieu of such entry, so soon as any such right of entry shall rise as aforesaid, upon request of the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, or any or either of them, made to them the said George Stokes and Thomas Stokes, or either of them, well and effectually grant, assign, convey, and assure all the said late partnership estate and property unto the said Mary Pemberton, Thomas Pemberton, Edwin Pemberton, and Benjamin Stokes, as executrix and executors as aforesaid, or to such other person or persons as they shall direct or appoint, upon trust that they do and shall sell the same estates and property, by public auction or private contract, and out of the money to arise from such sales, that they do and shall in the first place retain and pay the said sum of £49,600 and interest, or so much thereof as shall then remain unpaid, together with the expenses of such sale and entry, and all other expenses incident thereto, or to the said trusts; and then in trust to pay the overplus money arising from such sale (if any) unto the said George Stokes and Thomas Stokes, their executors, administrators, or assigns."

The bankrupt and Thomas Stokes, being thus possessed of the entirety of the partnership estate, continued to carry on the business in copartnership together until the 10th of September, 1810, when Thomas Stokes retired from the concern, and George Stokes became solely possessed thereof, subject to the conditions and covenants contained in the indenture of the 3d of October, 1807.

The firm of Pemberton and Stokes, before the retirement of the executors, was indebted unto John Ryland, since deceased, in the sum of £8941, which George and Thomas Stokes by the above deed covenanted to pay. During the time that the partnership was carried on between George Stokes and Thomas Stokes, this debt was increased to the sum of £10,441, and had since, by non-payment of interest, accumulated to a much larger sum.

On the 23d of March, 1812, a commission of bankrupt issued against George Stokes.

By an order of the lord chancellor, bearing date the 28th of February, 1825, made in several causes then depending,—and by indenture, bearing date the 4th of June, 1825, which was executed by all parties interested, pursuant to the directions contained in such order,—the said debt and interest due to John Ryland as administrator of his said late father, which was stated then to amount to £13,000; and all moneys due from the bankrupt and Thomas Stokes to the executor and executrix of the said Samuel Pemberton, deceased, by virtue of the indenture of the 3d of October, 1807, and all securities for the same, became legally vested in the petitioner, Edwin Pemberton, or his trustee, for his sole use and benefit; and the sum of £36,000 was then due to him, as the representative of his late father, and the sum of £14,000, also, as the representative of John Ryland, deceased, making together the sum of £50,000; for which sum the petitioner claimed a lien upon all the real and personal estate, debts, and effects, belonging to the firm of Pemberton and Stokes, and the subsequent partnership of the bankrupt and Thomas Stokes.

The petitioner alleged, that the assignees had received debts due to these two firms, as well as divers sums of money, which arose from the sale of certain property comprised in the indenture of the 3d of October, 1807, to the amount of £10,000 or upwards, which the assignees then held in their hands, or in the hands of the bankers chosen under the commission, and which sum the petitioner was apprehensive that the assignees intended to divide among the separate creditors of the bankrupt. That there were no other creditors of the firm of Pemberton and Stokes, or of the copartnership of George and Thomas Stokes, except the petitioner, and that the partnership property of these two firms was an insufficient security for the amount of the several debts secured on such property. That the petitioner had requested the assignees to cause the estate and property, which were so subject to the debts due to the petitioner, to be sold, and to apply the proceeds, after payment of all expenses and encumbrances (if any) in reduction of such debts, and to keep a separate account of the several sums of money received, which constituted a part of the joint estate of the firm of Pemberton and Stokes, and of the joint estate and effects of the bankrupt and Thomas Stokes, and to allow him to prove under the commission for the amount, which after such payment might remain due to him in respect of the said several debts, or sums of money so vested in him, pursuant to the said order, and the interest due and to become due thereon; and, in the mean time,



not to make any dividend under the commission. The assignees declining to comply with this application, the petitioner presented the former petition, praying that the estates and property, which, by the indenture of the 3d October, 1807, were subjected and made liable to the payment of the said sums of money due to the petitioner as aforesaid, might be forthwith sold by public auction, and that the petitioner might be at liberty to bid at the sale: that it might be referred to the commissioners, to take an account of what was due to the petitioner; and that the moneys to arise from such sale, after payment of encumbrances, and incidental expenses, might be paid to or retained by him; that the assignees should be directed to keep a separate account of all moneys received, or to be received by them, constituting a part of the estate of the firm of Pemberton and Stokes, or of the estate of the bankrupt and Thomas Stokes, for the benefit of the petitioner, as the only creditor of either of the said firms; that in case the moneys arising by such sale should be insufficient to discharge the amount of what should be so found due to him, he might be at liberty to prove the deficiency under the commission; that all sums of money received by the assignees, constituting any part of the estate and effects of the firm of Pemberton and Stokes, or of the bankrupt and Thomas Stokes, might be paid to him, in reduction of the said debt, so far as the same would extend; and that in the mean time the assignees might be restrained from making any dividend of the bankrupt's estate and effects.

The above was the substance of the former petition presented on the 15th May, 1826.

On the 7th August, 1826, that petition came on to be heard before the then vice-chancellor; when an order was made that it should be referred to the commissioners, to take an account of the joint estate and effects of the respective firms of Pemberton and Stokes, and George and Thomas Stokes, which had come to the hands of the bankrupt's assignees, or to the hands of any person or persons, by their or either of their order, or for their or either of their use, and also of such part of the joint estate and effects, as was then outstanding; and that the commissioners should also take an account of what was due to the petitioner, both as assignee of the executors of his late father, Samuel Pemberton, deceased, and as assignee of the said John Ryland, deceased, from the joint estate and effects of the said firms of Pemberton and Stokes, and George and Thomas Stokes, or either of them; and that all necessary and proper parties should be examined before the commissioners, by interrogatories, or otherwise, and should produce upon oath all deeds, books, papers, and writings in their custody or power, relating to the matters in question. And the assignees were restrained, until further order, from making any dividend of the estate and effects of the respective firms of Pemberton and Stokes, and George and Thomas Stokes.

From this order the petitioner appealed to the lord chancellor, who by an order, bearing date the 4th February, 1829, declared that the whole of the partnership property at Coseley, Eardington, and Billingsley, and elsewhere, in the deed of the 3d October, 1807, mentioned or referred to, was and is subject and liable to the payment of the several sums in the original petition stated to be due to the petitioner, and, subject to that declaration, he confirmed the vice-chancellor's order.

The present petition then alleged, that at a meeting of the commissioners, held on the 17th August, 1830, and by adjournment on the fol

lowing day, pursuant to notice in the London Gazette, and in obedience to the orders before-mentioned, the commissioners found that the several debts or sums of money, (amounting to the sum of 7445*l.* 14*s.* 1*d.*.) as mentioned in the first schedule (*a*) to their report annexed, which constituted a part of the joint estate and effects of the firm of Pemberton and Stokes, came to the hands of the assignees of the bankrupt, George Stokes; and that the several debts, or sums of money, amounting to the sum of 1568*l.* 8*s.* 10*d.*, and mentioned in the second schedule (*b*) to their report, which constituted a part of the joint estate and effects of the firm of George and Thomas Stokes, came to the hands of the said assignees; and the commissioners adjourned the further consideration of the several matters so referred to them. That at an adjourned meeting of the commissioners, held on the 12th and 13th October, 1830, they further found that the estate and effects particularized in the third schedule to their report annexed, which constituted a part of the joint estate and effects of the firm of Pemberton and Stokes, were then outstanding; and that it did not appear to them that any part of the joint estate and effects of the firm of George and Thomas Stokes, was then outstanding; and that the sum of 36,562*l.* 11*s.* 1*d.*, was due to the petitioner, as assignee of the executors and executrix of the said Samuel Pemberton, deceased, for principal and interest calculated thereon, up to the 11th October, 1830, as appeared by a particular thereof, signed by the petitioner, and exhibited to them; subject nevertheless to such rents and profits as had been received by the petitioner, in consequence of his having entered upon and taken possession of the said Coseley ironworks and property, particularized in the said third schedule; but that such rents and profits had been exceeded by the moneys expended by the petitioner in the necessary repairs of the ironworks and property since he took possession thereof, as were verified before the commissioners upon the oath of the petitioner; and the commissioners lastly found, that the sum of 15,711*l.* 18*s.* 10*d.*, was due to the petitioner, as assignee of the said John Ryland, for principal-money and interest calculated thereon to the 11th October, 1830, as appeared by a particular thereof, signed by the petitioner, and exhibited to the commissioners.

The petition then alleged, that the assignees of the said George Stokes

(*a*) The first schedule was as follows:—

“Schedule No. 1.

“Schedule of the estate and effects, which were the joint estate and effects of Pemberton and Stokes, and which have come to the hands of the assignees of George Stokes.

	£	s.	d.
Johnson's dividend of 15 <i>s.</i> in the pound, due to the estate of Pemberton and Stokes.....	2256	11	1
Stringer part of Astbury freehold.....	315	0	0
Do. do.....	13	19	11
Do. do.....	10	0	0
To amount received from Bradley and Co. for purchase of Yerdington works, land, and houses.....	3817	15	7
To do. do.....	522	10	0
Thomas Gitton, purchase of land and houses at Yerdington.....	309	17	6
	7445	14	1”

(*b*) The second schedule was entitled as follows:—

“Schedule of the estate and effects, which were the joint estate and effects of George and Thomas Stokes, and which have come to the hands of the assignees of George Stokes.”

The items consisted of various debts owing to the firm of George and Thomas Stokes, at the time of George Stokes's bankruptcy.

retained for some time in their own hands the moneys mentioned in the first and second schedule to the report of the commissioners, and used the same for their own purposes, and thereby made considerable profit; that they some time ago paid the whole of such moneys into the hands of their bankers, who allowed them interest thereon, and that such sums have ever since been making interest to a very considerable amount. The petitioner therefore claimed to receive, in part liquidation of the debts owing to him, not only the principal sum mentioned in the first and second schedules, but also all the profits and interest which had been made therewith, or had accrued due thereon, since the time the same respectively came into the hands or power of the assignees, and also all such interest as should accrue due thereon before the said sums should be paid to him. And the petitioner further alleged, that all the property mentioned in the said three schedules would be greatly insufficient for the payment and satisfaction of the said debts due to him.

It was then stated, that by a decree, made on the 9th March, 1831, by the vice-chancellor, in a cause in which William Spurrier was the complainant, and Samuel Ryland, the petitioner, Edwin Pemberton, George Talbot, Joseph Hancox, and others, were defendants, it was declared, that no part of the claim of the petitioner, as assignee of the said Samuel Ryland, (who was the administrator of the said John Ryland,) or of the claim of the petitioner under the indenture of the 3d October, 1807, ought to be satisfied out of the shares of Thomas Smith and David Smith, (in the pleadings in the said cause mentioned,) in the Coseley new colliery, as the same existed on the 3d October, 1807, nor out of the shares of any person deriving title under them; but that such claims ought to be satisfied out of the moiety or half-share of the said George Stokes and Thomas Stokes in the said Coseley new colliery, as the same existed on the said 3d October, 1807, or out of the shares or interests of the persons deriving title under them in such property, so far as such shares or interests should extend to satisfy the same, but without prejudice to the claims of the petitioner upon any other estate or property of the said George Stokes and Thomas Stokes, or either of them, comprised in the said indenture of the 3d October, 1807. And it was ordered, (amongst other things,) that the petitioner and all other parties to the suit, as the master should direct, should join in the sale of the said partnership premises, directed by the decree in a certain cause of *Jeffery v. Smith*, including other property therein specified; that the petitioner, and all other parties were to be at liberty to bid at such sale; and that all parties should produce before the master, upon oath, all deeds, books, papers, and writings, in their respective custody or power, and be examined upon interrogatories, as the master should direct, reserving costs and further directions, and any further application to the court, as there should be occasion.

The petitioner stated, that he intended to take proceedings to get in the remainder of the purchase-moneys for the said Coseley ironworks and premises in the said third schedule mentioned, or such parts thereof as should appear to be recoverable; and that the assignees ought to assist him in such proceedings, and also to get in and pay to him the sum of 555*l.* 11*s.* 9*d.* in the said third schedule mentioned, together with any interest due thereon. And he finally alleged, that the whole of the moneys to arise from the property and effects mentioned in the said several schedules, and from any other property on which he had

any lien or claim under the said indenture, or otherwise, would be very insufficient to satisfy the said several sums of 36,562*l.* 11*s.* 1*½d.*, and 15,711*l.* 18*s.* 10*½d.*, making together the sum of 52,274*l.* 9*s.* 11*½d.*, so found by the said commissioners to be due to him, as executor of his late father, Samuel Pemberton, deceased, and as assignee or representative of the said John Ryland, deceased.

The prayer was, that the said Joseph Hancox, and George Talbot, as surviving assignees of the bankrupt, George Stokes, might be ordered to pay to the petitioner the said several sums of 7445*l.* 14*s.* 1*d.*, and 1568*l.* 8*s.* 10*d.*, so found by the report of the commissioners to be respectively part of the joint estate and effects of the said firms of Pemberton and Stokes, and George and Thomas Stokes, and then in the hands or power of the assignees, together with the amount of the profits and interest made thereon, since the same first came to their hands or power, in part payment of the said several sums of 36,562*l.* 11*s.* 1*½d.*, and 15,711*l.* 18*s.* 10*½d.*, by the same report found to be due to the petitioner; that, if necessary, an account might be taken of such profits and interest; that the said assignees might be ordered to get in and pay to the petitioner, or to assist him in getting in, the outstanding property mentioned in the said third schedule to the report of the commissioners, and that the same, when got in, might be applied in further liquidation of the said debts due to the petitioner; and that the assignees might pay the costs of the present application, as well as of all former proceedings.

In opposition to the prayer of this petition, the affidavit of the bankrupt, George Stokes, stated, that by the deed of dissolution of the partnership of Pemberton and Stokes, all the debts due to that firm were absolutely assigned to George and Thomas Stokes; and that after Thomas Stokes withdrew from the partnership, they became due to the bankrupt, and in particular a debt of 3008*l.* 14*s.* 9*d.* from Johnson & Co., on which the bankrupt's assignees had received a composition of 15*s.* in the pound, amounting to 2256*l.* 11*s.*; that at the time of his bankruptcy, he was entitled to receive this debt, if Johnson & Co. had been enabled to pay it, and that he was then the actual owner of it, and that Johnson & Co. well knew that fact; that three other sums of £515, 13*l.* 19*s.* 11*d.*, and £10, mentioned in the first schedule to the commissioners' report, were paid to his assignees as the purchase-money for part of an estate at Astbury, in Shropshire, which belonged to him at the time of his bankruptcy, and was his own sole and separate estate: that the sum of 3817*l.* 15*s.* 7*d.*, also mentioned in the first schedule, was in like manner received by the assignees on account of the sale of certain works and premises at Eardington, in Shropshire, of which the bankrupt was likewise the sole owner at the time of his bankruptcy; that the sum of 522*l.* 10*s.*, mentioned in the first schedule, was inserted therein by mistake; and that the sum of 309*l.* 17*s.* 6*d.* was received by the assignees for the purchase of a house and land by one Thomas Gitton. That all the sums mentioned in the second schedule were received, either for debts due to the firm of George and Thomas Stokes, and assigned by Thomas Stokes to the bankrupt at the time of the dissolution of their partnership, or for debts contracted separately with the bankrupt since the dissolution of that partnership; and that all the different persons, from whom the first description of debts were due, had full knowledge that the debts belonged to the bankrupt, and that he was the sole person entitled to receive them; that the sum of 555*l.*

11s. 9½*d.*, mentioned in the third schedule, was a moiety of the balance of the moneys arising from the sale of the Billingsley works, which also belonged to the bankrupt at the time of his bankruptcy; that the said two several sums of 36,562*l.* 11s. 1½*d.* and 15,711*l.* 18s. 10½*d.*, making together the sum of 52,274*l.* 9s. 11½*d.*, found by the commissioners to be due to the petitioner, included interest calculated down to the 11th October, 1830, although the commission issued against the bankrupt on the 23d March, 1812; and that by calculating the interest down to the date of the commission only, the said sum of 36,562*l.* 11s. 1½*d.* would be reduced to 14,424*l.* 5s. 9*d.*, and the sum of 15,711*l.* 18s. 10½*d.* to 6827*l.* 12s. 8½*d.*, making together the sum of 21,251*l.* 18s. 5½*d.*; that a dividend of 2s. 6*d.* in the pound was declared on the 2d July, 1816, leaving a balance of 593*l.* 7s. 10½*d.* in the hands of the assignees, and that the whole of the moneys contained in the first and second schedules to the commissioners' report, (except the composition from the estate of Johnson & Co., of 2256*l.* 11s. 1*d.*,) had been received previous to such dividend being declared, and that no money (except that sum) in the hands of the assignees was produced for any purpose which belonged to the firm of Pemberton and Stokes, or George and Thomas Stokes; that the deed of dissolution of the partnership of Pemberton and Stokes of the 3d October, 1807, by which the £49,000 and interest was secured to the executors of Samuel Pemberton upon the entirety of the partnership estates and property at Coseley, expressly stated that all the other partnership estates and property should be free from the payment of the same, and was so understood by the bankrupt when he executed such deed; and that he would not have executed it, if he had understood that any other of the partnership estates were to be charged with the payment of this sum; and that the petitioner, in March, 1826, entered into and took possession of the Coseley estates, without accounting for the rents and profits.

The assignees made an affidavit to the same effect; and which further stated, that they had not for any period of time retained the moneys mentioned in the first and second schedules in their own hands, or used the same for their own purpose, or otherwise made any profit thereof, except for the benefit of the bankrupt's estate; and that they were advised, that before the petitioner was entitled to prove any debt under the bankrupt's estate, he must first avail himself of the several liens and securities, which he claimed as assignee of the executors of Samuel Pemberton, or of John Ryland.

It also appeared in evidence, that the assignees had paid the instalments to the executors of Samuel Pemberton, for a period of five years after the bankruptcy of George Stokes.

Mr. *Swanston*, Mr. *Montagu*, and Mr. *G. L. Russell*, who appeared in support of the petition of *Ex parte Hancox*, excepting to the report of the commissioners, applied their arguments in the first instance to the sum of 2256*l.* 11s. 1*d.*, specified in the first schedule.

By the deed of dissolution of the partnership of Pemberton and Stokes, what was before the joint property of that firm became afterwards the property of George and Thomas Stokes; and by the subsequent assignment from Thomas Stokes to George Stokes, all the property and debts of the original partnership became vested in George Stokes, and were in his order and disposition at the time of his bankruptcy, subject only to the provisions of the deed of the 3d October, 1807.

The right of the joint creditors of the firm of Pemberton and Stokes, against the joint property remaining in specie, would depend upon the *bona fides* of the parties dissolving their partnership; and, there being nothing in this instance to impeach the *bona fides* of the transaction, the joint creditors would, after the dissolution of the partnership and the subsequent assignment, have no claim against the joint property, which must then be considered as the separate property of George Stokes; *Ex parte Williams*, 11 Ves. 3. It appears, that notice was given to Johnson & Co., both of the dissolution of the partnership of Pemberton and Stokes, and of that of George and Thomas Stokes; so that the debt due from Johnson & Co. became the absolute property of George Stokes; and the interest, which was previously in the three, became the separate interest of one. The debt due from Johnson & Co. was in the order and disposition of George Stokes, within the principle of all the cases on that subject; *Ryall v. Rolle*, 1 Atk. 165; *Holroyd v. Gwynne*, 2 Taunt. 176; *Horn v. Baker*, 9 East, 215; *Clarke v. Crownshaw*, 3 B. & Adol. 804, (23 E. C. L. R. 190;) *Ex parte Dale*, Buck, 365; *Ex parte Enderby*, 2 B. & C. 389, (9 E. C. L. R. 122.) In the last case, where all the partnership stock and effects were, by the agreement for the dissolution of a copartnership between two partners, left in the possession of the continuing partner, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by the retiring partner,—and the continuing partner carried on the business for a year and a half, when he became bankrupt,—it was held, that all the partnership property and effects so left in his hands, and also the debts due to the concern, passed to his assignees, as being in the order and disposition of the bankrupt, within the intent and meaning of the bankrupt law.

Mr. Spence, and Mr. Duckworth, contra, in support of the petition, *Ex parte Pemberton*.

The case of *Ex parte Williams*, which has been cited by the other side, has nothing whatever to do with the present case. The question there was merely one between the joint and separate creditors of the bankrupt, and involved no point of order and disposition. We rely on the words of the 72d sect. of the 6 Geo. 4, c. 16, which declares, that if the bankrupt “shall, by the consent and permission of the *true owner* thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same, &c.” Now, in this case, the whole share and interest of the executors of Samuel Pemberton, in the partnership debts and effects, was absolutely conveyed and assigned by them to the bankrupt and Thomas Stokes. Who then were the *owners* of these debts and effects? Is not the assignee of a debt the owner of the debt, and as such entitled to receive it? In the present case, so long as George and Thomas Stokes continued to pay the yearly instalments of £3000, they were entitled to receive the debts,—and in like manner George Stokes was entitled to receive them, after the retirement of Thomas Stokes. In *Ex parte Watkins*, 4 Deac. & C. 97, 1 Mont. & A. 696, the chief judge says, that the mischief intended to be remedied by the 72d sect. was, where the possession was in one person, and the title in another. This case, therefore, is not within the mischief contemplated by the act; and is distinguishable from *Clark v. Crown-*

*shaw*, and that class of cases, where the title was in a third person, and the possession in the bankrupt.

Sir G. ROSE.—This does not appear to me to be a case of order and disposition, but one of the actual transfer of property. The deed of dissolution of the partnership provides, that the bankrupt and Thomas Stokes are trustees for all this species of property, which was charged with the payment of the purchase-money, and the partnership debts. And the question is, whether the assignees of the bankrupt, when they took possession of this property, did not take it for all the purposes of the deed.

Sir J. CROSS.—The clause of order and disposition in the bankrupt act, certainly, does not extend to trust property.

Mr. *Swanston*, in reply,—and Mr. *Montagu*, and Mr. *G. L. Russell*, by permission of the court,—offered some further observations on the provisions and the effect of the deed of the 3d October, 1807, which, they said, they had not sufficiently adverted to in their argument yesterday. That deed provided, that in case any instalment should not be fully paid or satisfied within sixty days after the same should have become due, it should be lawful for Pemberton's executors to enter upon the partnership estate and mines at Coseley, and to seize and take possession of all minerals, and the forges, foundries, mills, engines, and other erections, in like manner, in all respects, as if George and Thomas Stokes had granted, assigned, and conveyed the same to the executors; and also to seize and keep all the movable or fixed property thereon, for their sole use and benefit, without rendering any account for the same. And it was declared, that after such entry the assignment thereby made should then cease and determine and be utterly void. [ERSKINE, C. J. By Lord LYNDHURST's order of the 4th February, 1829, it is declared, that the whole of the partnership property, not only at Coseley, but also at Eardington and Billingsley, and elsewhere, was subject to the payment of the debt due to the petitioner.] That declaration is inconsistent with the deed of the 3d October, 1807; for it is there expressly stated, that all the other partnership estates and property shall be free from the payment of such debt. This provision, therefore, excludes the petitioner from any lien on any other partnership property than that at Coseley. But we contend, that this is a clear case of order and disposition, in regard to the Coseley property. If A. and B. are partners, and A. retires and assigns the debts to B., and both become bankrupt, no one will dispute, that if notice is not given of the dissolution and assignment to the partnership debtors, the debts must be considered to be in the order and disposition of A. and B. They say, on the other side, that in the present case the bankrupt himself was the true owner of this property, which does away with the question of reputed ownership. But, to the extent of the lien of any other person on the property, we say, that that person ought to be considered as the true owner; and that the petitioner must, therefore, to the extent of his interest in the property on which he claims a lien, be held to be such true owner. The other side are in this dilemma: they must either allow the bankrupt to be the absolute owner of the property, in which case it will be disengaged from any lien,—or, if they claim a lien on it, then the property must be held to be left in the possession of the bankrupt as reputed owner, and to be in his order and disposition at the time of his bankruptcy. There are two sections in the statute, which are applicable

to this case; the 72d, which relates to reputed ownership,—and the 79th, which applies to cases of trust, where the bankrupt has the legal, but not the beneficial ownership. The arguments on the other side would lead to inextricable confusion between the 72d and 79th sections. It is important to consider the nature of the dominion, which George Stokes had at the time of his bankruptcy over the property, on which this lien claimed. It was either an absolute, or a qualified right. If it was a qualified right, could he have sued for the partnership debts, as he is empowered to do by the deed of dissolution? It appears, that due notice was given to the partnership debtors of the assignment of the debts. Then, who but the bankrupt was the reputed owner of them? In fact, he was the absolute owner; for there was no default in the payment of any of the instalments, until after the bankruptcy. [Sir J. Cross. The petitioner contends, that although the partnership property was left in the order and disposition of the bankrupt, yet that Pemberton's executors had a contingent interest in it, in the nature of a trust.] This cannot be considered as the case of a trust; for no trust is declared by the deed, by which the property was assigned. Lord ELDON has indeed said, that nothing could be easier, when partners dissolve their partnership, than to prevent any question of order and disposition from interfering with the rights of the retiring partner, by executing a trust-deed, and constituting the continuing partner a trustee to receive and pay the partnership debts. But there is nothing of the kind in this case. The deed here is similar in its provisions to the deed of dissolution in *Horn v. Baker*, 9 East, 215, where Lord ELLENBOROUGH says, "that however consistent the possession of the continuing partners might have been with the deed, it would only have shown that the deed itself was the fraud which the statute meant to guard against." And he concludes his judgment in these words: "The principle is, that in all cases, where, by the consent and permission of the true owner of goods, a trader in possession has the apparent ownership, and, incidental to that, the order and disposition of them,—and no other circumstance appears to control such apparent ownership, and show that the trader was not the real owner,—the true owner, permitting the trader to exhibit this appearance, does it at his peril.

ERSKINE, C. J.—From the heading of the schedule on which this question arises, I at first thought that the commissioners had decided, that the debt due from Johnson & Co. was still part of the joint estate of Pemberton and Stokes, as the result of the law and the fact; but, on referring again to the schedule, I find that they merely state it as a debt due to the estate, which had afterwards come to the assignees of George Stokes. The substantial question is, whether the petitioner is entitled to treat this debt as part of the joint estate of Pemberton and Stokes, or whether it must be considered as belonging to the separate estate of George Stokes. If it belongs to the joint estate, then, according to the terms of the lord chancellor's order, it would be subject and liable to the payment of the several sums which are in the original petition stated to be due to the petitioner. On the part of the assignees it has been argued, that this debt must be held to be the separate property of George Stokes, and that it must be taken to have been in his order and disposition at the time of his bankruptcy. But, as it seems to me, the question of order and disposition does not arise in this case. There is no doubt that the debt was, originally, a joint debt due to the firm of Pemberton and



Stokes, and was afterwards assigned by Pemberton's executors to George and Thomas Stokes, and subsequently by Thomas Stokes to George Stokes, with due notice to the debtors of each assignment; which is quite sufficient to pass the property in a *chose in action*. It is clear, therefore, that if George Stokes had gone to the debtors and received this debt, he would have been fully entitled to do so, as the party to whom the debt of right belonged. Now, the section of the bankrupt act relating to order and disposition does not apply to a case of this description; but only to cases where a party not being the true owner of a chattel, is allowed to have the order and disposition of it, as if he was the true owner. But here George Stokes himself was the true owner of this debt. The present case, therefore, cannot be brought within the clause of the statute before mentioned, nor within the particular mischief it was intended to remedy; for George Stokes took the property in the debt, as *real*, and not as apparent, owner. The question then, as it appears to me, can be considered without any reference whatever to the clause of order and disposition. By the deed of the 3d October, 1807, it was made a condition, that if any of the instalments of £3000 should not be paid within sixty days after the same should respectively become payable, a double option should be given to Pemberton's executors, namely, either to enter upon all the partnership estates and property at Coseley, in which case the assignment thereby made was declared to be void;—or, in lieu of such entry, to take a conveyance from George and Thomas Stokes of all the said late partnership estate and property, upon trust—for what purpose? Why, to sell the same, and out of the proceeds of the sale, to retain the sum of £49,600, or so much thereof as should then remain unpaid. The deed provides, that in case default is made in the payment of the instalments, and the executors enter on the possession of the property, the assignment only shall be void, and not the whole deed. Now, it is clear that George Stokes, at the time of his bankruptcy, held all the property which had belonged to the partnership of Pemberton and Stokes, subject to this condition in the deed. Therefore, although the executors were not the actual owners of this property, they stood in the character of mortgagees of it from George Stokes. After the bankruptcy, the instalments fell in arrear, and the petitioner, as the assignee of the executors, exercised the right given them by this deed; and the assignment of the property to the Stokes became void. Then, in what way did the assignees of George Stokes take this property, after his bankruptcy? They took it, of course, subject to the conditions of the deed under which it was held by the bankrupt. If the assignees, therefore, received the money in question from Johnson & Co., after the bankruptcy of George Stokes, they received it in trust for the parties entitled to it under the deed of October, 1807. Consequently, the petitioner is entitled, under the lord chancellor's order, to have the sum of 2256*l.* 1*l.* 1*d.* taken into account, as the joint property of Pemberton and Stokes.

Sir J. Cross.—The question we have to decide in this case, is one of very great importance. On that account, I felt anxious to hear every thing that could be said by the counsel for the assignees; and, after the best consideration I can give to the case, my impression is, I confess, in favour of the petitioner, Pemberton. And I feel the less hesitation in expressing that opinion, concurring, as I do, with my learned colleagues, that this is not a case of order and disposition. On the face of the

original petition, which was presented nine years ago, the assignees might possibly have raised that question, though I am inclined to think that it would not have been considered a tenable point, even at that time. The state of facts I collect to be this: The property in question was a debt due from Johnson & Co. to Pemberton and Stokes. Pemberton dies, and his executors assign his interest in the partnership property, absolutely, to the two Stokes; afterwards, Thomas Stokes retires from the concern, leaving George Stokes alone in the possession of the partnership property. Upon George Stokes's bankruptcy, his assignees have undoubtedly a right to take all the joint effects, as the property of George Stokes; but then they must take them subject to a contingent interest, which vested in the petitioner, as the representative of Samuel Pemberton, after the bankruptcy of George Stokes; and it was not until after the interest so vested in the petitioner, that the assignees received the amount of the composition from Johnson and Co., which, by the provisions of the deed of 1807, the petitioner was entitled to have assigned over to him. It appears to me, that George Stokes was the true owner of this property, subject only to the lien of the petitioner; and, consequently, that the 72d section of the bankrupt act does not apply to the circumstances of this case. Nor does the case of *Ex parte Williams*, 11 Ves. 3, which has been cited by the counsel for the assignees, in any way bear upon the present question; for, there, the retiring partner's share was absolutely assigned to the continuing partner; but here, a contingent interest in the partnership property was expressly reserved to the executors. In *Horn v. Baker*, 9 East, 215, too, the outgoing partner was the owner of the chattels, and permitted the continuing partner to have the use of them until the period of his bankruptcy. The great question there was, whether the plaintiff was not the true owner of certain implements and fixtures, and had not left them in the bankrupt's possession as reputed owner; and it was decided, that the movable implements were in the order and disposition of the bankrupt. In the present case, I think that Pemberton had a lien on the property assigned to George and Thomas Stokes, for the amount of the purchase-money; and that he was entitled to be paid out of such property, in case default was made in the payment of any of the instalments. The petitioner appears to have been guilty of some delay in this matter; for it is certainly rather extraordinary, that we should now have to decide this question twenty-two years after the issuing of the commission. But this delay may possibly be explained; and as the question is now brought before us, we are bound to deal with it in the best manner we can; and I am of opinion, that the petitioner is entitled to the prayer of his petition, as far as regards the sum of 2256*l.* 11*s.* 1*d.* mentioned in the first schedule.

Sir G. ROSE.—The opinion I entertained yesterday upon this case was the same, as that which has been expressed by the rest of the court to-day. The question now before us is, in what way this specific property is to be dealt with, with reference to the 72d section of the bankrupt act, and the provisions of the deed of October, 1807; and to enable us to decide this question, we must ascertain who was the true owner of the property; and then see how far the party, whom we may find to be the true owner of the property, was a consenting party to its being left in the possession of the bankrupt. The circumstances of the present case are different from those in *Ex parte Dale*, Buck, 365; for the vendor, in that

case, had only contracted to sell the property, and the bankrupt was let into possession of it, without any conveyance being executed to him; and it was therefore decided, that the vendor was the true owner of the property. But here, by the deed of October, 1807, the executors of Samuel Pemberton conveyed and assigned all their share and interest in the partnership property to the bankrupt and Thomas Stokes. Where one partner, retiring from a concern, assigns his share in the partnership effects to the continuing partners, and the latter become bankrupt, there can be no question but that the commissioners are empowered to deal with it as the property of the continuing partners, and that it will vest in the assignees. What Lord ELDON has observed, with respect to the mode of preventing the operation of the clause of order and disposition, by executing a trust-deed, proves the correctness of this position. But in the case of an executory agreement, where one of the parties to it becomes bankrupt, the court will make the equities available between them, by taking hold of the incident of bankruptcy, which a Court of Equity, before default made by the bankrupt, could not effect. I agree, that if only the property at Coseley had been charged with the payment of the debt due to Samuel Pemberton's executors, the petitioner could have no lien on any other of the joint effects of Pemberton and Stokes; but there is an express contract in the subsequent part of the deed of 1807, that in case of default made in the payment of any instalment, George and Thomas Stokes should assign and convey *all* the partnership property unto the executors, upon trust to sell the same and pay the debt of £49,000, or so much thereof as should then remain unpaid. If all the debts due to the firm of Pemberton and Stokes had been received by George Stokes, before his bankruptcy, then, I admit, that the petitioner could have no lien on the funds arising from those debts in the hands of the assignees. But, as this debt from Johnson & Co. continued due and owing at the time of the bankruptcy of George Stokes, do not the assignees take it, subject to the condition attached to it by the deed? The assignees are as much trustees for the petitioner, in respect of the amount subsequently received by them, as they are in the case of a bill of exchange remitted to a banker who becomes bankrupt, and received by the assignees after the bankruptcy; in which case they become trustees for the party to whom the bill of right belongs.

After thus disposing of the item of 2256*l.* 11*s.* 1*d.* in the first schedule, and then of the second item, which was ordered to be struck out; the further hearing of the matter was, on Mr. *Swanston's* application, adjourned, for the purpose of giving the parties an opportunity to come to some arrangement. But this not having been effected, the matter was again brought before the court.

Mr. *Swanston*, and Mr. *G. L. Russell*, for the assignees, applied to the court to review its decision on the first item in the first schedule to the commissioners' report, on the ground, that the former argument proceeded on a mutual misapprehension of the facts, namely, that there had been no default committed by George Stokes before his bankruptcy, in the performance of the covenants contained in the deed of October, 1807; whereas it now appears that there was; as will be perceived from a reference to the report itself of the commissioners. We could not apply for a rehearing of the case, for only part of it has been heard. There are other items in the schedule, depending precisely on the same documents, on which the first item depended. If the court, therefore,

will not review its former decision, it may decide one way on some of the items, and a different way on the others.

Mr. *Spence*, for the petitioner, objected to this mode of proceeding. The case, as to the first item, has been already decided, and we are not now prepared to meet that question, being entirely taken by surprise. If we had known that an application for a rehearing was to be made, we should have been prepared to go into the former question. But they have not taken the proper means to entitle them to a rehearing.

The court said, that the better mode would be for the assignees to show, that the fact of a previous default was material, with respect to the former decision; in which case, the court could then direct an inquiry as to the fact.

Mr. *Swanston*, and Mr. *G. L. Russell*.—We will endeavour to show, not only the fact of a previous default, but that it was material to the decision of this question. That it was material, cannot be disputed; for, by the terms of the deed of 1807, the executors of Pemberton had a right to re-enter and take possession of all the partnership property, in case any of the instalments was not paid within sixty days after the same should become due; and if they did not exercise this power, then they permitted George Stokes to continue in the possession of the property, reputed owner. If the executors, therefore, had any lien at all on this property, they waived such lien by their own laches. For, after default made in the payment of the instalments, the executors of Pemberton must be considered as the real owners of all the partnership property, and the assignment of the debts, by the deed of 1807, must be treated as a mortgage from the executors to George Stokes. Now in all cases of mortgage, the mortgagor is considered as the true owner of the property mortgaged; therefore, in this case, the partnership debts must be held to have been left in the order and disposition of George Stokes, with the consent of the executors, who had become, in point of law, the true owners of all the partnership property. The deed of 1807 gave them the power to re-enter. [ERSKINE, C. J. But they have not re-entered, and therefore the assignment of the partnership property to the Stokeses stands good. The covenant, on the part of George and Thomas Stokes, to re-assign the partnership property, is to re-assign on re-entry by the executors,—the right to re-enter being left entirely to their option. As the re-assignment, therefore, was not to take effect until after the re-entry, and the executors have not exercised that right, the assignment to George and Thomas Stokes is still in force. Consequently, George Stokes was, at the time of his bankruptcy, the real owner of the property, subject to a defeasance containing certain conditions.] After default was made in the payment of the instalments, there existed such a state of circumstances between these parties, as would have entitled the executors of Samuel Pemberton to come into a Court of Equity and insist on a re-assignment of the debts and other property of the partnership. The proviso in the deed is, that in case any one of the instalments should not be paid within sixty days after it should become due, the executors might re-enter upon, and take possession of all the partnership property, for their own use. Now, we say, that as one of the instalments became due more than sixty days before the bankruptcy of George Stokes, and the executors might have entered, they *ought* to have entered; their right of re-entry operated so as to constitute them the true owners of the property; and by not having

exercised this right, they permitted George Stokes to hold out a false colour to the world, as the reputed owner of that property, which they were bound themselves to resume the possession of. The right to reclaim the property puts the executors in the same position as if they never had parted with it. If the court should hold, that in the case of an assignment of the debts of a trader to his creditors by way of security for his debt, the trader may be held out to the world as the ostensible owner, and that, upon his bankruptcy, the creditor may step in and take the whole of these debts for his own use,—the mischief, which was intended to be provided against the 72d section of the bankrupt act, is still without a remedy. The case of short bills in the hands of a banker who becomes bankrupt, which was alluded to from the bench in the former argument, is founded altogether on the custom of trade, depending on the principle which regulates the dealings between principal and factor. The difficulty we have to surmount here is, that the court seem to think that George Stokes was the true owner of the partnership debts. But what is the ownership of a debt but the right to go and receive it? And could not the executors of Pemberton have called on Johnson and Co., in this case, to pay them the debt which they owed to the partnership of Pemberton and Stokes? There is no authority against the position we are now contending for, which is this—that personal property cannot be made the subject of a valid assignment, where the possession is not consistent with the deed, as against the creditors of a bankrupt.

Mr. *Spence*, and Mr. *Duckworth*, *contrà*, were not called on by the court.

ERSKINE, C. J.—The discussion that has now taken place has arisen from a supposition, that the fact of one of the instalments having been in arrear, for sixty days before the bankruptcy of George Stokes, would have altered the decision of the court upon the former hearing. But the opinion I expressed, on that occasion, did not depend at all upon the circumstance now relied on by the counsel for the assignee; and I have heard nothing to-day, to induce me to alter that opinion. I still think, that the 72d section of the bankrupt act has nothing on earth to do with the present question. In this case, there was an assignment of the debt from Pemberton's executors to George and Thomas Stokes; and if no notice had been given to the debtor, the assignors would have been left in the order and disposition of the debt. But here, there was full notice given to Johnson & Co. of the assignment to George and Thomas Stokes, and of the subsequent assignment by Thomas Stokes to the bankrupt; who was therefore not only the apparent, but the real, owner of this debt. It is supposed, however, that there are some clauses in the deed of 1807, which defeat the operation of the assignment to George Stokes, and render it entirely void. It is very true, that there is a proviso contained in it, enabling the executors to re-enter and take possession of the partnership property, in case default is made in the payment of any of the instalments, for the space of sixty days; and it is declared, that, after such entry, the assignment should cease and determine, and be utterly void. But it appears to me, that the right to re-enter and vacate the assignment was an option, given to the executors alone, which they were to exercise, or not, for their own advantage; and that the re-entry was not to depend on the choice of *either* of the parties to the deed. The executors had, in fact, two options given

them: either to re-enter, and put an end to the assignment,—or to abstain from entering, and request the Stokeses to re-assign the property. They neither entered, nor requested a re-assignment; but, on the contrary, received payment of the instalments, both from George Stokes and his assignees, for a long period after the right of entry occurred. This amounts to a waiver of any re-assignment, and leaves the parties in precisely the same situation as that in which they originally stood under the deed of 1807. We are therefore thrown back on the terms of Lord LYNDBURST's order; which declares, that the whole of the partnership property was, and is, subject and liable to the payment of the money due to the petitioner. The case is left precisely where it was at the last discussion; when the court decided that George Stokes was not merely the reputed, but the real, owner of all the property included in the deed.

Sir J. CROSS.—I remain of the same opinion I before expressed, although I feel some difficulty in giving a positive judgment on the case; as it does not satisfactorily appear to my mind, at what precise period the first default was committed in the payment of the instalments. I should wish, therefore, to reserve my judgment, until that fact is ascertained.

Sir G. ROSE.—It appears to me that the fact must necessarily be presumed, both from the statements in the petition, and the argument of the counsel for the assignees, that there was a default committed in the payment of the instalments previous to the bankruptcy of George Stokes, as attaching upon the true ownership of this property at the time of his bankruptcy. But as this point has been much pressed, and the amount in question is considerable, it will be better, perhaps, that I should state the facts of the case. (His honour here recapitulated the leading facts.) I apprehend it is now too late to ascertain the correctness of this position in the law of bankruptcy—that whenever you find a trust attaching on a chattel, or where the delivery of a chattel to the bankrupt has been for the purpose of a specific appropriation of it, the right of the assignees is controlled, and the property does not pass under the commission. And I take the liberty of saying, that it is on this principle the cases relating to short bills have been decided, which equally rest upon a trust. It is material to observe, that neither the executors of Pemberton, nor the petitioner, were parties to the subsequent assignment from Thomas Stokes to George Stokes; for there would be more difficulty, perhaps, in dealing with this case, as between the petitioner and George and Thomas Stokes, than between the petitioner and George Stokes alone. The counsel for the assignees contend, that the debt of Johnson & Co., as well as the other joint property of Pemberton and Stokes, was left in the order and disposition of George Stokes, as reputed owner, with the consent of the petitioner. But where do you find, that either the petitioner, or the executors of Pemberton, have in any way consented that this property should be in the separate possession of George Stokes, and that he, to the exclusion of Thomas Stokes, should have the sole order and disposition of it? The case might be put upon this—there is no consent of the petitioner to the ownership of George Stokes only. It appears to me, that the question that was likely to arise, in the case of default being made in the payment of the instalments, was not lost sight of in the original arrangement by the parties to the deed; and it would be hard to make

a clause, intended for the benefit of a party, work a prejudice to him. The executors of Pemberton had a right to disclaim the right of re-entry reserved to them by the deed; but, by waiving this right, they have not abandoned their lien. There is nothing in the deed which says, that in case of default, they were to be remitted *instantly* to their former rights. If that argument was to prevail, the clause which enables the executors to call upon the Stokeses to re-assign the property, would have been wholly unnecessary. This brings the case back to what was said by the court on the former occasion, as to the first item in the first schedule to the commissioners' report. The judgment of the court, therefore, as to that item, must stand. The case of *Ex parte Kidder, re Watkins*, 4 Deac. & C. 87; 1 Deac. 131, has nothing to do with this; that went entirely on the point of notice.

The order finally made was, that it should be referred to Mr. Gregg, to inquire and certify whether the assignees were properly chargeable with more than the sum of 3294*l.* 5*s.* 7*d.* in respect of the several items of 3817*l.* 15*s.* 7*d.*, and 522*l.* 16*s.*, mentioned in the first schedule to the report of the commissioners; and further, to inquire and certify, whether, on the 3d of October, 1807, the date of the deed of assignment in the petitions mentioned, the property, from which the sum of 130*l.* 11*s.* mentioned in the second schedule, arose, constituted part of the joint estate of the firm of Pemberton and Stokes; and whether any and what debts of that firm had been proved, or were then proveable, under the commission against George Stokes; and the petitioner, Edwin Pemberton, was to be at liberty to tender to the assignees an indemnity to them in respect of such debts, if any, to be settled by Mr. Gregg; with the usual directions as to the examination of all necessary and proper parties on interrogatories, the production of books and papers, and the liberty to state special circumstances. It was further ordered, that the sums of 315*l.*, 13*l.* 19*s.* 11*d.*, and 10*l.*, mentioned in the first schedule, should be struck out from that schedule; and that all the sums mentioned in the second schedule, except the sum of 1130*l.* 11*s.*, should also be struck out from such schedule; and that, as to all other sums mentioned in such schedules, the certificate of the commissioners should be confirmed; and that the surviving assignee of the bankrupt's estate should, on or before the 15th of February, 1836, pay the balance of the account of the assignees in the hands of Messrs. Bates and Robins, including any interest allowed them, into the bank, with the privity of the accountant in bankruptcy, to the credit of this matter, to be laid out in the purchase of £3 per cent. annuities, in trust in this matter; and the accountant was to declare the trust thereof accordingly, subject to further order, and to draw on the bank according to the form prescribed by the act of Parliament, and the general rules and orders in such case made and provided. Further directions and costs were reserved, with liberty for any party to apply.

Ex parte KNIGHT.—In the matter of POWNALL.—p. 459.

A creditor advanced money to the bankrupt, by discounting bills, payable within three months from the date, and on the security of the deposit of goods, and took more than £5 per cent. for the discount:—*Held*, that this was within the provisions of the 3 & 4 Will. 4, c. 98, s. 7, and that the contract was therefore not usurious.

THIS was the petition of a creditor to prove the sum of 581*l.* 18*s.*, as the balance due on certain bills of exchange, which had been discounted for the bankrupt, and the proof of which had been rejected by the commissioners, on the ground of usury.

It appeared, that during the last two years the petitioner had various transactions with the bankrupt in discounting bills and promissory notes, payable at or within three months after date, on which, or on the greater part of them, the petitioner took more than £5 per cent. for the discount. On the 14th March, 1835, the petitioner discounted three bills for the bankrupt for £100 each, two dated the 13th March, and one the 14th March, 1835, payable respectively one, two, and three months after date, to the order of the bankrupt, at Masterman & Co.'s; and the petitioner retained out of the proceeds 23*l.* 2*s.* 5*d.* for the discount, which of course greatly exceeded legal interest. On the 21st April, 1835, the petitioner discounted another bill for the bankrupt, dated the same day, payable three months after date to the order of the bankrupt for £266, which was endorsed by the bankrupt to the petitioner; who retained 4*l.* 1*s.* for discount, stamp, and banker's commission. And on the 2d May, 1835, the petitioner discounted another bill for the bankrupt, dated the 1st May, 1835, payable three months after date to the order of the bankrupt, for £450; upon which occasion the petitioner retained 49*l.* 6*s.* 5*d.*, which also greatly exceeded legal interest. All the bills so discounted, except the first bill for £100, were dishonoured, and were in possession of the petitioner and unpaid. In February, 1834, the petitioner, being largely in advance to the bankrupt in these transactions, applied to him for some security for the balance due; when the bankrupt assigned to the petitioner a policy of insurance on the bankrupt's life for £1000, as a collateral security for all money advanced, or to be advanced, not exceeding £1000. The petitioner afterwards applied for further security, when the bankrupt deposited with the petitioner two parcels of hops, and afterwards delivered to him the following memorandum:—

“ Manchester, December 8, 1834.

“ Sir,—Herewith you will receive invoice of ten pockets of hops, delivered to you on the 8th of November last, marked and numbered; also invoice of sixteen pockets of hops, marked and numbered, and delivered to you this day; all which twenty-six pockets shall be to you as a security for such advances as you have made, or may hereafter make, in any way of discount of any bill or bills, or promissory note or notes, or any other account whatsoever; and for interest, and all incidental charges thereon. And in case of any default in payment of the amount which may be owing from me to you, for the time being, on demand, you shall be authorized to sell the same pockets of hops, or any of them, either by auction or by private contract, and either for cash or on credit, as you in your discretion shall think fit; and after repayment of your advances, interest and expenses, the surplus, if any, to be returned to me. And I



further agree, that until such sale or sales shall be made, the said pockets of hops shall remain, at my risk, from fire or otherwise, I hereby agreeing to pay you rent for warehouse-room, the said rent to be payable in advance half-yearly. And I further agree to be answerable to you for any deficiency of the amount owing by me to you, after sale of the before-mentioned pockets of hops.

JOHN POWNALL."

• In March, 1835, the petitioner, being still in advance £500 to the bankrupt, again applied for further security, and obtained invoices of two parcels of brandy, and a parcel of wine, with a bill of lading of one of the parcels of brandy, together also with a memorandum, similar in effect to the one before mentioned; and on the 28th of March he obtained an order for the delivery to him of another parcel of wine, of the value of 12*l.* 4*s.*

On the 22d of June, 1835, the fiat issued; and the various securities were afterwards sold by the petitioner, with the assent of the assignees. The bills dishonoured amounted to £916, and the net produce of the securities sold amounted to 309*l.* 15*s.* After giving credit for £50, cash received from the bankrupt, and for the produce of the securities, (deducting 25*l.* 3*s.*, paid on a claim of lien of another party,) there remained 581*l.* 18*s.* due to the petitioner. For this sum he tendered a proof, which the commissioners rejected, on the ground that the petitioner, by taking the collateral securities, had deprived himself of the protection of the late statute of 3 & 4 Will. 4, c. 98, s. 7, which the commissioners thought contemplated such loans and transactions only as were secured by bills or notes alone. The commissioners, however, entertained considerable doubt on the question, and were desirous that the opinion of the Court of Review should be taken on it.

Mr. *Swanston*, and Mr. *O. Anderdon*, in support of the petition. By the seventh section of the recent act of 3 & 4 Will. 4, c. 98, it is enacted, "that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon, or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any thing in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding." The commissioners were not aware, perhaps, of the case of *Connop v. Meakes*, 2 Adol. & Ell. 326, (29 E. C. L. R. 107,) which was lately decided on the construction of this statute, and in which it was held, that the statute extended even to a warrant of attorney, given to secure the payment of such bills; and that the liability on the warrant of attorney amounted to a liability to the bills. In the present case, the proof was tendered on the bills alone; therefore, no possible objection can apply to them; as might perhaps have been more plausibly urged, if the proof was sought on any additional security.

Mr. Cowling, contra. The case of *Connop v. Meakes* is beside the present question; for, there, the bills were discounted before the additional security was given; but, here, the pledge of the goods, and the discount of the bills, were simultaneous. It is very extraordinary, that this clause of the new act has no preamble to explain its meaning; (*u*) but still the enacting words of the clause are, in reference to the legalizing of this description of bills or notes, "by reason of any interest *taken thereon*, or *secured thereby*;" and the words at the end of the section must be taken subject to the previous words contained in it. In this case, the discount taken was not merely secured by the bills, but also by the pledge of the goods, the discount and the pledge being here one entire transaction. The term *discount* means a credit given to the parties on a bill, on advancing the amount of it to one of those parties; but it is confined to a transaction on the bill alone, and not to one which relates to a pledge of goods. Then, what effect has this clause in the new statute on the provisions of the usury act, 12 Ann. st. 2, c. 16? The clause in the new act does not say, that *all loans of money* shall be exempt from the penalties imposed by the statute of Anne, but merely "the loan of money on any such bill or note." [ERSKINE, C. J. Here the proof is tendered on the bills, and the statute of Will. 4 is express.] The contract here was not only on the bills, but on the bills and the goods united. You cannot separate the transaction, and take only part of it, for the purpose of bringing it within the provisions of the new act. If the petitioner had lost the possession of the goods, and had brought an action of trover to recover them back, he might have been met with the defence, that the goods were pledged for an usurious consideration. [ERSKINE, C. J. Does not the act of Parliament legalize the bills, and leave the pledge as it was before? The question is, whether you can refuse proof on the bills, because part of the transaction is illegal.] The words of the statute, "by reason of any interest *taken thereon*, or *secured thereby*," seem to confine the operation of the clause to a transaction on bills alone, and not to one mixed up of bills and goods. Suppose the petitioner was to bring an action on any one of these bills, the defendant might plead, that the bill was given to secure a sum lent for less than three months at usurious interest, and that goods were given at the same time as a pledge. The plaintiff in that case could not recover. In *Connop v. Meakes*, there was a debt already incurred, before the warrant of attorney was given; here the accruing of the debt, and the delivery of the bills and goods, were contemporaneous.

(a) It seems still more extraordinary, in these enlightened and prolific times of legislation, that so important a repeal as this, of the law of usury, should have been foisted into an act of Parliament, intitled "An Act for giving to the Corporation of the Governor and Company of the Bank of England certain privileges for a limited period, under certain restrictions:" the only object of passing which act, as can be gathered either from its preamble, or any recital contained in it, is to continue, limit, and explain the exclusive privilege of banking, possessed by the Bank of England. It would be certainly very desirable, that the material enactments of a statute should be, even in the present day, a little more consistent with its title or preamble, in order that those who are bound to know and obey the laws, should have a better chance of learning their annual fluctuation. The good old times were supposed to be gone by, when an act of Parliament, (31 Geo. 2, c. 35,) "for granting a liberty to carry American sugars, and for preventing the stealing or destroying of madder roots," was permitted to contain also enactments *for preventing the committing of frauds by bankrupts*; and an act, (23 Geo. 2, c. 26,) *for the regulation of pilots*, was allowed to embrace also within its comprehensive sections a provision to *prevent the stealing of turnips*, and *for the better regulation of attorneys*. It seems, however that the darling plan in George the Second's days, of legislating in the lump, is now speedily reviving.

Mr. *Swanston*, in reply, was stopped by the court.

ERSKINE, C. J.—In this case the circumstances are such, that the contract for the deposit of the goods may be void, and that for the discount of the bills good, by virtue of the recent act of Parliament. The difficulty here arises from the uncertainty as to the extent of the repeal by that act of the law of usury. The statute, however, positively declares, that no bill of exchange, payable at or within three months, shall be void, by reason of any interest taken thereon, or secured thereby, or any agreement to pay or receive, or allow interest in discounting the same. Now, here the proof was tendered on bills which were payable at or within three months. But it is objected, that there was a collateral security by the deposit of certain goods, and that the whole transaction must stand or fall together. The statute certainly does not say that *any* deposit is to be legal; but it is impossible to get over the plain language of the act, which says, that the liability of any party to any *bill of exchange* shall not be affected by reason of any statute or law for the prevention of usury. Now, if we reject this proof on the ground of usury, will not the party be thereby “affected,” contrary to the express words of the statute? That difficulty appears to me insurmountable. And as to its being one transaction, which cannot be separated—put the case of a pawnbroker, discounting a bill of exchange, and advancing money at the same time on the pledge of goods; the contract on the pledge might be usurious under the pawnbroker’s act; but it would not affect the contract on the bill. When the parties come here to contest the deposit of the goods, a different question may arise as to the legality of that transaction.

Sir J. CROSS.—I confess that I have not yet made up my mind on the petitioner’s right to prove on these bills of exchange; for it is not manifest to me, that the commissioners have erred in rejecting such proof. The act of Parliament in question repealed no previous law in force for the prevention of usury, being merely intended as an exception to that law; and I think the petitioner is bound to show, that this transaction is within the exception specified by the statute. The exception is in favour of bills of exchange or promissory notes, payable at or within three months, or not having more than three months to run. Now, does this exception apply to all cases of bills or notes, when mixed up with other transactions, or is it to be confined to such transactions and dealings as relate to bills or notes alone? The statute says, that the bill or note shall not be void “by reason of any interest *taken thereon, or secured thereby.*” Now, these words, according to my apprehension, confine the exception to bills or notes alone; the words “secured thereby,” meaning secured by such bills, and not by any thing else. But here there was a contract to lend money, not only on the security of bills of exchange, but also upon the deposit of goods, which I think is an entire contract, and cannot properly be split, by treating the discount of the bills as one transaction, and the pledge of the goods as another. The discount and the pledge were here simultaneous; and that makes all the difference between this case and that in the King’s Bench. If, instead of the warrant of attorney in that case having been given after the discounting of the bills, it had been given at the time, I have no hesitation in saying, that it would have been an usurious transaction. As at present advised, I am inclined to think the commissioners did right in rejecting this proof.

Sir G. ROSE.—It appears to me, that a clearer case than this was never before the court. The question simply turns on this—was this a *bonâ fide* contract on the bills, or not? It might have turned out, that there was some artful contrivance practised in the case, which would have taken it out of the act of Parliament,—as that the bills were given as a mere pretence, or shift for usury, and that the real transaction was a pledge of goods. But where does it appear, that this was not a *bonâ fide* transaction on a discount of bills of exchange? On the contrary, the evidence shows it to be a plain, straightforward case of discount. If the order made by this court to admit the proof was conclusive against the right of the assignees to recover the value of the goods pledged by the bankrupt, the case might present a different aspect. But the order may provide for the retention of the dividends on the petitioners' proof, for such a reasonable time as will afford the assignees an opportunity to inquire into their right to recover the goods pledged, or their value, from the hands of the petitioner.

The order was made, as suggested, by the learned judge.

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**Ex parte SPENCER and Others.**—In the matter of MITCHEL.  
—p. 468.

A bankrupt, whose wife, previous to her marriage, was entitled to some shares in a gas company, which were still standing in her name, deposited the certificates with a banking company, for the security of advances; but no notice was given to the gas company, until after the act of bankruptcy. *Held*, that the banking company were not entitled to those shares, as against the creditors of the bankrupt.

The bankrupt's wife, it was also held, ought to have been served with the petition.

THIS was the petition of a banking company, claiming to be entitled to ten shares in the Sheffield Gas Light Company, the certificates of which had been deposited by the bankrupt with the company, previous to his bankruptcy, to secure advances. It appeared, that the shares were the property of the bankrupt's wife before her marriage, and had never been actually reduced into possession by the husband; that they were still standing in the wife's maiden name in the books of the gas company, who knew nothing of the bankrupt; nor had the bankrupt ever interfered in any way with the shares since his marriage, until he deposited the certificates with the banking company. The deposit was made some time before the act of bankruptcy; but no notice of it was given to the gas company until some days afterwards; the act of bankruptcy having been committed on the 9th, the notice given on the 13th, and the fiat issued on the 18th of the same month.

The petition first came before the court on the 9th of March, when the court ordered it to stand over for the purpose of amending it, by suggesting the interest of the wife, and serving her with a copy of the petition, to give her the option of appearing to it or not. It was brought on again on the 25th of April.

Mr. *Kenyon Parker*, in support of the petition. The first question is, whether any notice of the transfer was necessary in this case; for as the shares continued to stand in the books of the gas company in the wife's maiden name, and the bankrupt had never reduced them into possession, he can hardly be said to be the apparent or reputed owner

of them at the time of his bankruptcy. But if notice was necessary then it has reference back to the original deposit, which was long before the commission of any act of bankruptcy.

Mr. *Swanston*, *contrà*, was stopped by

The court.—It is possible to get over the fact of the act of bankruptcy having been committed, before notice was given to the gas company of the deposit of the shares.

Petition dismissed, but without costs.

**Ex parte WILLIAMS.—In the matter of WEBB.—p. 469.**

The court has power to order the taxation of a solicitor's bill, in which is contained a charge for attendance before the commissioners on behalf of an equitable mortgagee.

THIS was a petition for an order to tax the bill of costs of a solicitor, under the following circumstances. The petitioner was a creditor of the bankrupt, and held some deeds deposited with him by way of equitable mortgage as security for his debt; he did not come in under the fiat, but stood upon his security. Being summoned before one of the commissioners of the Court of Bankruptcy, to be examined touching his mortgage, he was on that occasion attended by his solicitor, who afterwards sent in a large bill for conveyancing and other business done for the petitioner, which was the subject of the present application. There was no item in the bill for business done in bankruptcy, except the charge for the above attendance before the commissioner; nor were there, in fact, any items in the bill for business done in any other court.

Mr. *Swanston*, in support of the petition, referred to the case of *Collins v. Nicholson*, 2 Taunt. 321, where it was held, that an attorney's bill for obtaining a bankrupt's certificate was taxable by the master, on the ground that the procuring of the lord chancellor's signature is business done in court. And Sir J. MANSFIELD said, in that case, that he should have thought that business done under a commission of bankruptcy would, without the aid of the statute of 5 Geo. 2, c. 30, have been taxable by the master. [Sir G. ROSE. The question is, whether the items of this bill relate to any business in the Court of Review. If so, than no doubt we could refer the bill for taxation.] A fiat in bankruptcy is clearly a proceeding in a court, and therefore any proceeding under it is taxable. If the lord chancellor could formerly have ordered a bill containing such a charge to be taxed, then this court has equal power. The commissioner summoned a party to be examined before him, on a matter relating to the bankruptcy; and there is no reason, why the costs incurred for one description of business transacted before the commissioner should be taxable, more than those occasioned by another.

Mr. *Cooper*, *contrà*. The real question is, whether a solicitor, attending before commissioners of bankrupt for an equitable mortgagee, is liable to have his bill taxed, when there is no direct charge for business done by him under the bankruptcy. [Sir J. CROSS. Can the charge of an attorney for advising a witness, who is subpoenaed to give evidence in a Court of Law, be referred for taxation?] No such case can be found. Here the mortgagee did not come in under the commission, or

prove a debt, but insisted on his security, in opposition to the commission, and can therefore only be considered in the character of a witness. He was merely summoned before the commissioner, to explain why he detained the deeds relating to an estate, which the assignees thought proper to sell. It does not appear, that the solicitor did any act before the commissioner, which no one but an attorney could have done; for the whole of what he did might equally have been done by some discreet friend, as well as by an attorney. If an attorney charges for attendances and advising previous to an intended action or suit, which is never instituted, a charge of that description is not a subject of taxation. The Court of Review has therefore no jurisdiction to order such a bill as this to be taxed.

*Mr. Swanston* was heard in reply.

*ERSKINE, C. J.*—I confess that I, for one, do not feel much difficulty in this case. The item in question appears to me to relate to business done in the Court of Bankruptcy; and if so, I do not see how we can refuse to order the bill to be taxed. For, supposing the solicitor was to bring an action for the recovery of the amount of the bill,—as the defendant could not on the trial question the propriety of the charges, the only thing the plaintiff would have to prove would be, the business done; and the defendant would be obliged to have the bill taxed, if he disputed the amount, or propriety of the charges. Unless the bill was taxed in this court, therefore, it could never be taxed at all. The only circumstance to distinguish this case is, that the solicitor here did not attend as solicitor to a litigant party, but at some examination before the commissioners for the purpose of discovery. But the equitable mortgage was drawn under the jurisdiction of this court by the summons of the commissioner; and I cannot help saying, that the strong inclination of my mind is, that this was business done as an attorney in the Court of Bankruptcy.

*Sir J. CROSS.*—As our decision in this case will go to the profession as a rule to govern similar questions in future, I should wish to have time for further consideration of the point, before I deliver my opinion.

*Sir G. ROSE.*—As the act of Parliament has given to this court the same jurisdiction, which the lord chancellor previously possessed in matters of bankruptcy, the only difficulty here is, whether this business can be considered as having been done in the Court of Bankruptcy. It seems to me, as at present advised, that the lord chancellor, sitting in bankruptcy, would not have had jurisdiction to tax this bill. It is very true, that the 1 & 2 Will. 4, c. 56, and the 5 & 6 Will. 4, c. 29, s. 25, have created this a Court of Law and Equity, and have given it the same general jurisdiction over solicitors, as that possessed by any other court in Westminster Hall; and it certainly would be difficult to say, that this is not an item for business done relating to a matter in bankruptcy. But, that a trifling charge in a bill like this, where the party is summoned adversely before the commissioner, should transfer to our jurisdiction all kind and manner of charges, and of whatever amount, is to me, I confess, rather a startling proposition. And I think we should be assuming very great jurisdiction, if, under these circumstances, we were to order this bill to be taxed. Nevertheless, if on further consideration we find we have such jurisdiction, we are bound to exercise it, however unwillingly.

*Cur. adv. vult.*

The case stood over until this day, (3d May, 1836,) when

ERSKINE, C. J., said, that the court had further considered the matter; and as they had power to order a solicitor's bill to be taxed for business done *before* the issuing of the commission, (a) they had no doubt of their jurisdiction in the present instance.

The order was therefore made as prayed.

(a) See *Ex parte Smith*, 5 Ves. 706.

Ex parte LLEWELLYN.—In the matter of WILLIAMS.—p. 474.

*Seemle*, that the assignees are justified in commencing a suit in equity, without having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose; provided, they subsequently obtain the approbation of the creditors, whose debts are of the requisite amount.

THIS was the petition of assignees, to be allowed a sum for the costs of a Chancery suit, which the commissioners had disallowed in the audit of their accounts, on the ground, that the meeting of creditors, which had been called to consider the propriety of commencing such suit, had not been duly and regularly convened. (a) The meeting was advertised in the Gazette of the 28th of August, for the 1st of October; but it did not precisely appear, whether the major part in value of the creditors present at the meeting consented to the suit, nor whether the creditors present at the meeting were one-third in value of those who had proved under the commission. The petitioner stated, in his affidavit, that he attended the meeting in question, on behalf of one of the creditors who had proved a debt under the commission, and by his authority; but that he omitted to sign the consent on his behalf.

Mr. *Swanston*, in support of the petition. It is difficult to understand what the commissioners meant, by stating that the meeting was not duly convened, and assigning that circumstance, as the ground of their refusal to allow these costs; for it appears, on the face of the proceedings, that the meeting was convened according to the provisions of the 88th section of the bankrupt act, and that twenty-one days' previous notice of the meeting was given in the Gazette. There has been here no collusion of the assignees in conducting this suit, and the result has been beneficial to the estate. What is there to distinguish this case from the rule, that a *cestui que trust* cannot call his trustee to account for moneys received by him, without indemnifying him from the costs incurred in receiving those moneys?

Mr. *Pigott*, contra, said, he was instructed that the creditors, who attended the meeting to assent to, or dissent from, the suit being commenced, were not a third in value; and that the assignees, therefore, ought to have obtained the consent of the commissioners, before the suit was proceeded with.

(a) By 6 Geo. 4, c. 16, s. 88, the assignees, with the consent of the major part in value of the creditors, who shall have proved under the commission, present at any meeting, whereof, and of the purport whereof, twenty-one days' notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt's estate, &c.,—and no suit in equity shall be commenced by the assignees, without such consent as aforesaid; provided, that if one-third in value or upwards of such creditors, shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid,) the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid.

Mr. *Swanston*, in reply. It is sworn by one of the assignees, that there were actually half the creditors in value present at the meeting, by themselves or their attorneys; although the names of those who signed the consent, did not amount to that proportion, in consequence of the assignee, who attended on behalf of Mr. Hall, having omitted to sign such consent. [ERSKINE, C. J. You nowhere state in your affidavit, that you had the authority of Mr. Hall, to assent to, or dissent from, the suit in question. The affidavit merely says, that you attended the meeting by authority of Mr. Hall.] [Sir G. ROSE. The court never takes the fact of the consent of creditors by affidavit, but by the certificate of the commissioners.] I never heard of any certificate of commissioners, as to the number of creditors assenting to the institution of a suit in equity.

ERSKINE, C. J.—The commissioners having disallowed an item in the account of the assignees, they now come to this court to overrule the decision of the commissioners; they ought, therefore, to make out a clear case, in order to have the item allowed. The commissioners say, that there was not the due consent of creditors obtained previously to the institution of the suit in question. But it would not follow, that the suit was beneficial to the estate, although it was even properly instituted. It does not appear to me, that there is evidence of a third in value of the creditors having attended the meeting, or that the major part in value of those present consented to the suit. Neither am I satisfied, from the equivocal terms of Llewellyn's affidavit, that he had the express authority of Hall to consent to this suit. I think it right, therefore, that the case should go back to the commissioners, to inquire into the facts. If, however, there is a consent of creditors subsequent to the meeting, provided they amount to a third in value of those who have proved their debts, that, I think, would be sufficient.

Sir J. CROSS.—Upon an inspection of the memorandum of the meeting of creditors, there does not appear to have been a consent, within the strict provisions of the statute; and if the commissioners had founded their disallowance of the costs on that ground, perhaps they would have been right. But the reason they have given is, that the meeting of creditors was not duly convened; although there is nothing to show that the meeting itself was improperly convened. If Llewellyn had stated in his affidavit, that he was the general agent of Hall, and attended all the meetings on his behalf, that, in my opinion, would have been sufficient; for I think that we are not called upon to construe this act of Parliament in the same way as if it was a penal statute. To send this matter back to the commissioners is, to my mind, not the best course of proceeding; we have the proceedings now in court; and we can surely inspect them, without referring the matter back to the commissioners. And if we should find from the proceedings, that Llewellyn was the general agent of Hall, we ought to presume, as it seems to me, that he had the authority of Hall to give his consent.

Sir G. ROSE.—I think, under all the circumstances, that the proper course is, to refer the matter back to the commissioners; for the question does not depend, alone, on the consent of the majority of the creditors in value present at the meeting. If it should turn out, that there has been a subsequent approbation of the suit, by creditors to a sufficient amount, that will be enough.

Ordered, that it should be referred back to the commissioners, to



inquire and certify, whether the assignees commenced the suit with the consent of the major part in value of the creditors present at the meeting, or with their subsequent approbation; and whether the suit was beneficial to the estate; and that both parties should have their costs out of the estate.

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Ex parte WHITLEY.—Re WHITLEY.—p. 478.

Where a *cestui que trust* applies for the removal of a bankrupt trustee, and serves the bankrupt with the petition; the bankrupt is entitled to the costs of his appearance.

THIS was the petition of a *cestui que trust*, for an order to remove a bankrupt trustee, and appoint another in his room, under the provisions of the 79th section of the bankrupt act; and the only question was, whether the bankrupt, who had been served with the petition, was entitled to the costs of his appearance.

Mr. *Koe*, for the petition. The application to appoint a new trustee was rendered necessary by the bankrupt's own act, in becoming bankrupt; and he is, therefore, not entitled to be allowed his costs.

Mr. *Anderdon*, for the bankrupt. The bankrupt, having been served with the petition, was bound to appear; and the present application is for the convenience of the petitioner.

Mr. *Lowndes*, appeared for the assignees.

The majority of the court were of opinion, that the bankrupt ought, under the circumstances, to be allowed the costs of his appearance; Sir J. Cross saying, that the bankrupt had a right to appear on the hearing of the petition, to see that no order was made to his prejudice.

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Ex parte PETER HARRIS ABBOTT and THOMAS BROWNING.  
—In the matter of JAMES BARBER.—p. 479.

After a bankrupt had compounded with his creditors, a commission issued against him in 1825, under which he obtained his certificate, but did not pay 15s. in the pound. He was for several years afterwards engaged in trade, with the knowledge of the assignees, until 1835, when a fiat issued against him, under which the official assignee had collected considerable assets. Upon a petition by the assignees under the fiat to impound the former commission, and praying for an order that the official assignee might divide the assets under the fiat amongst the subsequent creditors: *Held*, that the court could not interfere with the legal title of the assignees under the commission, in the absence of any connivance or concert on their part; but it was ordered, that if no petition was presented by the first set of assignees before the second day of the next term, the commissioners might, after payment of the costs, divide the residue of the assets among the creditors under the fiat.

THIS was a petition of the official assignee and creditor's assignee, praying that a former commission issued against the bankrupt might be impounded, and that the petitioners might divide the assets in their hands under the subsequent fiat.

In July, 1820, the bankrupt was in partnership with his brother, Thomas Barber, in the business of drapers, and, being unable to meet their engagements, they compounded with their creditors, being only two in number; one of them agreed to take 13s. 6d. in the pound, and the other agreed to take certain fixtures belonging to the bankrupt and

his brother, in full satisfaction of their respective debts. but no deed or instrument of composition was executed on that occasion. In February, 1822, the bankrupt and his brother again, in like manner, compounded with their creditors, who agreed to take 10s. in the pound on their respective debts. In December, 1825, the brother, T. Barber, died; and in October, 1826, a commission of bankrupt issued against James Barber, under which sixty-five creditors proved debts, amounting to £10,000, and were paid a dividend of 2s. 7d. in the pound; and the bankrupt duly obtained his certificate. After this, the bankrupt carried on business as a linen-draper, in partnership with Samuel Pope and Richard Pope, in Henrietta Street, Covent Garden, under the firm of Pope and Barber, till July, 1828, when the partnership was dissolved, and all the creditors paid in full. The bankrupt then continued the business on his own account, till June, 1832, when he again compounded with his creditors at 7s. 6d. in the pound, and obtained a release from them.

On the 30th of August, 1832, the bankrupt took a lease from the Hungerford Market Company, of a public house, called the Dolphin Tavern, for the term of seven years, where he carried on the business of a publican and victualler, until the 26th of January, 1835, when the fiat now in prosecution issued against him.

The petition alleged, that all these subsequent tradings, both in Henrietta Street and Hungerford Market, were with the knowledge of the assignees under the former commission, and of the major part in value of the creditors who had proved debts under it; that many of the creditors had dealings with him in these respective trades, and none of them claimed any of the property which he had then in his possession; and that Messrs. Pope had also dealings with the bankrupt, while he carried on business at the Dolphin Tavern; the bankrupt having, on the 15th of June, 1834, deposited his lease with them to secure a balance of £300.

The debts proved under the fiat amounted to £1800, one of the creditors who had proved being Morgan Williams, who was one of the assignees under the former commission. The bankrupt had duly obtained his certificate under the fiat.

On the 22d of November, 1834, the bankrupt, in addition to the previous deposit of his lease with Messrs. Pope, gave S. Pope and James Fowler a warrant of attorney for £422—to secure them against their liability on certain bills of exchange, to which they had become parties, as sureties for the bankrupt. On this warrant of attorney judgment was entered up, and a *fi. fa.* duly lodged in the sheriff's office on the 8th of December, 1834, but the sheriff did not take possession under it until the 19th of July, 1835.

In September, 1832, the bankrupt gave Messrs. Barclay & Co. a warrant of attorney to secure to them £200, for money alleged to have been advanced, upon which they entered up judgment, sued out execution, and took possession on the 19th of January, 1835. Messrs. Barclay & Co. insisting on the priority of their execution, the warrant upon Messrs. Pope and Fowler's writ was handed over to the officer of Barclay & Co.; and Messrs. Pope, afterwards, gave up their lien on the lease, and placed it in the hands of the sheriff to sell. The sheriff had notice of the fiat on the 26th of January, 1835; notwithstanding which, he proceeded to sell the lease for £400, and paid over the net proceeds of the sale to Messrs. Pope and Fowler, on an indemnity. On the completion of the

sale, namely, on the 2d of May, 1835, the sheriff withdrew from the possession of the house in Hungerford Market, relinquishing all claim to the stock and furniture, the amount of the valuation of which was received by the petitioners, as assignees under the fiat. In June, 1835, the petitioners brought an action against the sheriff, for the amount of the money produced by the sale of the lease; to which action the sheriff pleaded in bar the composition of the bankrupt with his creditors in 1822, and that under his subsequent bankruptcy in 1826, his estate did not produce 15s. in the pound, whereby his future estate and effects became vested in the assignees under that commission.

The petitioner Browning alleged, that when he and his partner commenced their dealings with the bankrupt, they did not know that he had previously been a bankrupt, or compounded with his creditors, or had given any of the securities above-mentioned.

The petitioners, as assignees under the fiat, had possessed themselves of effects to the amount of £600; which being desirous of dividing amongst the creditors who had proved under the fiat, they caused a notice to be given on the 7th of January, 1836, to the surviving assignee under the former commission, that an application would be made to the commissioner for this purpose. At the meeting before the commissioner, the surviving assignee attended, and declined consenting to the division of the bankrupt's effects among his creditors under the fiat, unless under the directions of the Court of Review; upon which the commissioner refused to make any order of dividend.

Mr. *Swanston*, and Mr. *Lovat*, in support of the petition. As the bankrupt in this case compounded with his creditors previously to the issuing of the commission of 1825, and did not pay 15s. in the pound under that commission, all his future property would, by the 127th section of the bankrupt act, 6 Geo. 4, c. 16, vest in the assignees under that commission, and would thus deprive the creditors under the fiat of their just rights. The court will, therefore, on the present occasion, in the exercise of its equitable jurisdiction, order the proceedings under the commission to be impounded, to prevent such injurious consequences to the creditors under the fiat. In *Ex parte Devas*, 4 Deac. & C. 366, where a commission had issued against a bankrupt in 1823, under which he never obtained his certificate, and a fiat issued against him in 1832, the court refused to supersede the fiat, on the application of the creditors under the commission, and directed the proceedings under the commission to be impounded. In the present case, the equitable title of the assignees under the fiat ought to prevail over the legal title of the assignees under the commission. [Sir G. Rose referred to the case of *Norton v. Shakespear*, 15 East, 619.] That was the case of a composition by the bankrupt with one class of creditors, exclusive of another class of creditors. Before the 6 Geo. 4, c. 16, where a second commission issued against a bankrupt, who had been the subject of a former commission, or who had previously compounded with his creditors, and he did not pay 15s. in the pound under the second commission, a right of action against him was given to any individual creditor; a practice which was found to be very inconvenient, and which the 127th section in that act was meant to remedy. The simple question here is, whether the assignees under the commission have not so dealt with their legal right, as to make it subject to a paramount equity; they having permitted the bankrupt to go on trading the whole period, from 1826 to Janu-

ary, 1835, and to hold himself out to the world as a person unaffected by any previous commission. The doctrine on this subject is clearly laid down by Lord ELDON, in *Ex parte Bourne*, 2 G. & J. 141. The assignees under the first commission not only permit the bankrupt to go on trading for nine years, and to gain credit as a free and unembarrassed man, but they deal with him themselves; and even the surviving assignee goes in under the commission, and proves a debt.

Mr. Bethell, who appeared for the assignees and creditors under the former commission, said, that he was willing to *submit* to any order which the court might make; but that he could not *consent* to any; although he admitted that no claim had been made by the assignees under the commission. He begged, however, that the court would remember, that in this case there were two commissions before the commission of 1826. There might be some difficulty, also, if the court impounded the commission; for the assignees sold some freehold property under it; and they may be hereafter called upon to produce the commission and proceedings in evidence.

Sir G. ROSE.—The case of *Ex parte Devas*, which has been cited by the counsel for the petitioner, does not apply to this; and the cases referred to in *Ex parte Bourne*, were applications by the assignees under the *first* commission. The present is a case very peculiar, being an application made by the assignees under a *subsequent* fiat, for the purpose of getting rid of a former commission, notwithstanding the assignees under that commission are wholly passive on the occasion, and say to the petitioners—we do not claim any thing, you may do what you can. I never knew of the court making an order like that prayed for by these petitioners, where the assignees under the second commission endeavour to set aside the *first*. We cannot annul the first commission, as the bankrupt has obtained his certificate under it. And as to impounding it, unless we could enjoin parties not to give secondary evidence of the proceedings under the first commission, the impounding of it would be of no use to the creditors under the subsequent fiat. As the assignees under the first commission will not consent to any order, what can we do more than permit the assignees under the fiat to prosecute any action they may think proper, in the names of the assignees under the commission, and to bring into court any moneys that may be recovered in such action, subject to further order?

Mr. Swanston, in reply. The only difficulty we now wish to remove is this—what is to be done with the money in the hands of the official assignee under the fiat, to which the assignees under the fiat have an equitable title? It is clear, that it ought to be divided among the creditors under the fiat, although, in strictness of law, it may belong to the assignees under the first commission. In *Ex parte Bourne*, 2 G. & J. 141, Lord ELDON, in speaking of those cases, where a previous commission ought not to prevail against the *bonâ fide* creditors under a second, says, “Take the instance of a commission taken out in 1810, and another taken out against the same person four or five years afterwards, upon a subsequent “trading.” “According,” he adds, “to the strict law, the creditors, taking out the commission in 1820, would have a right to all the subsequently acquired property, until he should have obtained his certificate under such first commission; but if he has been permitted to go into the world as a trader, and to gain credit as such, whatever a Court of Law might say about the

rights of the creditors under the first commission, this court has said, it would support the second commission to this extent—that it would not permit the creditors under the first commission to take that which they could not take, without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt, as if he had his certificate; and that they should only take that part of the bankrupt's subsequently acquired property which should remain, after all the creditors, who had been so permitted to deal with him after the first commission, should have been paid; that the profits derived by the bankrupts, from such subsequent dealings, shall belong to the creditors under the first commission; but the debts contracted in his trading, after he secondly engaged in trade with the permission of those creditors, shall be first paid." The only difference between the present case, and that put by Lord ELDON, is this,—that there the bankrupt was uncertificated—here he has got his certificate; which is, however, of no effect, by reason of the previous composition.

ERSKINE, C. J.—I should be inclined to make the order, on the grounds of what Lord ELDON says, in *Ex parte Bourne*; but I should wish, previously, to look into the cases. Perhaps there may be a distinction, too, between a composition by deed, and a composition by parol.

Sir J. CROSS.—The only question here is, whether this case comes within the doctrine laid down by Lord ELDON, in *Ex parte Bourne*; that is, whether the bankrupt was permitted by the assignees under the first commission, to go into the world as a free man, and get credit as a trader.

*Cur. adv. vult.*

The case was brought on again this day, (April 29,) when

Mr. Swanston said, that, after consideration, he did not mean to contend, that there was any distinction between a composition by deed, and a composition by parol. The petitioners asked for a distribution of the property, on the ground of an equitable right, which they claim on the authority of the principle laid down by Lord ELDON in *Ex parte Bourne*, 2 G. & J. 141, and the decision of this court in *Ex parte Deras*, 4 Deac. & C. 366. In cases like the present, it is in the discretion of the court to annul either the first, or second commission; *Ex parte Lees*, 16 Ves. 473. The property here cannot be administered according to the legal right, and, therefore, ought to be administered according to the equitable right; there is no intermediate mode; as the legal right of the assignees under the first commission ought not to be suffered to prevail. In what a situation are the creditors under the fiat, if the court refuses to interfere? The commissioner will not order a dividend; and if the assignees under the fiat attempt to divide the bankrupt's effects, without an order, an application for an injunction might be made by the assignees under the first commission.

Sir J. CROSS.—The question is, whether this case comes within the 127th section of the general bankrupt act. *Prima facie*, the assignees under the fiat have the legal title. There must be two facts concur, therefore, to displace their title;—1st, a composition previous to the first commission, within the meaning of the 127th section; 2dly, the non-payment of a dividend of 15s. in the pound, under the first commission. As to the first point, there was here no deed or agreement in writing, relating to the composition between the bankrupt and his creditors, nor did they execute any release to him of their debts; as was the case in

*Newton v. Shakspear*, 15 East, 619, and *Fitch v. Sutton*, 5 East, 230. It appears to me, therefore, that the alleged composition in this case was *nudum pactum*, and had not the effect of barring the claims of the bankrupt's then creditors, so as to deprive him of the benefit of a certificate obtained under a subsequent commission. The 127th section is a penal clause, and ought to be construed strictly. With regard to the second point, namely, whether the estate was insufficient to pay 15s. in the pound,—there is no positive proof here, that the estate was insufficient for that purpose. It appears, that the creditors under that commission have been paid a dividend of 2s. 7d. But what of that? That does not decisively prove, that the estate was insufficient to pay 15s. in the pound. The statute does not speak of *payment*; the words are, “unless his estate shall *produce* (after all charges) sufficient to pay every creditor under the commission 15s. in the pound.” [Mr. *Swanston* here admitted, that the estate under the first commission was not sufficient to pay 15s. in the pound.] Taking that to be so, I nevertheless think, that the petitioners have, *primâ facie*, the legal title, until it is displaced by strict evidence of a former title.

Sir G. ROSE.—With the greatest respect for all the arguments I have heard in support of this petition, I cannot think, that the assignees under the fiat have the legal title to the funds, which they admit to be now in their hands. I know of no authority, except that of *Ex parte Devas*. 4 Deac. & C. 366, which recognises any title in the assignees under a second commission, without disposing of the first. The only question, which the court has always been in the habit of considering in the case of two existing commissions, is this—does the conflict of the two commissions occasion such an inconvenience, as to induce the court to supersede either, and which of them? Unless you can carry the permission given to trade, to a case of fraud or contract, on the part of the assignees under the first commission, you cannot take away what the law clearly gives them,—an indisputable title to all the bankrupt's property. The case of *Troughton v. Gitley*, Ambl. 630, (a) which occurred before Lord CAMDEN, was indeed a strong case of contract, on the part of the assignees under the first commission; but that case was held by Lord ELDON, in *Ex parte Martin*, 15 Ves. 116, to be no very great authority. I really do not see how this court can act, without the consent of the assignees under the first commission.

Sir J. CROSS.—If the assignees under the fiat are not to be considered, as having, *primâ facie*, a legal title to the fund now in their hands, at any rate they have a clear equitable title, which ought to prevail over any claim of the assignees under the former commission. The principle of the case of *Troughton v. Gitley* was, I conceive, not questioned by Lord ELDON in *Ex parte Bourne*, nor do I find that that case has been ever overruled. It seems, to me impossible to get over the strong language used by Lord ELDON, in *Ex parte Bourne*, where he said, that, whatever a Court of Law might hold on the subject, he would not permit the creditors under a previous commission, who have permitted a bankrupt to go again into the world as a trader and obtain credit as such, to

(a) In this case, a bankrupt bought his own stock of his assignees, and two sureties joined with him in a security for the purchase-money. The bankrupt continued to trade for four years afterwards, and then died, without having obtained his certificate, having contracted fresh debts subsequent to his bankruptcy. Under these circumstances, Lord Camden held, that the subsequent creditors were to be preferred to the creditors under the commission.

take that which they could not take without injustice to the creditors under the second commission. And *Ex parte Bourne*, it must be remembered, was determined by Lord ELDON, since the important alteration in the law of bankruptcy by the 6 Geo. 4, c. 16. Now, what are the facts in the present case? The bankrupt, who was a draper in Henrietta Street, Covent Garden, became bankrupt ten years ago, and obtained his certificate. The effect of the certificate was, to allow the bankrupt to go again into the world as a trader,—to enter into a partnership with other persons,—to dissolve that partnership,—to compound again with his subsequent creditors, from whom he obtains a release,—to keep, afterwards, a public house in Hungerford Market,—the assignees under the first commission being in London all this time, and making no objection to, if not absolutely conniving at these subsequent dealings of the bankrupt. Then the present fiat is issued against the bankrupt, in his business as a publican; and the assignees under the former commission have made no claim to any part of the estate and effects of the bankrupt, which have been acquired by him in his subsequent tradings. This is the state of facts, upon which we are now called upon to put in force an undisputed rule in equity. It is supposed, however, that the equitable title of the assignees under the fiat cannot exist, unless it be founded on *contract*, or *fraud*. But there is an intermediate case, namely, *laches*, on which the courts often act, in determining the preference of titles and encumbrances; and that rule, I think, ought to govern the present case. The commissioners, it appears to me, would have been fully justified, without the sanction of this court, in ordering the £600 to be divided among the creditors, who have proved their debts under the fiat; as no adverse claim has been set up by the assignees under the former commission.

ERSKINE, C. J.—I concur in opinion with both my learned colleagues, that the commissioner would have been justified in dividing this property among the creditors under the fiat, without any application to this court; and, perhaps, what has already fallen from the court may remove any difficulty from the mind of the commissioner. The assignees under the fiat were, however, quite right in giving notice to the assignees under the commission, of the amount of the funds they had received under the fiat, and of their intention to divide them amongst the bankrupt's creditors; and if the assignees under the commission had come in adversely, then it would have been, no doubt, the duty of the commissioner to have suspended the order of dividend, and waited for the opinion of this court. But the first assignees made no claim to any portion of these funds; very probably admitting the equitable right of the subsequent creditors, which was founded on their own neglect. The commissioner, however, having under the present circumstances declined proceeding without the sanction of this court, the assignees under the fiat have prayed, that the former commission might be impounded, and that they might proceed to distribute the effects collected by them under the fiat; or, if the court refuse to impound the commission, that it would in that case authorize them to distribute the funds,—on the ground, that no objection to their doing so has been made by the assignees under the commission. But, although the assignees under the commission have said that they do not object to this distribution, yet they have positively refused to consent to it. It is quite impossible, therefore, that the court can under these circumstances give formal directions to the assignees under the fiat, to dis-

tribute this fund; because that would be, in effect, saying, that the second assignment was good against the first; which could not be said by any court, whilst the first was in legal operation. We may declare a second fiat to be valid, in preference to the first; but we cannot declare a second assignment to be so, without disposing of the previous fiat. Nevertheless, if an equity, in favour of the second set of creditors, were in this case clearly made out, I think the court might order the assignees under the fiat to pay those creditors first the amount of their debts, and then distribute the surplus among the creditors under the commission. The question is, then, whether the petitioners have made out such a case, as to justify us in interfering with the title of the first set of assignees. The dictum of Lord ELDON in *Ex parte Bourne*, 2 G. & J. 137, is, indeed, very strong; but his observations in that case were only intended to illustrate the general right of the court to interfere, in favour of the creditors under the second commission, and cannot be considered as a judgment of the particular case then before him; the question in which was, merely, whether a commission taken out, not for the legitimate purposes of a commission, but for a private object of the petitioning creditor, should be allowed to stand. Now, I must confess, that I have not been able to find any case, where the court has interfered in favour of the creditors under a second commission,—except on the ground of a contract, express or implied, on the part of the creditors under the first commission,—or where they have connived at the bankrupt's subsequent trading. And if, in this case, the assignees under the former commission had fraudulently lain by, for the purpose of reaping an undue advantage from the bankrupt's subsequent trading, I should have said, that the court might then interfere, on equitable grounds, in behalf of the creditors under the fiat. The case of *Troughton v. Gitley*, Ambl. 639, is, in my opinion, no authority, to the extent supposed, in favour of the order sought by these petitioners; for Lord CAMDEN put that case entirely on the ground of contract; and the authority of the case is, certainly, very much shaken by what Lord ELDON said in *Ex parte Martin*, 15 Ves. 116. The case of *Ex parte Bold*, C. B. L. 12, too, is against the present application. That was a petition by the assignees under a first commission, to supersede a second, and to compel the assignees under the second commission to account to them for the property; and, although the petition was opposed, on the ground of the laches of the assignees under the first commission, and *Troughton v. Gitley* was cited in the course of the argument, yet Lord LOUGHBOROUGH said, that he could not let the second commission stand, but that he must, of necessity, make the assignees under that commission account to the assignees under the first. In the present case, it does not appear to me, that we could proceed to treat the first commission as a nullity, either on the ground of contract, or fraud. It would appear, from what Lord ELDON said in *Ex parte Martin*, 15 Ves. 115, that the mere circumstance of the assignees under a first commission permitting the bankrupt to trade, does not of itself raise an equity in favour of the second set of creditors; because the assignees cannot prevent his trading, if he chooses to run the risk of their taking possession of the property he may acquire. Now, the circumstances here, of the bankrupt's subsequent tradings, do not show any collusion of the assignees under the first commission; for, the bankrupt having in the first instance entered into partnership with two other persons, the assignees could not seize any part of the joint stock and effects,



until the partnership creditors were paid; and then only for the bankrupt's share in the surplus. Afterwards, the man was again in difficulties; and the assignees might have been then unwilling to press him, whilst he was struggling with misfortune, and not with any fraudulent intention of permitting him to trade, for the purpose of obtaining an unfair advantage over his subsequent creditors. And it appears, that the assignees are still unwilling to interfere, unless the law compels them. Under all the circumstances, therefore, I think we should not be justified in interfering with the legal title of the first set of assignees. But, if they do not absolutely oppose the distribution of this fund among the creditors under the fiat, or set up an adverse claim to it themselves, I think, as the duty of the commissioner in this respect is merely ministerial, he might safely make an order to divide this property among the creditors under the fiat.

The order finally made was, that the petition should stand over until the second day in Trinity Term, with liberty for the surviving assignee under the former commission, in the mean time, to present such petition as he should be advised; and if no such petition should be presented, then, that the costs of the petitioners and the bankrupt of and incidental to the meeting before the commissioner on the 14th January, as well as the costs of this application, should be paid to the respective solicitors of the parties, out of the assets of the bankrupt in the hands of the official assignee under the fiat; such last-mentioned costs to be taxed, as between attorney and client, by the deputy-registrar, and the costs of the meeting to be taxed by the commissioner; and that the commissioner should be at liberty to divide the residue of the assets, *pari passu*, amongst the creditors who had proved their debts under the fiat.

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Ex parte WALLIS.—In the matter of HAMBLY.—p. 496.

Where a bill of exchange exhibited by a creditor at the time of his proof is lost before a dividend is declared, the commissioner should, on the application of the creditor, give special directions to the official assignee to pay the dividend, without requiring the production of the bill. But see Lord Chancellor's general order, 1 Sept. 1836, *post*, App.

THIS was the petition of a creditor, praying that the official assignee might be ordered to pay a dividend, without the production of a bill of exchange, which the creditor held as a security, and which was exhibited to the commissioner when the proof was made. The proof was made in 1803, for the amount of £365, which was stated to be for money paid by the creditor for the use of the bankrupt; and the bill in question was drawn by the bankrupt, and accepted by a person of the name of Bird, and was over-due at the time of the proof. In 1808, the petitioner went to Madeira, where he had since resided: and in 1834, his brother, who had a letter of attorney to act for him in England, hearing that a dividend was payable under the commission, wrote to him for the bill, to produce to the official assignee; when he answered, that he had no recollection of where the bill was to be found. The bill, not being negotiable, was in fact either mislaid or lost. The official assignee declined to pay the dividend, without the production of the bill; and Mr. Commissioner Evans refused to give any special directions to him to

pay the dividend, although the petitioner offered to indemnify the estate.

Mr. *Wilcock* appeared in support of the petition.

Mr. *Deacon*, and Mr. *Keene*, for the assignees. By a general order, lately made by the Lords Commissioners of the Great Seal, (a) it is ordered, that, "when a creditor, or any person duly authorized under his hand to receive his dividend, shall apply for payment, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof;"—"and upon the creditor, or such other person authorized as aforesaid, signing the receipt for such dividend, the official assignee shall mark the securities, if any, with the amount of that dividend, and shall sign and deliver the draft for the same; provided that no dividend shall be paid to any creditor holding any security for his debt, until such security shall be produced, without the special directions of a commissioner in that behalf." The petitioner, in this case, did not assign a sufficient cause for the non-production of the bill; for the only answer he gave to his brother's inquiry was, that he had merely no recollection of where the bill was to be found. This was any thing but a satisfactory reason for a non-compliance with the positive terms of the general order, and probably appeared so to the commissioner, when he was applied to for his directions on the subject. His having no recollection of where the bill was to be found, does not prove, that the creditor did not part with the bill to some other person. If proper evidence had been offered before the commissioner, that the bill had been really destroyed or lost, he would, no doubt, have given directions to the official assignee to pay the dividend.

ERSKINE, C. J.—The commissioner, I think, would have been fully justified in giving special directions for the payment of this dividend, according to the terms of the general order. It is a pity that he did not do so; as it is clear that this is a *bonâ fide* case; and the only consequence of the miscarriage of the commissioner is, the costs and expense that have been incurred by this petition.

Mr. *Deacon*, and Mr. *Keene*, then suggested, that the costs of the assignees should be paid by the petitioner, who, by his own admission, was chargeable with forgetfulness and neglect; and the estate ought not to be burdened with the costs occasioned by the petitioner's own laches.

The court, however, refused to order the petitioner to pay the costs of the assignees.

Ordered as prayed; the petitioner paying his own costs, and the costs of the assignees to be retained out of the estate. (b)

(a) 31 October, 1835, 4 Deac. & Ch. 688.

(b) Since the decision of this case another general order has been made on this subject by the lord chancellor. See post, Appendix.

### Ex parte WALTER MORRIS and others.—In the matter of ROBERT JONES.—p. 498.

Where the bankrupt, who carried on business as a draper in the town of Carnarvon, and had contracted debts with various creditors in Lancashire, was described in the fiat, as "of Geuftron, in the county of Carnarvon, draper, dealer, and chapman," a place, where he merely resided, and did not carry on the drapery business,—the fiat was annulled, at the costs of the petitioning creditor.

Where the notice of the meeting for the choice of assignees was advertised in the Gazette, only

three days before the meeting took place at Carnarvon, and the creditors at a distance had no opportunity, from the shortness of the notice afforded them, of attending such meeting; *semble*, that this was a sufficient ground for setting aside the choice of assignees.

This was the petition of several creditors of the bankrupt, to annul the fiat, under the following circumstances, which were stated in the petition, and verified by affidavit.

The fiat was issued on the 19th January, 1836, in which the bankrupt was described as "Robert Jones, of Geufron, in the county of Carnarvon, draper, dealer, and chapman;" and it was directed to five commissioners, resident at and in the neighbourhood of Carnarvon. On the 22d January, two of the commissioners, who resided at Carnarvon, proceeded from thence to Bangor, a distance of nine miles, to open the fiat, in conjunction with another commissioner, who resided at Beaumaris, thirteen miles from Carnarvon; although the two other commissioners named in the fiat, and one of whom actually resided at Carnarvon, were both at home at the time, and were willing to attend to open the fiat at Carnarvon. Neither of these had been professionally employed by the bankrupt; but the two commissioners, who proceeded from Carnarvon to Bangor to open the fiat, had been very recently employed as his attorneys.

The adjudication of the bankruptcy was announced in the London Gazette of the 26th January, in which the bankrupt was described as "Robert Jones, of Garfron, in the county of Carnarvon, draper, dealer, and chapman;" and the meeting for the choice of assignees was appointed to be held at the Castle Hotel, in Carnarvon, on the 29th January last; thus allowing only an interval of three days between the advertisement in the Gazette, and the meeting for the choice of assignees. The usual practice, it appeared, was to allow an interval of at least ten days between the advertisement in the Gazette, and the day appointed for such meeting; in order that the creditors, living at a distance from the place where the fiat is to be executed, may have an opportunity of proving their debts, and voting in such choice.

The bankrupt was indebted to the petitioners, (who were eight in number, and resided at Manchester and Liverpool,) in various sums, amounting in the whole to £490; and he was also indebted to five other creditors, who resided in various parts of Lancashire, in different sums, amounting to £140.

The petitioners had no opportunity of seeing the London Gazette of the 26th January, or any extract from it, until the 28th January, and it was then impossible for them to prepare the necessary documents, to enable them to prove their debts, and vote in the choice of assignees, at the meeting to be held at Carnarvon on the 29th January; Liverpool being distant from that place 86 miles, and Manchester about 117 miles.

The petitioners alleged, that the bankrupt never at any time carried on business as a draper, dealer, and chapman, at Geufron, or Garfron, but that his shop was in the town of Carnarvon; that all the goods and merchandises sold and delivered to him were, by his desire, directed to him at Carnarvon, where he told the petitioners he carried on the business of a draper; and that there was no town whatever in the county of Carnarvon known by the name of Geufron, or Garfron.

At the meeting, held on the 29th January for the choice of assignees, one of the commissioners named in the fiat, but who was not called upon to act, attended, and informed the acting commissioners, that several of

the bankrupt's creditors resided in England, who could not be possibly aware of the meeting, and requested the commissioners to adjourn the choice of assignees, and give the parties at a distance time to prepare for voting in such choice; but the commissioners, after consulting with the creditors present, declined to make any such adjournment. At this meeting, William Jones, the petitioning creditor, and an uncle of the bankrupt, proved a debt for the sum of £270, and was thereupon elected sole assignee. The only other persons who proved debts at the meeting were, the bankrupt's brother-in-law, who proved a debt of 58*l.* 18*s.*; a servant of the bankrupt, who proved a debt of £21; an attorney's clerk, who proved a debt of 21*l.* 2*s.* 6*d.*; and five other persons, one of whom was the brother-in-law of the bankrupt's father, who respectively proved debts of 30*l.*, 28*l.*, 22*l.* 10*s.*, 20*l.* 19*s.*, and 21*l.* 11*s.* 8*d.* These creditors were all resident in or near Carnarvon.

The petitioners alleged, that they had reason to believe, that the said debts so proved, were fictitious, or contracted by the bankrupt without a sufficient consideration; but that, supposing them to be all good debts, they only amounted to the sum of 493*l.* 14*s.* 2*d.*; while the debts of the petitioners, and the other creditors in the neighbourhood of Liverpool and Manchester, amounted to the sum of 702*l.* 6*s.* 1*d.*, and were incurred within four or five months of the date of the bankruptcy.

On the 3d September last, a fiat had been issued against the father of the bankrupt, by the name and description of "Robert Jones, of High Street, in the town of Carnarvon, in the county of Carnarvon, draper, dealer, and chapman," on the petition of his son-in-law, William Jones, who was appointed sole assignee, and in that capacity sold the stock in trade of the father to the son. This sale took place, either late in the month of September, or early in the month of October last, which was the commencement of the trading of the present bankrupt, Robert Jones, the son. The petitioners alleged, that the bankrupt, after having been thus in business at Carnarvon as a draper for a period only of four months, made over, shortly before his bankruptcy, the whole of his stock in trade, composed chiefly, as they had reason to believe, of the very goods which he had bought of them, to his sister, Mary Rathbone Jones, who was under the age of twenty-one years. Two of the petitioners called at the shop of the bankrupt, to inquire into the truth of this circumstance, when they saw the bankrupt's father, who admitted the fact to be true, and that she had no money of her own to pay for it, saying, "there were many ways of buying a stock, without having money to pay for it—she could borrow money."

It appeared, that the shop of the bankrupt was the same shop that had been previously occupied by his father at the time of the father's bankruptcy, and that it was still open, and the business of a draper was carried on there by the bankrupt's sister, Mary Rathbone Jones, with the name of "Robert Jones," still over the shop door; the stock in trade of such shop consisting almost wholly of the goods sold by the petitioners to the bankrupt.

The petitioners further alleged, that the bankrupt, about the time of the transfer of his stock in trade, privately disposed of his stock on a farm, which he held near to the town of Carnarvon.

Under these circumstances, the petitioners suggested, that if the fiat was worked at Carnarvon, there would be no chance that the assets would be fairly administered; and that if the present fiat was annulled,

and a new one directed to commissioners at Liverpool, or Manchester, it would be much more convenient to the majority, in number and value, of the *bonâ fide* creditors, and would not only be the means of unravelling a system of fraud practised by the bankrupt, in the concoction of many fictitious debts, but also of recovering considerable property, made over by the bankrupt to his relatives on the eve of his bankruptcy.

The prayer was, that the present fiat might be annulled, and that two of the petitioners might be at liberty to sue out a new fiat against the bankrupt, directed to commissioners at Manchester; or, if the working of the present fiat was continued, that the court would at least annul the choice of the assignee already elected under the fiat, and direct the commissioners to appoint another meeting for that purpose on such future day, as would afford the petitioners a reasonable time to prove their debts, and vote in such choice; and that in that case, the time appointed for the bankrupt to pass his last examination might be enlarged; and that the costs of this petition, and all proceedings incident thereon, might be paid either by William Jones, the present assignee, or out of the bankrupt's estate.

The affidavits in opposition stated, that the reason why the fiat was opened at Bangor was, because two of the commissioners, who signed the adjudication, were going on the day in question from Carnarvon to Bangor on their own business, and said they would open the fiat there. That one of the other commissioners, resident at Carnarvon, was a creditor of the bankrupt to the amount of £100 and upwards, and that that was the reason why he was not applied to on that occasion. That the bankrupt purchased his father's stock in trade, under an execution issued against his father, and not of the assignee under his father's bankruptcy. That the bankrupt had resided for two years at Geufron, a distance of two miles and a half from Carnarvon, and was living there when he bought his father's stock in trade; a fact which, it was alleged, was well known to his creditors; and that he was also well known as the son of Robert Jones, of High Street, in the town of Carnarvon, draper. That the debts owing by the bankrupt to creditors residing in England, did not amount to more than £720; but that the debts owing by him to creditors living at Carnarvon, and in the neighbourhood, exceeded £4000. And that the sale to the bankrupt's sister, Mary Rathbone Jones, of his stock in trade, was under an execution issued against the bankrupt.

Mr. Deacon and Mr. J. Russell, in support of the petition, cited *Ex parte Purrey*, 2 G. & J. 225; *Ex parte Beudles*, Ib. 243; *Ex parte Day*, Mont. & M. 208; *Ex parte Beckwith*, 1 G. & J. 20; *Ex parte Tanner*, 2 Deac. & C. 563; *Ex parte Smith*, 1 Christ. 299; *Ex parte Surtees*, 12 Ves. 12; *Ex parte Hawkins*, Buck, 520; *Ex parte De Chapeaurouge*, Mont. & M. 174; *Ex parte Edwards*, Buck, 411.

Mr. Swanston, for the respondents.

Mr. Deacon, in reply.

ERSKINE, C. J.—If the only point in this case had been to set aside the choice of assignees, I should not have thought it necessary to have called on the petitioners' counsel to reply; but as it has been so strongly urged that a new fiat ought to issue, and I entertained, at first, some doubts in my own mind as to the expediency of annulling the present fiat, I wished to hear every thing that could be advanced on the part of the petitioners, in order to remove those doubts. It appears to me, that

the description of the bankrupt in the fiat, as "of Geufron," the place where he actually resided, is a true description, as far as it goes, but that it is not a full description. The creditors, who only knew the bankrupt as a draper at Carnarvon, and were ignorant that he had any other place of abode, might have been deceived by such a description. At the same time, if it had been manifest that no creditor could have been misled, I am not prepared to say, that the fiat, for this cause alone, ought to be annulled; for in no one of the affidavits filed in support of the petition, or in any part of the petition itself, it is alleged, that the intent was to mislead. The difference between the description of the bankrupt in the fiat, and that in the gazette, was perhaps an accident. But I cannot help entertaining a strong impression in my own mind, that there was some intention to mislead, on the part of those who sued out this fiat. There is no explanation given of the sale of the bankrupt's stock in trade to his sister, which is alleged to have been made by him shortly before his bankruptcy, and to have consisted chiefly of the very goods which the bankrupt had bought of the petitioners; nor is there any satisfactory reason given, why the bankrupt's uncle should have been appointed sole assignee, when there were so many other creditors interested in the distribution of the assets. I think I am bound, therefore, to look at the case with a very different eye, than if the description of the bankrupt had been a mere mistake. The circumstances of this case do not quite agree with those of any other case, that has been previously decided; but, acting on the principle which governs all those cases, I am of opinion, that as the description of the bankrupt in the fiat was an imperfect description, and calculated to mislead, the present fiat ought to be annulled. I do not think, however, that there is any ground for directing the new fiat to other commissioners, for there is nothing to show that the commissioners, in the present case, were improperly influenced. The only reason assigned to induce that suspicion is, that neither Mr. Poole, who lived at Carnarvon, nor Mr. Hughes, who lived at Bangor, was summoned to attend the meeting for opening the fiat. But that circumstance appears to be explained in the affidavits on the part of the respondents.

The order was, that the fiat should be annulled, at the costs of the petitioning creditor, and that the petitioners, or any of them, should be at liberty to take out a fresh fiat.

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Ex parte SAMUEL BIGNOLD.—In the matter of HENRY FRANCIS, ROBERT JOHN TURNER, and CHARLES JOHN WEST.—p. 515.

The petitioner, who was an equitable mortgagee, discovered that the bankrupt had made other mortgages, and given other liens on the same property, of which the legality of some, and the priority of others, were disputed by the petitioner; who prayed a sale of the property, and that the proceeds might be applied towards the reduction of his debt,—and in case the other parties should come in and submit to the jurisdiction of the court, then that the court would settle the respective priorities of those parties and the petitioner: *Held*, that the court could make no such order, unless those parties were regularly before their court; and that it would be disadvantageous to the bankrupt's estate to make an order for the sale of the property, until the interests of the respective parties were precisely ascertained. Under these circumstances, the petition was dismissed with costs.

*Semble*, that the Court of Review has no jurisdiction in those matters relating to the estates of bankrupts, over which the lord chancellor was accustomed to exercise jurisdiction only by bill in equity.—*Quære tamen*. And see note, ante, p. 494.

THIS was the petition of the secretary of the Norwich Life Insurance Society, claiming, on behalf of the society, an equitable mortgage on certain freehold estates and other property of the bankrupt, Henry Francis, under the following circumstances :—

In the year 1822, the bankrupt, Henry Francis, applied to the petitioner for the loan of £10,500, upon the security of an undivided third part of a real estate belonging to his wife, and of the assignment of a policy of assurance in the Equitable office for £2000 on his own life, which was settled on his wife for life, with remainder to the issue of the marriage, and in default of issue, for the benefit of himself; and also, upon the security of his shares in the capital and profits of the business which he then carried on in partnership with the bankrupt, Robert John Turner, as attorneys and solicitors. This money was required by Francis, as he then represented, among other purposes, for that of enabling him to complete the purchase of certain freehold estates; which purchase was, in fact, afterward completed by him. The petitioner agreed to make this advance upon the proposed terms; but, it was agreed, that only part of the sum was to be required in the first instance; and that, as the intended purchases of the estates were completed, the title-deeds of those estates should be deposited with the petitioner as a further security. Upon the faith of this agreement, large sums were, from time to time, advanced by the insurance company to Francis.

In pursuance of this agreement, Francis and his wife, by an indenture dated 27th of August, 1822, demised unto the petitioner an undivided third part or share of the wife in remainder, expectant on the death of one Dorothy Banyer, of and in certain freehold property in the Isle of Ely; to hold the same to the petitioner for the term of 99 years, subject to a proviso for redemption, on payment of the £10,500 and interest. The deed also contained a covenant to levy two fines, *sur concesserunt*, for the term of 1000 years, for the purpose of granting and assuring unto the petitioner a term commensurate with the above term of 99 years; and also, a covenant and declaration on the part of Francis and his wife, to cause a surrender to be effected of an undivided third part or share of certain copyhold property in the Isle of Ely, to which the wife was entitled in like remainder.

Dorothy Banyer was dead; and the whole sum of £10,500, with a large arrear of interest, was now due to the Norwich Company.

For better securing this sum, also, Francis, before the year 1825, deposited with the petitioner the title-deeds of certain estates in Norfolk.

Before the year 1830, Francis contracted for the purchase of the other two-thirds of the estate specified in the deed of the 27th of August, 1822, the purchase-moneys being made by means of the advances made him by the Norwich Company. And by indentures of lease and release of the first and second of May, 1830, these two-third shares were conveyed by the owners of them to Francis.

In the year 1830, Francis applied to the Norwich Company to extend the loan of £10,500 to £28,000, on the security of the estates before mentioned, as well as others after specified; and the company, accordingly, at different times, advanced him the further sum of £17,500.

For some time previous to their bankruptcy, West was admitted a

partner with Francis and Turner; and all the professional business relating to this extended loan, and to all other advances by the company to Francis, were transacted by some or one of the partners on his account, and with his concurrence.

The title-deeds belonging to part of the estates, which were intended to be comprised in the mortgage to secure the extended loan, were deposited with the company or their solicitors; the execution of the mortgage itself being considerably delayed, by a long investigation into the titles of the different estates.

Towards the end of the year 1830, the Norwich Company, upon the request of Francis, made him further advances to the amount of £9000, which were agreed to be secured upon the same property as that on which the extended loan was to be secured. And, as a further security for this sum, Francis assigned to the petitioner his interest in four policies of life assurance, subject to the usual proviso for redemption; and notices of such assignment were duly given to the different assurance companies. But only one of these policies was delivered to the petitioner, who discovered that the three others had been previously deposited, by way of security, with another person. Under these circumstances, the petitioner claimed, on behalf of the company, to stand as an equitable mortgagee, in respect of the £9000, upon the whole of the estates intended to be comprised in the security for the sum of £28,000, or, at all events, upon such of them whereof the title-deeds had been deposited, at the time of the agreement, for the advance of the £9000.

The bankrupt, West, had a share in one of the estates intended to be comprised in the mortgage security, which he agreed to convey to the petitioner; but no such conveyance was ever executed by him. The petitioner, however, claimed to be entitled to the full benefit of such share, as part of the security intended to be given to the insurance company.

On the 22d February, 1834, West addressed a letter to the company's solicitors, in which he said that he had obtained the execution, by Francis, of the mortgage-deeds, namely, certain indentures of lease and release, by which Francis and his wife conveyed to the petitioner, in fee, certain estates situate at Wentworth, and other places, in the Isle of Ely, and also covenanted to surrender to him certain copyhold property there situate, subject to a proviso for redemption, on payment, of the sum of £28,500 and interest at four per cent.; with a power of sale and demise given to the petitioner, in trust for the insurance company. The blanks left for the date of these indentures of mortgage were omitted to be filled up, but they were executed at or about the date of West's letter to the company's solicitors. And, by certain other indentures of lease and release, intended to bear even date with the above mentioned indentures, Francis appointed and released unto the petitioner, in fee, an estate at Carleton in Norfolk, with the like powers of sale and lease, and subject to a similar proviso for redemption.

On the 16th of April, 1834, Turner absconded; and on the 12th of May following a separate fiat was issued against him, which, however, was afterwards superseded; and on the 16th of May a joint fiat was issued against all the three bankrupts.

After the bankruptcy, many circumstances affecting the property thus mortgaged by Francis to the company were discovered by the petitioner



which were previously unknown to him, or the solicitors to the company. It appeared, that by an indenture dated the 4th of November, 1816, Francis had mortgaged a part of the freehold property at East Carleton, and a freehold estate at Shottisham, for securing the transfer of 6183*l.* 12*s.* 2*d.* three per cent. consolidated annuities; but, the Shottisham estate being afterwards sold by him, he had in October, 1828, deposited with the mortgagees the title-deeds of a house and premises in Surrey Street, Norwich, (being another portion of the property mortgaged to the company,) and also a policy of assurance of the Atlas Assurance Office for £3000, (one of the four policies assigned by Francis to the company in 1830,) which deposit was accompanied with a written memorandum. The company deemed it advisable to pay off this encumbrance, and, accordingly, obtained from Mr. Ramsay, the mortgagee, a transfer of all his interest, for £5300; considering, that the property comprised in the last-mentioned securities would realize more than that sum. By arrangement between the company and the assignees of the bankrupts, the estates at East Carleton and Mulbarton had been sold; and it was agreed, that the purchase-money should abide the determination of the Court of Review, as to the respective rights of the company, and the assignees.

It was also discovered by the petitioner, that several mortgages and encumbrances had been made and executed in respect of the Carleton Rode estate, another portion of the property mortgaged to the company; and in particular, that one E. Phillips, a former owner of it, had in 1814 executed a mortgage of it for a term of 1000 years to W. L. Robinson, for securing the sum of £1000 and interest; which mortgage was afterwards transferred to Messrs. C. and T. Scott, who claimed to be entitled to this estate in preference to the company; but the title-deeds of the estate were not delivered to Messrs. Scott, nor had they ever given notice to the persons in whose hands they were deposited. The company, however, claimed to be entitled to the benefit of their security as to this estate, in priority to Messrs. Scott; inasmuch, as at the time of the company making their advances to Francis on the security of this estate, as well by way of equitable mortgage, as of legal mortgage under the before-mentioned indentures of lease and release, the company had notice of this mortgage by Phillips; and in the year 1827, when the title-deeds of the estate were rightfully in the hands of one Mr. Bygrave, they gave notice to him of their mortgage securities, and he was required to deliver over the deeds to the company.

In 1815, E. Phillips had also created another mortgage term of the Carleton Rode estate, for securing £750 to Wm. Blyth, which was, however, afterwards paid off by Francis, or his partners; and the mortgage-deed, with an acknowledgment of such payment, was delivered to Francis; but no re-assignment or other conveyance of the mortgage was executed. This mortgage-deed, together with other title-deeds, it appeared that Francis had, shortly before his bankruptcy, deposited with the Norfolk and Norwich Joint-Stock Banking Company, for the security of advances made to him by that company, who claimed to be entitled to a lien on the estate, in preference to the petitioner, but which preference the petitioner contended could not be maintained.

In September, 1820, Francis had also executed a mortgage of the Carleton Rode estate, by way of demise, for the term of 1000 years, to Messrs. Hardy and Burton, for securing two sums of £1000, and £1500;

who, on the 21st of January, 1821, gave notice of such mortgage to Mr. Bygrave, requiring him not to part with the title-deeds of the Carleton Rode estate, without their consent, which notice was placed by Mr. Bygrave with the title-deeds. Messrs. Hardy and Burton were, however, ignorant of the mortgages made to W. L. Robinson, and Wm. Blyth. The sums of £1000, and £1500, due upon this mortgage to Hardy and Burton, were afterwards paid off out of the money advanced by the petitioner to Francis, but no assignment of the mortgage was executed, and the mortgage-deed was deposited by Francis with the petitioner along with the other securities; and the petitioner claimed to stand in the place of Hardy and Burton, upon the footing of such mortgage-deed, and to all the rights of priority incident thereto. But the rights and interests of Messrs. Scott, and the Norfolk Banking Company, as adverse to the rights of the petitioner, being still undetermined, prevented a sale of the Carleton Rode estate, in satisfaction of the debt due to the petitioner.

The petitioner further alleged, that it was also discovered after the bankruptcy, that the title-deeds relating to a part of the Wentworth estate comprised in the above-mentioned indentures of lease and release, which Francis had purchased of Mr. Golding, had not been delivered by Francis to the petitioner, but were, at the time of the bankruptcy, in the possession of the bankrupt, and since, in that of the assignees; who alleged that Francis had created some charge upon this estate in favour of Robert Francis, a cousin of the bankrupt, and that he had deposited the title-deeds in his hands by way of security, though he had afterwards parted with them; and that Robert Francis claimed to be entitled to the benefit of such estate, and to the possession of the title-deeds, in priority to the petitioner. But the petitioner alleged, that the Norwich Insurance Company had no notice of this charge until after the bankruptcy, and that he himself was ignorant of the nature and particulars of this alleged security, and of the amount of the debt of Robert Francis; and he therefore claimed to be entitled to the possession of these title-deeds, and to the estate comprised therein, in preference to Robert Francis; contending, that Robert Francis, by parting with the title-deeds, if he ever had possession of them, must be considered as having relinquished all claim to them, as against the petitioner, by thus enabling the bankrupt to satisfy the petitioner of his power to make a valid and effectual conveyance of the estate comprised therein. And the petitioner alleged, that it was always represented to the insurance company and their solicitors, that the bankrupt Francis had the title-deeds of this estate in his possession, and that he engaged to deliver them to the petitioner.

It was also discovered for the first time, after the bankruptcy of Francis, that the before-mentioned policy of the Equitable Assurance Office, for £1000, had, previously to the assignment of it to the petitioner, been assigned by Francis, and actually delivered to the Rev. W. F. Wilkinson, for securing the sum of £1000, who claimed to be entitled to the benefit of it, on the ground that he had, before the bankruptcy of Francis, given notice of the assignment to the Equitable Assurance Office. The petitioner, however, alleged, that he had good reason to believe, that Mr. Wilkinson did not in fact give due notice of such assignment to the office. The petitioner, therefore, claimed to be entitled to all the benefit of this policy, by virtue of the assignment made to him, and of the notice of the 18th January, 1831.

By an arrangement between the petitioner and the assignees, the Norwich estate had, under the sanction of this court, been brought to sale, and the purchases were in a course of completion.

The premiums due, since the bankruptcy, on the several before-mentioned policies of assurance, except that in the hands of W. F. Williams, had been paid by the petitioner.

The amount of the advances made by the Norwich Insurance Company to Francis, between the 10th October, 1829, and the 1st February, 1831, amounted to 32,744*l.* 1*s.* 6*d.*, which sum the petitioner claimed to be due, with a large arrear of interest, besides the debt of £5300 and interest incurred by the purchase of Ramsay's mortgage.

It was alleged by the assignees, that previously to the execution of the mortgage to the insurance company, and some time in the year 1830, Francis had executed some conveyance of all his real and personal property to certain trustees, for the benefit of his creditors; and difficulties had been raised by the assignees as to the effect of the mortgage to the insurance company. But the petitioner contended, that if such conveyance was ever executed by Francis, it did not affect the validity of the mortgage to the company, inasmuch as they had no notice of any such conveyance, until after the bankruptcy.

No surrender of the copyhold property comprised in the different mortgages had ever been made, in pursuance of the covenant of Francis to surrender it; and the same was now, therefore, legally vested in his assignees.

The petitioner alleged, that he was willing to submit to the judgment of this court, the questions as to the priorities, in respect of the claims of Messrs. Scott and the Norfolk Banking Company, as to the Carlton Rode estate, and the claim of Robert Francis, as to that part of the Wentworth estate, which was purchased from Mr. Golding; and the claim of W. F. Wilkinson, as to the policy of assurance for £1000; but that he was advised that, without the submission of those parties to the jurisdiction, he was not entitled to make them respondents, for the purpose of agitating those questions. Some of the parties, however, having signified their readiness to submit to the jurisdiction, the petitioner suggested that they should for that purpose present short petitions, to come on to be heard with this petition.

It further appeared, that Francis, the bankrupt, had, on the 10th June, 1820, lent £450 to one S. Love, at interest, on mortgage of a freehold estate at Norwich; and that the petitioner, on behalf of the Norwich Insurance Company, had, on the 7th March, 1822, advanced to the bankrupt the like sum, on a deposit of the mortgage securities, and had been for some time past in receipt of the rents; but no legal transfer of the mortgage securities had been made. The petitioner had also, at the same time, advanced to the bankrupt the sum of £230, on the deposit of a mortgage from one H. Whisson to the bankrupt of another freehold estate at Norwich, for securing the like sum. Both these sums of £450 and £230 were still due, with an arrear of interest; and the petitioner was desirous that these mortgage securities should be sold, and the proceeds applied towards the reduction of the debt due to the Norwich Insurance Company.

The prayer was, that the petitioner, on behalf of the Norwich Insurance Company, might be declared entitled, by virtue of the several deposits of deeds and mortgage securities, to have all the freehold and copy

hold estates, and the several policies of assurance, as well as the two last-mentioned mortgages, made available, and to have the proceeds applied towards satisfaction of the several debts of 32,744*l.* 1*s.* 6*d.*, £450, and £230, and the interest due thereon respectively; and that the petitioner might also be declared entitled, by virtue of the purchase from Mr. Ramsay, to have the debt of £5300, and interest, in the first instance, paid out of so much of the estate at East Carlton, and Mulbarten, as was comprised in the securities affecting the same, or the clear produce of the same, and also of the Norwich estate, or the clear produce of the same, and of the produce of the policy of the Atlas Assurance Company for £3000, so far as the same will extend; and, in particular, that it might be declared, that the share and interest of Charles John West of and in so much of the Norwich estate, as was called or known as the Surrey Street Estate, or Family Estate, ought to be comprehended and included in the mortgage securities, as well the security derived from Mr. Ramsay, as the securities to the petitioner on behalf of the insurance company; that all the freehold, leasehold, and copyhold estates, comprised in the before-mentioned mortgage securities, or the interest of the bankrupt therein, not already sold, as well as the several policies, and the two last-mentioned mortgage securities, might be ordered to be sold in the usual manner before the commissioners under the fiat; and that all proper persons might be ordered to join and concur in all necessary and proper conveyances and assurances to the purchasers of the said premises, as the commissioners should direct; and that the petitioner might be at liberty to bid and become the purchaser at such sales; that it might be referred to the commissioners to take an account of what was due and owing to the insurance company for principal and interest; and that it might be declared, that the produce of the policies of assurance, when so sold, ought to be, in the first instance, charged with the premiums of assurance from time to time paid by the company; and that after paying the costs of this application, the clear produce of the sales so to be made, and of the sales of the before-mentioned estates already sold, might be applied, so far as the same would extend, towards satisfaction of what, upon taking the account, should be found due and owing to the company, and that the petitioner might be admitted to prove the residue against the separate estate of Henry Francis; and, in case Mr. Scott, and the Norfolk and Norwich Joint Stock Banking Company, the said Robert Francis, and W. F. Wilkinson, or any of them, should come in and submit to the jurisdiction of the court, then that the court would make such declaration and order, touching the respective priorities of the several parties, as might be just, the petitioner being ready and willing to submit to and abide by such declaration and order.

The only parties, besides the petitioner, who had expressly signified their readiness to submit to the jurisdiction, were Messrs. Scott, who had presented a petition, claiming a priority in respect of their mortgage.

Mr. *Swanston*, and Mr. *Anderdon*, were in support of the petition; and after they had stated the prayer of it,

Mr. *Twiss*, and Mr. *E. Montagu*, for the assignees, took several preliminary objections to the petition; 1st, That this court had not jurisdiction to deal with any matter over which the lord chancellor had jurisdiction only by bill in equity, and that the present petition was one of that description; 2dly, That the court could make no order, unless Mrs. Francis, the bankrupt's wife, and all the *cestui que trusts* and mortga-

gees were respectively before the court; the bankrupt's wife being entitled to the reversion of one-third of the equity of redemption of the property.

Mr. *Swanston*, and Mr. *Anderdon*. This court possesses all the jurisdiction in bankruptcy which belonged formerly to the lord chancellor, whether by petition in bankruptcy or by bill; for the 1 & 2 Will. 4, c. 56, s. 2, expressly gives jurisdiction to the court in all matters of bankruptcy, which the lord chancellor possessed, whether by petition, or otherwise. The petition now before the court embraces such a matter in bankruptcy as the lord chancellor was accustomed to dispose of, not perhaps while sitting in bankruptcy, but in the Court of Chancery, as lord chancellor. There can be no doubt, that the intention of the legislature was, to invest this court with such jurisdiction; the declared object of the act being, to save the expense and delay that were formerly incurred in administering the estates of bankrupts; and the expense of proceeding, in this instance, by petition in bankruptcy, being much less, and the delay much shorter, than that of going into a Court of Equity for redress, where there must be numerous suits, and numerous costs incurred. Then, with respect to the interest of the bankrupt's wife, we do not ask for any order affecting her right or interest in this property, but expressly limit the order to the bankrupt's interest alone; the order we seek is without prejudice to her interest, which is, after all, a mere fractional interest. The estate, perhaps, may not be sold quite so advantageously as if all parties interested were to join in the sale; but this is entirely a matter of convenience, and cannot prevent the right of the mortgagee, who is most materially concerned, to apply to the court for a sale. The bankrupt's wife has only a life-interest in the policy of assurance for £2000. Could not that policy be sold, subject to her interest, which is wholly disconnected with the bankrupt's interest? The objection raised on the other side is not an objection for want of parties; for we do not seek to affect their interests in any way whatever; but the objection amounts to this, that the estate may not be so advantageously sold; but this is a circumstance which cannot for a moment be permitted to obstruct the rights of the petitioner.

ERSKINE, C. J.—The object of this petition is, that the court would make an order, declaring what are the rights of the Norwich Life Insurance Company, in reference to the other mortgagees of the bankrupt's property. But before we can make any order of this kind, it is absolutely necessary that we should ascertain what the rights of the bankrupt were, at the time of the mortgage to the insurance company, and the right of the parties who claim under other mortgages or liens made or given to them by the bankrupt. It appears, that some of these parties have consented to submit to the jurisdiction of this court, but that others have held out. Now, can we make any order, binding on those parties, unless they are regularly before the court; and is it not essential that, before the court directs the sale of the bankrupt's interests in this property, we should know precisely what those interests are? In the present case, it is matter of dispute, whether there are two or more mortgagees besides the Norwich Insurance Company, and whether they have any claim of priority or not, in interest, over the interest of the company. Would it, therefore, be advisable to sell the property, subject to innumerable suits in equity that might be brought by the different claimants? The only adverse parties now before the court are Messrs.

Scott, who claim under the mortgage of the Carleton Rode estate, made by a former owner of it to Robinson. Now, if this court were even to decide that Messrs. Scott had a priority over the Insurance Company, there would still be a further question, as to the rights and priorities of the other mortgagees; nor can we even then determine, with any degree of precision, the interest of the company, without having the *cestui que trusts* before the court. Whether we shall have jurisdiction to make the order prayed for, when all those parties are properly before the court, is another question. My present impression is, that this court cannot take upon itself to exercise such a jurisdiction, unless those parties appear and consent to the order; for I think that this court can claim no other jurisdiction than what the lord chancellor formerly possessed on petition in bankruptcy. If the legislature had, on passing the Bankruptcy Court act, intended to give this court jurisdiction over all those matters relating to the estates of bankrupts, which the lord chancellor had only power to decide by bill in equity, they would have used more precise words for this purpose, than what appear in the act of Parliament. Under all the circumstances, however, I do not think that the petition ought to be dismissed, but that it ought to stand over, for the purpose of serving it on all the parties interested.

Sir J. Cross.—It is rather difficult to decide upon this preliminary question, applying, as it does, to the whole matter of the petition, unless all the complicated facts detailed in it had been properly stated to the court; and I have heard nothing opened to-day, but merely the prayer of the petition. The debt of the insurance company, it appears, amounts to £32,000. The fiat has been now two years in operation, and the insurance company cannot prove for any balance that may be due to them, unless their rights are properly determined. The commissioners have not authority to adjudicate upon these rights, and the question is, whether this court has not the power to determine them, without driving the petitioners to another and more expensive tribunal. The express declaration of the act of Parliament establishing this court is, to save expense and delay in administering the estates of bankrupts, and to remedy the former imperfections in the law, which were so detrimental to the interests both of bankrupts and their creditors. In this case it appears, that the petitioners have certain claims by way of mortgage, and also by way of lien on the bankrupt's property; and that other parties have also similar claims on certain portions of such property. The petitioners wish that the amount of their interest in the property may be sold, and that, after applying the proceeds of the sale in reduction of their debt, they may be permitted to prove for the residue. But it is said, that this cannot be done, unless the interests of all the other parties are included in the sale. I deny the proposition, that the rights of a party having a charge upon the bankrupt's property cannot be sold, unless the interests of others are also sold. As an abstract proposition, this cannot be maintained; and as a concrete proposition, I know nothing of it, on the hearing of this petition. As well might you say, that a lease, to which the bankrupt was entitled, could not be sold, without selling the interest of the reversioner; or, that a bank note could not be dealt with, without the consent of the Bank of England. What is the insurance company to do, if we cannot entertain this petition? It is said, that he may have relief in the Court of Chancery. What relief? Can that court make an order for him to prove his debt? He must come here again for

that purpose, whatever relief he may obtain in the Court of Chancery; and thus the expense and delay incurred by him, in seeking merely a plain declaration of his rights, will be increased twofold.

Sir G. ROSE.—I think this petition has been sufficiently opened to enable the court to dispose of the question now before it; and I will take upon myself to say, that there is no point in this petition material for the decision of this court, which I am not in possession of at this moment. Notwithstanding the statement of facts in the petition is complicated, and involving various interests, the petitioner is, no doubt, entitled to the assistance of the court, if the court can give it. If it was merely a question between the petitioner and the assignees, the court might, in ten minutes, give the desired relief. But I find this passage in the prayer of the petition:—that in case Messrs. Scott, and the Norfolk and Norwich Joint Stock Banking company, the said Robert Francis, and W. F. Wilkinson, or any of them, should come in and submit to the jurisdiction of this court, then that this court will make a declaration and order touching the respective priorities of the several parties mentioned in the petition, as might be just. The question is, therefore, whether this petitioner does not tender it as a necessary condition precedent, that the different parties, over whom he claims priorities, must come in and submit to the jurisdiction of the court, before the court can make any order touching those priorities. And yet the petitioner has not served these parties with the petition, without which it is impossible that the court can make any order affecting their interests. It has been suggested, however, that if these parties were served, they would only come in to deny the jurisdiction of the court, and claim costs against the petitioner for serving them; a supposition, which appears to me to have been put by the petitioner's counsel, in order to feel the pulse of the court as to what would be its opinion, if the parties were actually before it. Upon this part of the case, I, for one, hesitate not to say, that this court possesses no greater jurisdiction in bankruptcy, than what the lord chancellor was accustomed to exercise upon petition in bankruptcy, and that the petitioner would consequently be liable to costs for bringing parties here, whose claims and priorities could only be settled by bill in equity. For the last fifty years, the lord chancellor, sitting in bankruptcy, has made no such order as is sought by this petition. This court, too, has again and again said, that it would not interfere in the disposition of the bankrupt's property, by making any order for the sale of it, which would be productive of consequences inducing a difficulty of title. I should therefore hesitate a good deal, even if all the parties were properly before the court, before I could acquiesce in any order for the sale of the bankrupt's property, on such a complicated title as appears in this petition; although I do not say, that I would not put the machinery of the court into motion as usefully as I could. The pledge here is of such a nature, that the assignees have a right to say,—before we will consent to any sale, you shall bring the rights of all the parties interested before the court. Whatever security for their debts has been obtained by the petitioners from the bankrupt, it ought to be made available to the very extent of which the security is capable; this is one entire question, and ought not to be dealt with in parts. What I would suggest is this,—that the petitioners should enter a claim on the proceedings for the amount of their debt, against the separate estate of Francis, until their

security can be realized; and that the petition should, for the present, stand over, and the costs be reserved.

The court, accordingly, ordered the petition to stand over until the first day of the next term.

The matter came on again this day, (May 25th,) when

Mr. *Swanston*, and Mr. *Anderdon*, on behalf of the petitioner, stated, that as the majority of the court was of opinion that it had no jurisdiction to settle the priorities of the different mortgagees, the petitioner did not intend to serve the petition on the other parties alluded to on the former hearing; and that the petitioner would only now ask for the judgment of the court upon the first point raised by the petition, namely, whether the insurance company could not have an order for the sale of the property, without reference to the interests of any other parties.

ESKINE, C. J.—The court thought, that until the conflicting interests of the other parties were first settled, it would be disadvantageous to the bankrupt's estate to direct a sale. The question then arose, whether this court had power to dispose of those conflicting interests, in the absence of the parties concerned. As far as Messrs. Scott are interested, the court can no doubt dispose of theirs, as they have submitted to the jurisdiction. But we cannot do so as to the other parties, or decide adversely to their interests, unless they are served with the petition. That being so, I think we ought not to make the bankrupt's estate bear the costs of a petition, which is preferred by a creditor, without bringing the proper parties before the court.

Sir J. CROSS.—I consider it more as a question of convenience, or as an inflexible rule of a Court of Equity, that the court does not entertain this petition, than as a question of jurisdiction.

Sir G. ROSE.—It is a matter of regret to me, that the court feels itself obliged to dismiss this petition, with costs. But had we all the parties before the court, it would even then be doubtful, whether, in so complicate a question as this, the court would have jurisdiction to determine the priorities of all these parties. As between the assignees and the petitioner, therefore, there is no way of disposing of this petition, but by dismissing it, with costs. The only question is, as to determining the payment of costs on Scott's petition.

Mr. *Bichner*, who was with Mr. *Twiss*, in support of the petition presented by Messrs. Scott, said, that they would not have been brought here but for the course adopted by the Norwich Insurance Company, and that they came here on purpose to facilitate the views of the company; that they were not the cause of the company's petition being dismissed, for that they would have been very glad to have had it heard.

Mr. *Gordon* appeared for Miss Scott, one of the *cestui que trusts*, for whom the Messrs. Scott were trustees.

The order made was, that the petition of *Ex parte Bignold* should be dismissed, with costs; and that the petition of *Ex parte Scott* should be dismissed, without costs, except as to the assignees, and Miss Scott.



Ex parte HALL.—In the matter of HILTON.—p. 536.

When a country commissioner is prevented by his private business from attending a meeting under the fiat, to which he has been regularly summoned, he ought to pay the costs of another meeting, rendered necessary by his default.

*Quære*, as to the jurisdiction of the Court of Review to enforce the payment of such costs.

MR. *O. Anderdon*, on the part of the petitioning creditor, applied for the assistance of the court, under the following circumstances. The fiat was issued on the 19th March last, directed to commissioners at Manchester, three of whom met on the 5th April, when the adjudication took place, and they appointed the 18th April for the choice of assignees; but one of the commissioners, who had joined in appointing such meeting, omitted to attend, having gone to London on business; in consequence of which no meeting could be held, nor assignees chosen. It was therefore wished, that this court would appoint another meeting for this purpose.

The court made an order, that the commissioners should be at liberty to appoint another meeting for the choice of assignees; declaring, at the same time, that the costs of this application, and those incidental thereto, were not to come out of the estate, but that the consideration of that question should be reserved; and that the petitioning creditor might be at liberty to take out a rule nisi, calling on the commissioner who had made default, to show cause why he should not pay those costs.

MR. *Anderdon* now moved for a peremptory order on the commissioner to pay the petitioning creditor all the costs occasioned by his default.

ERSKINE, C. J.—The costs you are now applying for are twofold; 1st, the costs of the former meeting, when the commissioner failed to attend; 2dly, the costs subsequently incurred by the application to this court for an order to appoint another meeting. How do you reconcile it with the jurisdiction of this court, to compel the petitioner to pay the costs of the first meeting?

MR. *Anderdon*.—If the court can order the commissioner to pay the costs of the second meeting, it can equally order him to pay those of the first; the costs in both cases proceeding from the same cause. In *Ex parte Kirby*, Mont. & M. 405, where country commissioners had misconducted themselves, by taking more than the statutable fees, Lord LYNDBURST ordered, that they should not only be prevented from acting further as commissioners of bankrupt, but that they should also pay the costs of the application; and he directed that the commission should be renewed to London commissioners. On the present occasion, the court is not asked to remove the commissioner, but merely to order him to pay the costs. Nevertheless, the court could, if it chose, *recommend* the Great Seal to remove him in the same way, as it *recommends* a fiat to be annulled and the recommendation would be, no doubt, equally attended to.

MR. *Bacon*, for the commissioner. In strictness, this application ought to have been by petition; but the commissioner waives that objection, to save expense; nor would he now have opposed this application, if the question of costs merely, and not his own character, had been involved in it. The commissioner, who is a respectable solicitor at Manchester, has made an affidavit, that he was requested to attend the

meeting for the adjudication, in consequence of one of the quorum commissioners being ill; and that he then distinctly stated, that he should not be able to attend the subsequent meetings, on account of his being obliged to go to London, on some parliamentary business; and that after he had taken his place in the coach to proceed to London, he received a summons for the 18th April.

Mr. *Anderdon*, in reply. The quorum commissioner continued ill, and another of the five commissioners was absent on a journey; so that there were only two commissioners able to act, besides the one against whom this application is made. [ERSKINE, C. J. Have you any instance of the court compelling a commissioner to pay the costs of a meeting, which he omitted to attend?] There may be none; but probably such a case never occurred before. The party in this case, having once taken upon himself the duties of a commissioner under the fiat, ought to have worked out the functions of the office which he undertook to perform; and cannot qualify his judicial duties, by saying that he would attend the first meeting, but could not attend the others.

ERSKINE, C. J.—Although the circumstances, now brought forward on behalf of the commissioner, tend to place his conduct in a more favourable light, still, I cannot consider him as wholly free from blame. For, as he took upon himself the office of a commissioner under this fiat, it is no justification for his non-attendance at any meeting for which he was regularly summoned, that his private business called him away, and prevented him from attending. At any rate, he should not have left Manchester, before he had ascertained that another commissioner, named in the fiat, could have attended the meeting in his stead. He does not stand acquitted, therefore, from the charge of neglect. But the difficulty with me is, whether this court has the jurisdiction to compel him to pay the costs occasioned by his default. The jurisdiction of the lord chancellor, exercised over commissioners of bankrupt, was an indirect jurisdiction, from the circumstance of his having the power of nominating them in each commission issued under the Great Seal. If his directions, therefore, were not attended to by any commissioner, he could refuse to nominate him again. The jurisdiction of this court over the commissioners, is not to appoint or remove them, but merely to review their decisions; and it is only in relation to this branch of our jurisdiction, that this court can claim any power over them. If we order the commissioner, in this case, to pay the costs occasioned by his neglect, can we enforce the order by process of contempt? That is a question I should wish to consider. It may probably be found, that, although we do not possess such a power in strictness of law, this court can, nevertheless, exercise the power indirectly; and, therefore, when the commissioner knows the opinion of the court on his conduct, it may be more advisable for him to pay the costs at once.

Sir J. CROSS.—There are two questions in this case for the consideration of the court,—the one of law, and the other of fact. The first is, whether this court has jurisdiction to compel a commissioner of bankrupt to pay the costs occasioned to the estate by his wilful default; the second is, whether he is guilty of such default, in fact. I should wish the latter question to be considered first; though I should much regret that it should be conceived, that this court has not the jurisdiction now contended for. In considering, whether the commissioner has been guilty of wilful default, there may be a distinction taken between the

office of a London and a country commissioner. In London, the commissioners are, by act of Parliament, required to devote their whole time to the execution of the duties of their office. In the country, it is well known, that they are engaged in other employments, and that the perquisites of the office form but a small portion of their income. In London, only one commissioner is necessary to conduct the proceedings. In the country, the fiat is directed to five commissioners, two barristers, and three solicitors, and only one of the three solicitors is accustomed to attend; the barristers having a right of priority in attending each meeting. Now, what are the facts, of this case? When the commissioner, against whom the present charge is made, and who happens to be one of the three solicitors named in the fiat, was summoned to attend the meeting for the adjudication, he told the solicitor to the fiat, that he could not attend any of the subsequent meetings. Why did not the solicitor to the fiat hold the same language then to the commissioner, that his counsel has held to-day: "At your peril, you must attend,—if you think proper to attend the first meeting and take upon yourself the duties of a commissioner?" Instead of this, the solicitor says nothing, and appears to acquiesce in the intentions expressed by the commissioner. These are the circumstances, on which this court is now called upon to charge the commissioner with wilful default, in omitting to attend the meeting for the choice of assignees. I give no opinion on the law of the case, at present. But this is the state of facts.

Sir G. ROSE.—I should be very sorry, as far as the public is concerned, that this court was not sufficiently powerful to control the conduct of the commissioners in the country, in cases similar to the present. The observations made by the court, when this matter was previously before it, I do not think have received the attention they deserved. Our strongest inclination is, when such accidents as this occur, to relieve professional men from the consequences of any inadvertence they have committed in the execution of their duties as commissioners of bankrupt; and on the former occasion, the court pronounced the mildest order it could make, that another meeting should be appointed for the choice of assignees, and that the costs should be reserved. This has been the usual order on these occasions; and the costs have, I know, in many instances, been invariably paid at once by the commissioner. The commissioners, to whom a country fiat is directed, ought to arrange among themselves their attendance at the different meetings. If the court finds that one of these individuals has neglected his duty, not by the act of God, but to attend to his own private business,—assuming that his conduct is blameless as between man and man,—who, I should like to know, is to pay the costs? Not the petitioning creditor, or the estate; but the party who has occasioned the costs, by his own neglect. And the court will certainly find a means of protecting the estate, if an application for the costs is to be treated adversely by the commissioner. The fiat may be annulled, and an injunction issued to restrain him from acting as a commissioner under any future fiat. Either this court, or the lord chancellor, has certainly power to make such an order; but though the power exists, it would be exercised with reluctance. What I could wish to be done is this,—that the case should stand over for the present, with liberty for either party to mention it again, and with an intimation of the opinion of the court to the party against whom the application is made; and I think we shall then hear nothing more of it.

The case was ordered to stand over accordingly.

Ex parte JOHN SEABER.—In the matter of JAMES SEABER.  
—p. 543.

The bankrupt and the petitioner had numerous dealings together, from January, 1820, to June, 1835, of which no account was actually delivered by the bankrupt to the petitioner, but the various items of which were entered in the bankrupt's books; the date of the last item being in April, 1835, which was an entry of a payment of £300 by the bankrupt to the petitioner, on account:—*Held*, that the petitioner was not barred by the statute of limitations, or by the 9 Geo. 4, c. 14, from proving such balance as he could prove to be due to him, on the result of these transactions; and that they constituted a running and continuous account between the parties.

THIS was the petition of a creditor, to be permitted to prove for the sum of 1150*l.* 1*s.*, as the balance of a running account between him and the bankrupt; the proof of which had been rejected by the commissioners, on the ground that the debt was barred by the statute of limitations.

The bankrupt had been a solicitor at Newmarket, and had been employed for many years by the petitioner, who was a farmer in the neighbourhood, and the father of the bankrupt, in the management of his affairs. During this period, there were numerous dealings and transactions between them, commencing in January, 1820, and terminating on the 26th of June, 1835; there being various items, both on the debit and credit side of the account, in every year during that period. This account was not made up by the bankrupt, but was rendered by the petitioner, when he applied to prove the balance which he claimed to be due. The bankrupt was dead; but it was sworn by a person, who had been his clerk, and was since appointed accountant to the assignees, that there did not appear to have been any bill delivered by the bankrupt to the petitioner, and that the bankrupt's cash ledger did not show any account between him and the petitioner, subsequent to the year 1828, the last item being of the date of September 30th in that year. In answer to this, it was sworn by a witness, who was consulted both by the bankrupt and the petitioner for the purpose of arranging the bankrupt's affairs, that it appeared from the bankrupt's other books that there were items as late as 1835; and that in particular there was an item, extracted from one of the bankrupt's other books, as follows:—"1835, April 4. Paid my father an account of £300."

Mr. Maule, and Mr. L. Wigram, in support of the petition.

This case is not within the operation of the statute of limitations, 21 Jac. 1, c. 16, but is within the exceptive words contained in the third section of that statute, namely, "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." This exception is engrafted on the very words contained in the enacting clause, and is not confined to actions of account alone, but extends to the accounts themselves. The wording of the statute is certainly somewhat loose, but it must be interpreted according to its spirit; and the cases have accordingly decided, that it is not confined merely to merchants' accounts, but that an open account between any parties is within the purview of the statute. The late act of 9 Geo. 4, c. 14, does not apply to this case. The only question is, then, whether the dealings between these parties do not constitute a running and unsettled account, within the cases that have been decided on this subject. Here there was an entry by the bankrupt, in one of his own books, of a payment made by him

to the petitioner so late as the 4th of April, 1835; which amounts to an admission of a continuing account between them, according to the principle laid down in *Eicke v. Noakes*, 1 Mood. & R. 359, where it was held, that an entry in a bankrupt's last examination before the commissioners, of a certain sum being due to A., was evidence of an account stated between them, and was a sufficient acknowledgment to take the case out of the statute of limitations. The accounts, excepted by the statute, are not to be restricted to a mere statement in writing of receipts and payments on a sheet of paper, but were intended to comprehend any state of continuing and unsettled dealings between merchant and merchant. (They were then stopped by the court.)

Mr. *Swunston*, and Mr. *Campbell*, for the respondent.

The present case is clearly within the operation of the statute of James. There is no reference made in the petition, or the affidavits in support of it, to any account of the bankrupt; nor was any account, in fact, kept by the bankrupt within six years, that terminated in 1828. A man cannot, by making detached entries in his books at various intervals, take the case out of the statute. The foundation of the petitioner's claim, therefore, must be the transactions themselves, and nothing else. The petitioner insists on his right to use the transactions, arising within the last six years, for the purpose of letting in a demand for anterior transactions, before the six years. This he cannot do. [ERSKINE, C. J. There are three questions involved in this case: 1st, Whether these parties were within the relation or description of persons specified in the statute of James; 2dly, Whether, if they came within that description, such an account was kept between them as brought them within the exception of the statute; and, 3dly, Whether there has been such an appropriation of payments by the petitioner, as will let in the items before the six years.] The question of appropriation does not apply to this case; for there can be no appropriation, unless the petitioner can show, that the relation of debtor and creditor between him and the bankrupt subsisted more than six years ago. The correctness of the petitioner's account has never been admitted by the bankrupt, or the assignees; and it appears, from an account made out by the bankrupt of the debts he owed previous to his bankruptcy, that the petitioner is not included in the list of creditors; nor does the bankrupt's ledger show any cash account between him and the bankrupt, subsequent to 1828. It is decided in *Foster v. Hodgson*, 19 Ves. 180, and *Barber v. Barber*, 18 Ves. 286, that in order to take an unsettled account out of the operation of the statute, there must be an item accruing within six years. Now, it is very material to consider, on what principle the courts proceeded, when they gave a retrospective operation to items occurring within six years. It is submitted, that it was on the principle of the admission of the debtor, which let in the antecedent items. That principle might be very properly acted upon, under the statute of James; but it cannot apply to the recent statute of the 9 Geo. 4, c. 14; for, by the last-mentioned statute, there are only two instances specified, which are to be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the statute of James: 1st, an acknowledgment in writing, signed by the party chargeable thereby; and, 2dly, a payment of any principal or interest within the six years; and here there is neither one nor the other. (a)

(a) *Sed quære*, as to the entry in one of the bankrupt's books: "1835, April 4. Paid my father on account £300."

In *Williams v. Griffiths*, 2 Cr. M. & R. 45, where the plaintiff, whilst occupying premises of the defendant at a rent of £10, agreed to take the place of a person who had been bailiff to the defendant, and who had 12s. a week, and no rent or wages were paid for upwards of twelve years, and then the plaintiff brought an action for wages; it was held, that, although before Lord TENTERDEN's act, the accruing rent would have been sufficient to have taken the case out of the statute of limitations, yet that since that act there must be part payment, or something equivalent to it, to have that effect. In the present case, there has been no payment, but merely a pecuniary transaction. But even a verbal acknowledgment by a defendant, of having paid part of the debt within the six years, has been held insufficient to take the case out of the statute; there must be an acknowledgment in writing, accompanied by a signature; *Willis v. Newham*, 3 Y. & J. 518. [Sir J. Cross. There does not appear to have been any running account in that case.] The commissioners rejected this proof, on the authority of *Rother v. Munings*, 1 B. & Adol. 15, (20 E. C. L. R. 334,) which decided, that a pending account cannot take a case out of the statute, where there is a hiatus in the account. In that case, no item in the plaintiff's bill, except the last, had occurred within six years, and there was an interval of more than six years between the last item and the next preceding item; and it was held, that the last item did not take the case out of the statute. In the present case, there is a hiatus in the account, between September, 1828, and February, 1829. [ERSKINE, C. J. Can you contend, that that is a sufficient interval to prevent it from being considered a continuous account?] There is another question for the court to consider, namely, whether the relationship and mode of dealing between these parties was such, as to bring the case within the exception of the statute. This was not an account between merchant and merchant, but between father and son.

ERSKINE, C. J.—The question is, whether the case should not go back to the commissioners, to examine into the accounts between the parties, or whether they were right in rejecting the proof altogether, merely upon the face of the account. It appears from the case of *Calling v. Skoulding*, 6 T. R. 189, that all accounts between merchants are wholly excepted out of the operation of the statute of limitations; and that if the accounts are not between merchants, then, if there is one item within six years in a continuous account, that item will take the others out of the statute. (a) Now, in the statement of this petition, there is alleged

(a) The decisions, on the exception in the statute of limitations as to merchants' accounts, have been very conflicting. In *Foster v. Hodgson*, 19 Ves. 185, Lord Eldon says, that Lord Hardwicke held, in a case which occurred on the 9th of July, 1737, that the exception as to merchants' accounts was not to be confined to open accounts merely; for that between common persons, as long as the account is continued, the statute does not bar; and that the exception must, therefore, mean something more; and he seemed to think that, between merchants, an open account would do, though there had been no dealing within six years. But in the subsequent case of *Welford v. Liddell*, 2 Ves. 400, Lord Hardwicke says, "It is a pretty difficult construction, how to apply that exception in the statute relating to merchants' accounts. It is not, that a defendant may not plead the statute in all cases, where the account is *closed* and *concluded* between the parties, and the dealing and transaction over. It was not the meaning to hinder that." Lord Eldon says, that Lord Hardwicke in this last case appears not to have retained the opinion he before expressed, holding, that a merchant's account will be barred, if there is no item within six years. But the two judgments do not really seem to be so very irreconcilable. In the first case, Lord Hardwicke thinks, that an account between merchants is excepted out of the statute, provided it is an open account; in the last, he says, that the statute may be pleaded in all cases, where the account is *closed* and *concluded*; so that the only question would be, whe-

to have been a payment of £300, so late as 1835. That is a matter of fact, which ought to have been ascertained by the commissioners. It is true, that by Lord TENTERDEN's act, this payment cannot be proved by the mere verbal acknowledgment of the bankrupt. But the petitioner might have shown, by other evidence, that this was, in truth, a payment made by the bankrupt; and the commissioners did not go into any evidence on the subject. The commissioners rejected the petitioner's claim for £1150, because great part of it consisted of items in the account, occurring more than six years ago. But the petitioner says, that there were various items occurring within the six years. It seems to me, that the case ought to go back to the commissioners, to inquire whether there was a running account between the parties, within six years, and whether any balance is due to the petitioner, on such account. And if the petitioner is able to establish before the commissioners, that there was such a running account between him and the bankrupt, then he is entitled to an order, that he may prove for the amount of such balance, as may appear to be due to him on such account.

Sir J. CROSS.—The commissioners have decided, in this case, that they would not go into the account, on the ground of the statute of limitations; and the question is, whether they have done right. Now, I have always been so accustomed to consider a running account as taking the case out of the statute, that it is like reverting to first principles, to hear such a point debated. It appears to me, that no Court of Law or Equity could possibly reject the evidence of such an account, as this purports to be of the dealings of these parties, running on, as it does, within a period of six years.

Sir G. ROSE.—If it appeared, from an examination of the bankrupt's books, that there were items of dealings between the parties, within a period of six years, that would clearly take the case out of the statute.

The order was, that the claim of the petitioner, as stated in the petition, was not barred by the statute of limitations; and that the petitioner should be at liberty to prove the balance of any running account between him and the bankrupt, that was due to him at the date of the fiat.

ther the account is to be considered an *open*, or a *closed* account, after the lapse of six years from the date of the last item. In *Callin v. Skoulding*, 6 T. R. 189, (the case referred to by his honour the chief judge,) Lord Kenyon says, that where there is no item of account at all within six years, the plaintiff will be precluded, unless he can bring his case within the exception in the statute concerning merchants' accounts; but that, if he can do this, he will not be barred. In some cases, however, as in *Bridges v. Mitchell*, Gilb. Eq. Rep. 224; *Barber v. Barber*, 18 Ves. 286, and *Martin v. Heathcote*, 2 Eden, 169, it has been held, that where all dealings have ceased above six years, the statute is a bar, even to merchants' accounts. And this, after all, appears to be the sound construction of the exception in the statute; for where all dealings have entirely ceased between two parties, for more than six years, it is not a very strained inference to presume, that there is no longer an *open* account between them, but that it is *closed* and *concluded*. The words, too, of the exception in the statute, must surely be intended to apply to an *existing* and *continuing* account, and not to one that has been closed for any indefinite period, by an entire cessation of dealing. There may be certainly some few instances imagined, where the account may be considered still an *open* one, although there has been no dealing within six years; but such instances must be very rare; and the question, then, would be one of fact, depending on the circumstances of the particular case; for it is not every *unsettled* account, that can rightly be termed an *open* one.

**Ex parte JOHN SEABER PEACHY.**—In the matter of JAMES SEABER.—p. 551.

The bankrupt had been in the habit, for a long course of years, of making payments and receiving moneys for the petitioner; no account of which had been rendered by the bankrupt, but the account was extracted from his books after his bankruptcy. It did not appear, however, that for the last six years he had made any payment to the petitioner, or had received any money for him, but that the only transaction, during that period, was an annual payment made by him for the petitioner, of the drainage tax. *Held*, that such payment was evidence of a running account between the parties, so as to take the case out of the statute of limitations.

THIS was also the petition of another creditor, in the same bankruptcy as the last case, to be permitted to prove a debt which had been rejected by the commissioners, on the ground of its being barred by the statute of limitations. The facts were not so strong as in the last case, inasmuch as there was no item in the bankrupt's books, purporting to be a payment by him *to the petitioner* of any portion of the debt. It appeared, however, that the bankrupt, in six successive years ending in 1832, had made an annual payment for the petitioner, of the sum of 3*l.* 18*s.* 3*d.*, for the drainage tax, in respect of some lands in Cambridge-shire; and that he had also, previous to 1828, been in the habit of making other payments for the petitioner, in respect of poor-rates and church-rates, as well as of receiving his rents. The account of these receipts and payments was extracted from the bankrupt's books.

ERSKINE, C. J.—There does not appear in this case to have been any payment on account made by the bankrupt *to the petitioner*, but merely a payment or advance by the bankrupt of the amount of the drainage tax.

Mr. Maule, for the petitioner.—The bankrupt was accustomed to make payments on account of the petitioner for various matters, which form one side of the account that was running between these parties; and the other side of the account was composed of the moneys, which he was in the habit of receiving for the petitioner. This account was extracted from the bankrupt's books by Mr. King, who had been some time the bankrupt's clerk, and was, after the bankruptcy, employed as accountant by the assignees. This is evidence, therefore, that there was an account current between the bankrupt and the petitioner. For an account is not necessarily confined to a mere piece of paper, containing figures; but comprehends within its meaning the simple fact of pecuniary transactions and dealings subsisting between parties, although there may be no statement in writing, and although neither party can read or write.

Mr. Swanston, and Mr. Campbell, contra. The only account, on which they rely in this case, is a loose memorandum of an annual payment having been made by the bankrupt, of the drainage tax, down to 1832. This is not a payment to the petitioner of any part of the principal or interest, within the meaning of the 9 Geo. 4, c. 14, but a mere payment *for* the petitioner; nor has there been any acknowledgment, signed by the bankrupt, of any debt being still due from him *to* the petitioner. Unless, therefore, they can bring this case within Lord TENTERDEN's act, they are barred by the statute of limitations. [ERSKINE, C. J.—It is not a question, whether the payment amounts to an admission of the debt, but whether it is not an admission of an open account between the parties.] The two cases of *Willis v. Newham*,



3 Y. & J. 518, and *Rothery v. Mannings*, 7 B. & Adol. 518, cited in the last case, more strongly apply to the present. *Rothery v. Mannings* was an action by a proctor for the amount of his bill, to which the defendant pleaded the statute of limitations; and on the trial, it appeared that the plaintiff had been retained by the defendant, to conduct an appeal on his behalf from the Vice-Admiralty Court at the Mauritius, to the High Court of Admiralty in England; in which, sentence was given against the appeal on the 23d of July, 1822, and the defendant condemned in costs. The plaintiff commenced his action in September, 1828, for the amount of his charges in the cause; but no item of his account was proved to have accrued later than the day of the sentence, except an item, in respect of a communication made by the adverse proctor to the plaintiff on the subject of the costs, which item was added to the plaintiff's bill; and it was contended there, that the last item connected itself with the previous account, and took the whole out of the operation of the statute of limitations. But Lord TENTERDEN said, "When the suit was terminated by a sentence, there is no doubt that the proctor had a right to call for the amount of his bill. His duty was then concluded, unless something should occur to require his further interference. That was quite uncertain. A letter is indeed sent to him in October, on the subject of the costs, and a further charge arises for the perusal and consequent attendance; but this was mere accident. As, therefore, his right of suing on the items now in question accrued at the time of the judgment, and was not enforced within six years, I think he is not entitled to recover beyond the amount given at the trial." So in the present case, the regular account between the bankrupt and the petitioner began in 1821, and terminated in 1828, and the payments made by the bankrupt since were purely accidental. Those payments have no connection with any previous matter of account, but are merely isolated transactions. It does not follow, from those payments, that there was then an open account between the bankrupt and the petitioner. They might create a debt due *to* the bankrupt, but could not revive a debt due *from* him. Nothing occurs in the letters between the parties, to show that there was any running account between them subsequent to 1828.

Mr. *Muile*, in reply, was stopped by the court.

ERSKINE, C. J.—The present case is certainly not so strong as the last was, against the operation of the statute; for, in that, there was proof of the bankrupt having paid to the petitioner certain moneys on account. But, in one respect, the bankrupt stands in the same situation, namely, that of being in the habit, for several years, of paying and receiving money on account of the petitioner; and Courts of Equity have held, by analogy to the case of merchants' accounts, that where such transactions are continued, they are not within the statute. The payment of the drainage tax, although its effect is not sufficient for the purpose of acknowledging a debt, serves at least to show that there was a running account between the parties.

The other judges concurring, the same

Order was made as in the last case

**Ex parte CHARLES VINING.**—In the matter of **RICHARD BOWERMAN** and **GEORGE BOWERMAN.**—p. 555.

A creditor, having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint estate, and did not discover till seven months afterwards, that they were bought on the separate account of one of the partners:—*Held*, that he might transfer his proof from the joint to the separate estate.

THIS was the petition of a creditor, praying for leave to transfer his proof from the joint estate to the separate estate of Richard Bowerman. On the 3d April, 1835, the petitioner proved a debt of £423 against the joint estate, as due to him from the two bankrupts jointly, for goods sold and delivered. The goods were, in fact, bought by George Bowerman, as the agent of Richard Bowerman, on Richard Bowerman's separate account; but the petitioner took it for granted, that they were purchased on account of the partnership, and did not discover, till November last, that they were bought on the separate account of Richard Bowerman. He then applied to the commissioners to transfer the proof to the separate estate of Richard Bowerman, but they thought that they had no authority to do so.

*Mr. Swanston* appeared in support of the petition.

*Mr. Bethell*, *contra*. All the dealings of the petitioner were with George Bowerman alone, who accepted bills for the goods. The legal contract therefore, in this case, was with George Bowerman. The petitioner treated the debt as a partnership debt, and voted as a joint creditor in the choice of assignees. He made his election to prove on a joint contract, and, in his deposition before the commissioners, swore that the two bankrupts were jointly indebted to him. Having once made his election, therefore, to prove against the joint estate, he is not entitled to another election.

*ERSKINE, C. J.*—It is quite clear, that the petitioner is entitled, in this case, to transfer his proof. George Bowerman had acted as the agent of Richard Bowerman, and made this purchase solely for the benefit of Richard Bowerman; and when this fact was discovered, the petitioner was entitled to treat either George Bowerman as his debtor, in whose name the goods were bought, or Richard Bowerman, for whose benefit and on whose account they were bought.

*Sir J. Cross.*—The petitioner says, that he made a mistake in his proof, and applied to the commissioner to rectify it as soon as it was discovered. It is contended, that the proof must remain on the joint estate, because the petitioner has already made his election. But he never had any election to prove against one estate or the other, until he discovered that George Bowerman had bought the goods, not for the partnership, but on the separate account of Richard Bowerman. It would be injurious to the rights of the joint creditors, that the proof should be permitted to continue on the joint estate.

*Sir G. Rose* concurred.

Ordered as prayed.

Ex parte the Rev. JOHN LATEY and SUSANNAH his Wife, late SUSANNAH DAVIS, Spinster, MARIANA DAVIS and FRANCES DAVIS, and RICHARD HART DAVIS.—In the matter of HENRY DAVIS.—p. 557.

A testator devises freehold property to trustees, of whom the bankrupt is one, upon trust to sell and divide the proceeds equally among his brothers and sisters, including the bankrupt and his co-trustee. The *cestui que trusts*, in consideration of a specific sum stated in the deed to be paid to each of them, but which was in fact not paid, convey the estate to the bankrupt, who, a few days afterwards, gives each of the *cestui que trusts* two promissory notes for the payment of the money by instalments, but the notes are never paid:—*Held*, that the *cestui que trusts* had a lien on the estate in the hands of the bankrupt's assignees, for the money still remaining unpaid.

THIS was a petition, that the court would declare the petitioners entitled to a lien on certain estates conveyed to the bankrupt, under the following circumstances.

Thomas Davis, by his last will, bearing date the 23d of May, 1812, devised and bequeathed unto his brothers, Henry Davis, the bankrupt, and the petitioner, Richard Hart Davis, all his real and personal estate, upon trust, (subject to the proviso next therein contained,) as soon as conveniently might be after his decease, to sell and dispose of all his real estate, and all such parts of his personal estate as should not consist of money and outstanding debts; and to collect in and receive all his moneys and debts. But he directed, that before any sale should take place of any of his freehold and leasehold estates, they, his trustees, should offer to sell such estates to his heir at law, at such prices, and for such sums, as the testator had paid for the purchase thereof, and as were mentioned in the several deeds of conveyance and assignment thereof respectively; and that his heir at law should be at full liberty to purchase the same, or such part or parts thereof as he might think proper, at such price or prices; and that only such of his freehold and leasehold estates, as his heir at law should decline so to purchase, should be sold and disposed of in manner first mentioned. And as to the moneys to arise by sale, or otherwise, of his real and personal estates, upon trust, (after payment of his debts and funeral expenses, of an annuity of £100 to his mother, and certain specific legacies,) to pay and divide the same unto and amongst such of his brothers and sisters, the petitioner, Richard Hart Davis, and James Corsley Davis, and the petitioners, Susanna Lathey, then Susanna Davis, Mariana Davis, and Frances Davis, and the said Henry Davis, the bankrupt, as should be living at the time of his decease, and the issue of his said brothers and sisters as should be then dead, having left issue, equally between them, share and share alike; such issue to take the share and shares, only, to which their deceased parent or parents would have been entitled to if living. And the testator directed, that all the shares of such of his brothers and sisters, as should be living at his decease, should be vested and transmissible immediately upon and after his decease. And he appointed Henry Davis, the bankrupt, and the petitioner, Richard Hart Davis, joint executors of his will.

By a codicil to his will, the testator merely revoked a specific legacy of £300, given to his servant John Irvine, and in lieu thereof gave him an annuity of £10, which he charged on his personal estate.

The testator died on the 13th of October, 1813, without altering or revoking his will and codicil, leaving Henry Davis, the bankrupt, his heir

at law, and also leaving the petitioner, Richard Hart Davis, the said James Corsley Davis, and the petitioners, Susanna Latey, Mariana Davis, and Frances Davis, and Mariana Davis, his mother, him surviving; and the will and codicil were afterwards duly proved by the executors.

On the decease of the testator, the bankrupt, as his acting executor, took possession of all his personal estate and effects, and also, as trustee as aforesaid, entered into the possession or receipt of the rents and profits of the devised estates; and thereout paid the greater part of the testator's debts, and all his funeral and testamentary expenses, and also some of the legacies and annuities given by his will, including the annuity of £100 devised to his mother, who was since dead.

By indentures of lease and release, bearing date respectively the 28th and 29th of July, 1815, the release being made between Henry Davis, the bankrupt, and the petitioner, Richard Hart Davis, of the first part, the petitioner, Richard Hart Davis, and the petitioners, Susanna Latey, (then Susanna Davis,) Mariana Davis, and Frances Davis, and the said James Corsley Davis, of the second part, the said Henry Davis, the bankrupt, of the third part, and William Vinecombe, gentleman, of the fourth part,—after reciting that all the mortgage, bond, and other debts then remaining due from the testator, did not amount together to the sum of £14,000, and that an agreement and arrangement had been entered into between the bankrupt and the petitioners and the said James Corsley Davis, that the whole of the testator's freehold and leasehold estates should be taken by the bankrupt, and should be conveyed or assigned to or in trust for him, in manner thereafter mentioned,—and that in lieu and in full satisfaction of the shares, rights, and interests of the brothers and sisters therein and thereto, the bankrupt should pay to each of them the sum of 868*l.* 10*s.*, making together the sum of 4342*l.* 10*s.*, and should enter into the covenant thereafter contained for payment of the debts so remaining due and owing from the testator, as therein mentioned;—it was witnessed, that in pursuance and performance of the said agreement, and for and in consideration of the sum of 868*l.* 10*s.* to each of the petitioners, Richard Hart Davis, Susanna Latey, (then Susanna Davis,) Mariana Davis, and Frances Davis, and the said James Corsley Davis, making together the sum of 4342*l.* 10*s.*, then paid by the bankrupt, the receipt whereof was thereby acknowledged; and also for a nominal consideration paid to each of the parties of the second part by the said William Vinecombe, and in consideration of the covenant of the said bankrupt thereafter contained, the bankrupt and the petitioner, Richard Hart Davis, (with the approbation and by the direction and appointment of the parties of the second part,) did grant, bargain, sell, alien, release, and convey; and the parties of the second part did grant, ratify, and confirm unto the said William Vinecombe, as a trustee for the bankrupt, all the freehold property of the testator to certain uses, for the purpose of barring dower. And by the same indenture, the parties of the first and second parts bargained, sold, assigned, transferred, and set over, unto the said William Vinecombe, all the leasehold property of the testator, in trust for the bankrupt, Henry Davis. The bankrupt also assigned to Mariana Davis and Frances Davis, a policy of assurance for £1000, as a further security.

The petition then alleged, that although the shares of the petitioners, Susanna Latey, Mariana Davis, and Frances Davis, of the said purchase-money, were by the said indenture of release stated to be paid to

them, and the receipt of such shares was thereby acknowledged, yet the same were not in fact paid, but only a small part thereof; and that to secure the payment of the remainder of such shares, two several promissory notes were given to each of the petitioners, Susanna Latey, Mariana Davis, and Frances Davis, for the several sums of £500 and £315, in the following form: that is to say,

“£500.

Bristol, 11th August, 1815.

“I promise to pay to Miss Mariana Davis the sum of £500, (value received,) by the instalments and at the times hereinafter mentioned; viz. the sum of 233*l.* 6*s.* 8*d.*, part thereof, after the decease of William Webb, of St. George, in the county of Gloucester, gentleman, with lawful interest for the said 233*l.* 6*s.* 8*d.* from the time of his decease; the like sum of 233*l.* 6*s.* 8*d.*, other part thereof, after the decease of Elizabeth, the wife of the said William Webb, with lawful interest for the said last mentioned 233*l.* 6*s.* 8*d.* from the time of her decease; and the remaining sum of 33*l.* 6*s.* 8*d.*, after the decease of John Irvine, of St. George aforesaid, with lawful interest for the same from the time of his decease.

HENRY DAVIS.”

“£318.

Bristol, 11th August, 1815.

“After six months’ notice, I promise to pay to Miss Mariana Davis, £315, value received, with lawful interest for the same from the 13th November last.

HENRY DAVIS.”

Neither of these promissory notes had been paid in full to either of the petitioners; but the instalments due on the first note had been paid up to the 24th of December, 1832, on the note given to Mariana Davis, and up to the 24th of June, 1833, on the note given to Frances Davis, and up to the 24th of December, 1832, on the note given to Susanna Latey.

William Webb, and his wife, and John Irvine, the several parties mentioned in the first promissory note, were all dead.

Henry Davis, the bankrupt, immediately after the execution of the indentures of lease and release, entered into the sole possession or receipt of the rents and profits of all the freehold and leasehold estates of the testator, and continued in such possession or receipt, until the time of his bankruptcy.

In December, 1815, Susanna Davis married the petitioner, John Latey; and by an indenture of settlement made on that occasion, the said purchase-moneys so due to her, and the securities for the same, were assigned and transferred to the bankrupt, Henry Davis, and the petitioner, Richard Hart Davis, upon trust to pay the interest to the petitioner, Susanna Latey, for her life; and, after her decease, to her husband, in case he should survive her; and after the death of the survivor, for the benefit of their children.

On the 18th of October, 1833, a fiat in bankruptcy was issued against Henry Davis, under which his assignees took possession of all the real and personal estate and effects of the testator, Thomas Davis, which were in the possession or power of Henry Davis at the time of his bankruptcy.

The petition alleged, that there was still due to each of the petitioners, Mariana Davis, and Frances Davis, the sum of £818, and to the bank

rupt, and the petitioner, Richard Hart Davis, as such trustees as aforesaid, the sum of 206*l.* 1*s.*, together with interest for the same several sums,—deducting from the interest due to the petitioner, Mariana Davis, the sum of 25*l.* 10*s.*, which had been received by her from the assignees, subsequent to the bankruptcy.

The prayer was, that it might be declared, that the petitioners had respectively a lien for the amount so due to them upon the estates of the testator, Thomas Davis, so conveyed to the bankrupt; and that the assignees might be ordered to pay to each of the petitioners, Mariana Davis, and Frances Davis, the sum of £818, and to the bankrupt, and the petitioner, Richard Hart Davis, or to Richard Hart Davis only, upon the trusts of the settlement, the sum of 206*l.* 1*s.*, and also the interest due upon those several sums, out of the proceeds of the estate and effects of the testator, Thomas Davis; or that the same might be sold for the benefit of the petitioners, and the proceeds applied for that purpose; or, if the court should be of opinion that the petitioners had not such lien, then that the petitioners, Mariana Davis, and Frances Davis, and Richard Hart Davis, might be admitted to prove the amount due to them respectively, against the estate of the bankrupt.

Mr. *Chandless*, and Mr. *Bethell*, in support of the petition. When the property was conveyed to the bankrupt by the indentures of lease and release of the 28th and 29th of July, 1815, he paid off the whole of his two brothers' shares under the will of the testator, and also paid £50 to each of his three sisters, in part of their respective shares; giving them each the two promissory notes mentioned in the petition, for the remainder of the purchase-money; and assigning over a policy of insurance for £1000, as a further security. The petitioners have, therefore,—as in the ordinary case of the purchase of an estate, where part of the purchase-money remains unpaid,—a clear lien on the estate, for the remainder of their respective shares of the purchase-money; and the onus lies on the assignees to show, that the petitioners have done any thing to abandon such lien; *Mackrith v. Symmons*, 15 Ves. 329. The merely taking a bond or a note for the purchase-money, does not do away with the lien.

Mr. *Swanston*, and Mr. *J. Russell*, *contra*. This is not the case of a vendor's lien, for the remainder of the purchase-money left unpaid at the time of the execution of the conveyance; but here the estate was already charged with a sum of money, payable to the petitioners under the will of Thomas Davis; and nothing in the shape of purchase-money passed between the parties. All that was done here was, to exonerate the estate from the demands of the petitioners. That was the intent and only reasonable purpose of the deed. To hold the contrary, would involve a contradiction, and render the deed a nullity. The testator created a charge on the estate in favour of the petitioners, and the object of the deed was to exonerate the estate from that charge. How can it be contended, then, that the charge still exists? It would be absurd to say, that the deed had no operation. A lien, like that now contended for, can only exist, where the party claiming the lien had originally an estate in the land conveyed, and passed an estate in the land by the conveyance to the purchaser. The petitioners here never possessed any estate in the land; that was already in the bankrupt; all that the petitioners could claim, was a charge upon the land which they agreed to release; if they had died, their heirs could have claimed

nothing, but the whole of their interest, such as it was, would have gone to their executors. In this case, therefore, there could be no contract of purchase or sale. [Sir J. CROSS called the attention of the counsel to that part of the will of Thomas Davis, which directed that the trustees should offer to *sell* the estates to his heir at law, at such prices as the testator himself had paid for them, and that his heir at law should be at full liberty to *purchase* the same at such prices.] Whomsoever the heir at law might purchase from, he could not purchase from the petitioners, for they had no estate in the land; the right to sell was only in those in whom the title was vested, and that was in the trustees. The deed of 1815 was a mere family arrangement, and not the conveyance of a vendor to a purchaser; but even viewing it in the latter light, there is no case in which the doctrine of lien has been held to apply, where the estate, on which the lien is claimed, never was the property of the party claiming the lien; all the cases relate to parties, in whom the estate once was.

But, in this case, the petitioners did not rely on any lien on the estate, but took other securities from the bankrupt for the payment of what was due to them. It is not disputed, that, generally speaking, a bond or note for the whole or part of the purchase-money may be so worded, as not to destroy a vendor's lien; because a personal credit is still given to the vendee, and may be given upon the confidence of the lien on the estate. But a bond or a note may also be worded in such a manner, as entirely to defeat the lien. In *Winter v. Lord Anson*, 1 Sim. & St. 434, it was decided by Sir J. LEACH, that where a vendor agreed to sell an estate, in consideration of a bond for the purchase-money, payable at the death of the vendor, with interest in the mean time, but the conveyance expressed that it had been paid, and had the vendor's receipt endorsed upon it,—the vendor, under these circumstances, had no lien on the estate for the amount of the bond. It is true, that this case was afterwards overruled by the lord chancellor; (a) but the reasoning of Sir J. LEACH is very strong in support of the first decision. The lien of a vendor, however, is clearly destroyed, by taking any thing in the shape of special security by way of pledge; *Nairne v. Prowse*, 6 Ves. 752. And Sir W. GRANT's observations in that case make strongly against the claim set up by these petitioners. He says, "if the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given, because of the lien? Suppose a mortgage was made upon another estate of the vendee; will equity at the same time give the vendor what is, in effect, a mortgage upon the estate to be sold; the obvious intention of burdening one estate being, that the other shall remain free and unencumbered? Though in that case the vendor would be a creditor, if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money." Now, what do two of the petitioners do here? They take a pledge of a policy of assurance for £1000, as a further security, which is totally distinct and independent of the conditions in the deed of 1815. Therefore, as to them, it is clear, if there ever was a lien, it is gone. And their omission to give notice to the insurance office will make no difference as to the effect; for notice is only material, in case of bankruptcy; and if they had no lien before bankruptcy, they could not gain one afterwards.

(a) See *Winter v. Lord Anson*, 3 Russ. 489.

There is another way of viewing this question, which is this. By the deed of 1815, the petitioners, in consideration of the sum of 868*l.* 10*s.*, and also of the covenant of the bankrupt to pay the testator's debts, released their interests given them by the will. Now, whenever you contract for a covenant, you must be satisfied with the covenant, and cannot claim a lien. Thus, in *Clarke v. Boyle*, 4 Sim. 499, it was decided, that where A. conveyed an estate to B., in consideration of B. entering into the covenants contained in the deed to pay an annuity to A., and also £3000 to certain persons in the event of B's. marrying there was no lien on the estate, either for the annuity, or the £3000. The lien, too, if it ever existed in this case, was defeated by the subsequent arrangement between the parties. There is no case which decides that a vendor, having a lien at the time of the contract for the purchase of an estate, retains such lien, after he has entered into another and different contract for the payment of the purchase-money. In the present case, the contract, being at the time of the deed, the 29th July, for the immediate payment of the money, is entirely varied by another and subsequent arrangement on the 11th August, when the notes were given by the bankrupt to the petitioners. The question of lien is entirely a question of intention; and here, by express agreement between the parties on the 11th August, the petitioners had no right to call for the payment of part of their money, until after the death of Mr. and Mrs. Webb, and John Irvine,—nor for the remainder, until after six months' notice to the bankrupt. If a lien existed, why was it never claimed before the bankruptcy of Henry Davis? The family arrangement between these parties took place in 1815, and yet no claim of lien on the estate was ever brought forward, although the bankrupt in that interval mortgaged, and even sold, parts of the property. [Sir G. ROSE. How can the assignees take the estate, discharged from the trusts of the will?] The deed of 1815 annihilates the trusts of the will; for it expressly declares, that the bankrupt was to pay to each of the petitioners the sum of 868*l.* 10*s.*, in lieu and in full satisfaction of all their rights and interests under the will. The petitioners have no more right against the estate in the hands of the bankrupt, than if the estate had been sold to a third party. And what right would they have had to a lien, if the estate had been sold by the trustees under the will to a third party? [Sir J. CROSS. Still, the difficulty is, to get rid of the trusts of the will, which remain to be performed.] The case set up by the petitioners is, that the relation of trustee and *cestui que trust* is entirely destroyed, and that of vendor and purchaser substituted in its stead. [Sir J. CROSS. The subsequent arrangement, as to the notes, was made with only one of the two trustees; but the question is, whether the parties could not vary their rights, without defeating their lien.] The money claimed by the petitioners did not become due to them under the will of Thomas Davis, but under their contract with the bankrupt. The relation of trustee and *cestui que trust* no longer subsists, when the trustees are ready to pay the money, and the *cestui que trust* enters into another contract with them for the payment of it.

Mr. *Chandler*, in reply. There is not the slightest evidence in this case, that the trustees were ever ready to pay the money to the petitioners. In *Winter v. Lord Anson*, 1 Sim. & St. 434, which has been cited by the other side, the agreement to sell was, expressly, in consideration of a bond, with interest, payable at the death of the vendor



but even in that case the lord chancellor held, that the bond did not defeat the vendor's lien on the estate.

ERSKINE, C. J.—I am of opinion, that there is nothing in the deed of 1815, nor in the subsequent transactions between these parties, which could operate as a release to the bankrupt, except on payment of the sums specified in the deed; and that the estate in the hands of the assignees is still subject to the trusts of the will. The testator devises his estate to the bankrupt, R. H. Davis, and another trustee, upon trust to sell, and directs that the proceeds of the sale should be divided equally amongst his brothers and sisters, of whom the bankrupt was one. It was the duty therefore of the trustees, to sell the estates, and divide the money, pursuant to the directions of the will. Instead of selling, however, the parties come to an agreement among themselves, that the bankrupt should take the whole of the estates, and pay a specific sum to each of his brothers and sisters; and they accordingly enter into the deed of 1815, by which the whole of the estates are conveyed to the bankrupt. If the bankrupt had paid the money mentioned in the deed, then it would have operated as a good release to the trustees; but the agreement was never perfected, as the money was not paid; and therefore trusts of the will are still to be discharged. The assignees, who have got possession of the estate, are not entitled to the whole of it, without satisfying the trusts with which it was charged by the testator, Thomas Davis. The bankrupt could not, by taking the estate as a purchaser, discharge himself from his liability as trustee; nor could the deed of 1815 be construed as a release from the trusts, while the money remained unpaid. The bankrupt, therefore, must be considered to take as a purchaser, with notice of the trusts.

Sir J. Cross.—I think the case is one of great importance, and therefore wish to consider my judgment. At present I offer no opinion.

Sir G. Rose.—The question is, whether the notes taken by the petitioners, for the amount of the respective sums of money mentioned in the deed of 1815, can be said to operate as a release of their interests under the will. The effect of the deed was to secure to the petitioners their respective shares under the will; and if the notes had been paid, then the trusts might be said to have been discharged. But it is the duty of this court, as between the assignees and the estate, to take notice of any existing trusts affecting the estate, although they may not even be urged for our consideration by the *cestui que trusts*. On the case stated merely on the face of this petition, the court might certainly find great difficulty in acting; but, looking at the case in the point of view I have just mentioned, I think the lien will be found to exist.

Sir J. Cross, on taking his seat this day (April 29) in court, said, that he had talked this matter over with his colleagues, and that he concurred with them in opinion, that the petitioners were entitled to the relief they sought.

The order was, that, subject to such of the antecedent charges created by the will of Thomas Davis, as remained unsatisfied, the petitioners had respectively a lien on the estate, for the amount of the sums due to them from the bankrupt; and that it should be referred to the commissioners, to take an account of the principal and interest so due to them respectively; the costs of both parties to be paid out of the proceeds of the bankrupt's interest in the estates.

## Ex parte HARVEY.—In the matter of BOX.—p. 571.

A person, ostensibly carrying on the profession of a *proctor*, is made a bankrupt as a *bill-broker*; and the evidence to prove the trading is, generally, "that he procured bills to be discounted, that he carried on the business of a bill-broker, and that on one occasion he was employed to get a bill for £48 discounted."—*Held*, that this was insufficient evidence of the trading; as the affidavits did not specify the name of any party, to whom the bankrupt applied to discount any bills, or with whose money the same was cashed, nor even state the whole particulars of any one of such bills.

When affidavits, not read on the hearing, are alleged to be impertinent, the court will direct the officer, on taxation of costs, to disallow the costs of them, if he shall consider them to be impertinent.

THIS was the petition of creditors, praying that the fiat might be annulled, on the ground that the bankrupt was not a trader.

The bankrupt had exercised the profession of a proctor in partnership with his father, until March, 1835, when the father retired; but the business continued to be carried on by the bankrupt as before, under the firm of "Box and Son," until the issuing of the fiat on the 19th of November, 1835. In 1834 the bankrupt became embarrassed in his circumstances, and went to Boulogne, but his business was managed by his clerks in his absence. The bankrupt was described in the fiat, as "John Box, of Bell's Yard, Doctors' Commons, and Charlotte Street, Portland Place, Scrivener, and Bill-Broker;" but the petitioner contended, that he was never either the one or the other. When the petition was presented, the bankrupt had obtained the requisite number of creditors to sign his certificate, but it had not been then allowed; it was, however, afterwards allowed, before the petition came on for hearing.

The evidence in support of the trading was as follows:—

A witness of the name of Atherton deposed, that for two years previous to the issuing of the fiat, he was employed by the bankrupt to assist him in his business, which was principally carried on at his private residence in Charlotte Street, Portland Place; that during this period the bankrupt carried on the business of a bill-broker to a considerable extent, in addition to his professional business of a proctor, which he carried on in Doctors' Commons; and that he was employed by many persons to get bills of exchange discounted; that, in particular, during the months of May, June, July, August, and September, in 1834, the bankrupt was employed for this purpose by seven different persons, whom the witness named, and that he, during that period, procured bills of exchange to be discounted for them; that in August, 1835, the bankrupt procured a bill to be discounted for a Mr. M., and that the bankrupt charged, and was paid by his employers, commission for his trouble in getting these bills discounted.

Another witness deposed, that in 1832, 1833, and 1834, he had many dealings with the bankrupt in his business of a bill-broker, and that, during those years, the bankrupt was in the habit of applying to the deponent to assist him in getting bills of exchange discounted; that the deponent charged to the bankrupt such commission only as would enable him, the bankrupt, to make an addition to it, in order that he might obtain a profit from his employers; and that the deponent did not at the time know that the bankrupt was a proctor, but believed that he sought and endeavoured to get his livelihood as a bill-broker.

Another witness stated, that he had known the bankrupt intimately

for many years, and was informed and believed, that he carried on the business of a bill-broker; and that in May, 1834, he employed him as a bill-broker, to get a bill for £48 discounted, which he did, and charged the deponent commission for so doing. It was sworn, also, by a witness, who was a wine-merchant, that he had employed the bankrupt as a bill-broker.

A Mr. Goldsmid, who was himself a bill-broker, deposed, that he was well acquainted with the bankrupt for about eighteen months previous to his bankruptcy, and that during all that time, or the greater part of it, he carried on the business of a bill-broker, by getting bills of exchange discounted; and that the deponent, upon several occasions, employed him to get bills of exchange discounted, and he charged the deponent commission for his trouble.

Mr. *Swanston*, and Mr. *T. C. Barber*, in support of the petition. Although the witnesses swear, that they employed the bankrupt to get various bills of exchange discounted, there is not one who states the particulars of any one of such bills. The mere discounting bills does not make a man a bill-broker, unless he procures the bills to be discounted with other men's money. Now, it is somewhat remarkable, that Mr. Atherton, who swears that he assisted the bankrupt in getting bills discounted, does not state *with whose money* any one of these bills was discounted.

Mr. *Messiter*, who appeared for the bankrupt, objected, that the petitioners were too late in applying to annul the fiat, for the mere defect of trading; as the bankrupt had obtained his certificate, and no defect of trading appeared on the face of the proceedings; *Ex parte Levi*, Buck, 75.

Sir G. ROSE.—The petition here was presented on the 1st of April, and the certificate not allowed till the 12th; the bankrupt therefore took his certificate, subject to this petition.

Mr. *Twiss*, and Mr. *Rogers*, for the petitioning creditor, contended, that the evidence was decisive that the bankrupt had held himself out to the world as a bill-broker, in addition to his business of a proctor; and that the petitioners were estopped from applying to annul the fiat, as they had already proved their debts under it.

Mr. *Swanston*, in reply. A creditor is not precluded from petitioning to supersede, because he has proved under the commission.(a)

ERSKINE, C. J.—It is impossible, in this case, to shut one's eyes to the fact, that this is a friendly fiat. It is therefore incumbent on us to look on it with some degree of jealousy and suspicion. But jealousy and suspicion, I admit, are not of themselves sufficient to upset the fiat, if all the requisites to support it are properly proved. Now, the affidavits which have been made, to prove the trading of the bankrupt as a bill-broker, I must confess, are not satisfactory to my mind. The deponents state, that the bankrupt procured bills to be discounted in his business of a bill-broker, but do not specify the particulars of any one bill, or the name of any party to whom the bankrupt applied for this purpose. Mr. Goldsmid's affidavit, however, makes out such a case, that, speaking for myself, I should not like to annul the fiat, without some further examination into the facts. The other judges differ with me upon this point. But I, for one, should certainly wish for a *vivâ voce* examination of the witnesses, who have deposed to the trading.

(a) See *Ex parte Bonnor*, 2 Rose, 61; and *Malkin v. Adams*, 11. 33; and 1 Desc. B. L. 636.

Sir J. Cross.—If any great amount of property were at stake in this matter, I might hesitate before I annulled the fiat, without some further examination of the witnesses; but, under all the circumstances, it does not strike me, that there is any substantial ground for ulterior inquiry. With respect to the trading, it was over and over again urged by the counsel who argued in support of the fiat, that the bankrupt held himself out to the world as a bill-broker; but that does not appear in evidence. On the contrary, it appears most clearly, from the very affidavits in support of the fiat, that he held himself out to the world as a proctor, and that he only occasionally acted as a bill-broker. He may, very likely, have got bills frequently cashed or discounted for friends, from his connections with small traders; but there is no satisfactory evidence, that he carried on the business of a bill-broker for his livelihood. Here we have every species of generality; but *dolus versus in generalibus*. No one affidavit states, who were the persons that discounted any bill, or with whose money any bill was discounted; nor, except in one instance, is the amount of any bill given. Upon that occasion, the witness states, that he employed the bankrupt to get a bill for £48 discounted; but with whose money the bill was cashed, or by whom it was discounted,—as to these two facts,—the affidavit is wholly silent. Why, the very essence of all these cases of procuring bills to be discounted as a broker, is, was there a discounter? I cannot, therefore, in the absence of all particular evidence as to any act of trading, say, that this man was a bill-broker, within the meaning of the bankrupt law. I observe, that in the fiat the bankrupt is called a scrivener, which it is admitted he was not; and I therefore cannot help thinking that the bill-broker's business was an invention, or an after-thought, for the purpose of getting this party made a bankrupt. On these grounds, I think the fiat ought to be annulled.

Sir G. Rose.—I find it impossible to say, that there was any intention of the bankrupt to get his livelihood by the business of a bill-broker, and therefore this fiat ought to be annulled, upon general grounds. For, if it is permitted to stand, there is no one in future, who lays his fingers on a bill of exchange, in any course of dealing with it, but will incur the hazard of being made a bankrupt as a bill-broker. If the bankrupt, however, after hearing the opinion of the court, still wishes for an inquiry into the fact of bill-brokering, I am willing, for his sake, as he appears to be acting fairly, to let him have an issue; though I do not think it will be attended with a favourable result.

Mr. Twiss then stated, that some of the affidavits filed in support of the petition were impertinent. In *Ex parte Williamson*, 1 Deac. & C. 529, it was held, that the court would decide the question, as to impertinence of affidavits, on the hearing of the petition.

The court said, that as the affidavits to which allusion was made had not been read, the rule laid down in *Ex parte Williamson* did not apply. But they directed the officer of the court, on the taxation of costs, to disallow the costs of all or any part of the affidavits, which, in his judgment, he should find to be impertinent. (a)

The order was, that the fiat should be annulled, unless an application should be made for an issue, or a *viva voce* examination and in that case, the petitioners were to be protected from the costs of the inquiry.

(a) And see *Ex parte Arnaby*, 2 Deac. & C. 119.

## Ex parte MOORE.—In the matter of CARTWRIGHT.—p. 57E.

Although the petitioning creditor's costs up to the choice of assignees have been taxed by the commissioners, and paid to the solicitor, for a period of two years, yet where objectionable items are stated on affidavit, the court will make an order for a retaxation of the bill, as against the solicitor to the petitioning creditor, without bringing the petitioning creditor himself before the court. *Dissent.* Sir J. Cross.

THIS was the petition of a creditor, for an order to retax the bill of the solicitor up to the choice of assignees, which had been taxed by the commissioners more than two years ago, and subsequently paid. The bill amounted to £102, and the commissioners taxed it at 85*l.* 17*s.* 7*d.* The petitioner's affidavit in support of the petition pointed out objectionable items in the bill, to the amount of £34, but they were not stated in the petition; and he swore, that he only lately saw the bill, or he should sooner have applied to the court to have it taxed.

Mr. *Jeremy*, in support of the petition, cited *Ex parte Brown*, 3 Deac. & C. 496, where, on a petition by creditors to tax the bills of several solicitors, who had been successively employed by the assignees, the court made the order as prayed, notwithstanding the bills had been previously taxed by the commissioners, and paid by the assignees.

Mr. *Swanston*, *contrâ*. After so long a period has elapsed since the bill has been already taxed and paid, the court must look upon this as a vindictive proceeding of the petitioner, and as one not entitled to any indulgence. They will therefore require the strict practice of the court to be adhered to by the petitioner; and that is, that when a bill has been already taxed and paid, the objectionable items must be pointed out by the party, who applies to have it retaxed. Here the objectionable items are only stated in the affidavit, which is not enough; they ought to have been stated in the petition. And the 14th section of the bankrupt act, under which the application is made, relates only to charges after the choice of assignees, and not to the costs previously incurred, which the statute says are to be reimbursed to the petitioning creditor. The court, therefore, ought not to make any order on this petition, in the absence of the petitioning creditor.

ERSKINE, C. J.—I think there is no objection to make the order as prayed, taking it for granted that the bill has been taxed by the commissioners, and paid in the ordinary way. The practice has always been for the solicitor to have the bill of costs, up to the choice of assignees, settled by the commissioners, and then for the assignees to pay the amount to him, and not to the petitioning creditor. If the petitioning creditor had received the money in this instance, and not the solicitor, the respondent might have shown that fact on affidavit; and at all events, if the petitioner is entitled to compel the solicitor to refund, the latter may have his remedy against the petitioning creditor.

Sir J. Cross.—The difficulty I feel in this case arises from the words of the 14th section of the bankrupt act. By that section it is provided, "that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands, direct the assignees (who are hereby thereto required) to reimburse such *petitioning creditor or creditors* such costs, out of the first money that shall be got in under the

commission." Now, as the statute says that the *petitioning creditor* is the party to be reimbursed his costs, and not the solicitor, it appears to me, that the *petitioning creditor* is the only party legally entitled to receive the money; for if you come to a question of reimbursement, the petitioning creditor may be entitled to the whole, and the solicitor to none; the claim of the latter being more in the nature of remuneration. The right given to a creditor to have the petitioning creditor's bill taxed, after it has been settled by the commissioners, is only ten years' old; for he does not seem to have possessed that right, previous to the 6 Geo. 4, c. 16. The question is, would the solicitor be entitled to sue the assignees for the amount of the petitioning creditor's bill of costs, as settled by the commissioners? Clearly not; for the statute says they are to pay them to the petitioning creditor. There is no privity, as to these costs, between the solicitor and the assignees, but between the solicitor and the petitioning creditor. If any creditor, therefore, is dissatisfied with the amount allowed by the commissioners, I think he ought to bring the petitioning creditor as a party before the court.

Sir G. ROSE.—I must take the liberty to observe, that it is not quite correct to say, that this right of a creditor, to apply for a re-taxation of the petitioning creditor's bill of costs up to the choice of assignees, has sprung up within the last ten years; for I take it, that any creditor might always have applied for that purpose, on alleging reasonable cause for the court's making the order. The question is here, to what extent any objectionable items appear on the face of the bill. With respect to the objection, that the petitioning creditor is the material party interested on this decision, and that he, and not the solicitor, ought to have been brought before the court, the true principle I apprehend is this, that wherever any party has improperly received money belonging to the estate, the court will compel him to refund.

The order was, that it should be referred to the deputy registrar to tax the bill of costs, with the usual directions; and if it should appear that the solicitor had been overpaid, that he should refund to the assignees the amount of the difference between the sum of 85*l.* 17*s.* 7*d.* and the amount at which the bill might be re-taxed; with liberty for the petitioning creditor to attend the re-taxation; and if upon the re-taxation the bill should be reduced by a less sum than one-sixth, then the petitioner was ordered to pay to the solicitor his costs of this application, and those incidental thereto; but in the event of more than one-sixth being taken off, then the solicitor was ordered to pay such costs, which were to be settled by the deputy registrar.

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Ex parte EDWARD BRIDGER.—In the matter of BENJAMIN GLOVER.—p. 581.

The bankrupt had bought some freehold property by auction, and had paid a deposit of £20 per cent. on the amount of the purchase-money; but there being some dispute about the title, the purchase was not completed before the bankruptcy. Upon a petition by the vendor, that the assignee might be ordered to deliver up the agreement, and that the vendor might retain the deposit-money, a special order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit-money.

THIS was the petition of a party who had agreed to sell a freehold estate to the bankrupt, praying that the assignees might be ordered to deliver up the agreement, under the following circumstances:

The property in question was put up to sale by auction in two lots on the 27th of July, 1829, and the bankrupt was declared the purchaser of one lot, at the price of £120, and of the other lot at the price of £190. By the conditions of sale, it was stipulated that the purchaser was to pay down a deposit of £20 per cent., and sign an agreement for the payment of the remainder, on or before the 29th of September, 1829, when the purchase was to be completed, and the purchaser to have possession; and the petitioner undertook to deduce a good title; and it was provided, that if the purchaser neglected to comply with any of the conditions, the deposit-money should be forfeited. The bankrupt accordingly signed an agreement to this effect, and paid to the auctioneer a deposit on one lot of £24, and on the other of £38.

A commission issued against the bankrupt on the 8th of December, 1831.

The petitioner alleged, that he delivered an abstract of his title within the time appointed for that purpose, and had been at all times ready and willing to complete the sale; but that the purchase was not completed by the bankrupt at the time of his bankruptcy; and that since the bankruptcy, the petitioner had applied to the assignee to elect, whether he would abide by the agreement for the purchase, or abandon it; but that he had declined so to elect.

The prayer was, that the assignee might be ordered to deliver up the agreement, and the possession of the premises, to the petitioner, and that the agreement might be declared to be rescinded and void; and that the petitioner might be at liberty to re-sell the premises, and retain the deposit-money for his own benefit.

Mr. *Ayrton* appeared in support of the petition.

Mr. *Deacon*, *contra*, said, that the assignee had no wish to complete the purchase, as there was a difficulty in the title; but the question was, who was to have the deposit-money, which, he submitted, the court would not order to be paid to the petitioner, unless he could show that he had a good marketable title to the property.

The court made the following order:

On the petitioner submitting to any order of the court touching the agreement and deposit in the petition mentioned, let the petition stand over for a fortnight, and the assignee in the mean time elect, whether he will fulfil or abandon the agreement. If the assignee reject it, let him deliver up possession of the premises, and the agreement in that case to be declared cancelled, as against the assignee; but without prejudice to any steps the assignee may think fit to take as to the deposit.

Ex parte CURTIS.—In the matter of NANTES.—p. 583.

Where the *final* order for the distribution of unclaimed dividends was obtained before the passing of the 5 & 6 Will. 4, c. 29, s. 5:—*Held*, that the provisions of that act did not prevent the order from being carried into effect.

In 1834, the usual preliminary order for a reference to the registrar had been obtained under the 6 Geo. 4, c. 16, s. 110, according to the

then practice of the court, upon a petition to distribute unclaimed dividends; and the registrar had since made his report, upon which the usual order was made for the distribution of them amongst the bankrupt's creditors. But, before any distribution was actually made, the recent act of 5 & 6 Will. 4, c. 29, (a) was passed, the 5th section of which repeals the provision of the former statute as to unclaimed dividends, and new directions are given for the disposal of them; and the commissioner, under these circumstances, thought that he had no jurisdiction to carry the order into effect, for the distribution of the dividends amongst the creditors. This was a petition that the commissioner might be ordered so to distribute them.

Mr. *J. Russell*, in support of the petition, admitted, that where merely a preliminary order had been obtained upon a petition of this description, and no final order was made for the distribution of the dividends, the matter being thus *in fieri*, the court had held they had no power to make such final order. *Re Pocklington*, ante, 491. But, in the present case, the final order was obtained before the law was altered, and therefore the creditors were entitled to have that order carried into execution.

ERSKINE, C. J.—The 5 & 6 Will. 4, c. 29, s. 5, deprived this court of the power to order the dividends to be divided amongst the creditors; but, in the present case, the final order was made before that statute passed, and therefore the last act has no operation. All the court can now do is, to direct the commissioner to carry into effect the former order, by distributing the dividends according to the terms of that order.

The rest of the court concurring,

It was ordered accordingly.

(a) See Appendix, 4 Deac. & C. 665

Ex parte ANDERDON.—In the matter of MANNING.—p. 585.

Where a purchaser of the bankrupt's estate resells it before a conveyance is executed to him by the assignees, the court will, at his instance, order the assignees to convey the estate direct to the second purchaser, if no imputation is thrown on the fairness of the first sale; notwithstanding the estate has been re-sold at a profit.

THE petitioner, in this case, had bought of the assignees a freehold estate of the bankrupt's in the island of St. Croix, for the sum of £5350; and, before any conveyance had been executed to him, he contracted to sell the property to another purchaser for £5600. This was a petition, that the assignees might be directed to execute a conveyance direct to the second purchaser, in order to save the expense of two conveyances.

Mr. *J. Russell*, in support of the petition, submitted that, as the first purchase was *bonâ fide*, and the petitioner had given a reasonable price for the estate to the assignees, and had made but a moderate profit of £250 by the re-sale, there could be no objection to the proposed order.

Mr. *G. Richards*, on behalf of the assignees, was willing to do any thing the court might direct, but objected to any recital in the order, that the assignees had appeared and consented to it.

Sir G. ROSE.—This petition is presented under very peculiar circumstances, and is not in the common form of a petition, praying that the assignees may be directed to convey to the purchaser, who had bought an estate from them; but for an order, that they may execute a con-



veyance to a third party, who is a total stranger to them. This state of circumstances, under which the petition is presented to the court, makes it necessary that the court should leave the matter open, until it is informed of the particulars of the sale. The assignees, it appears, are willing to convey to the petitioner; but when he has sold the estate for a profit to another person, they have a right to call for the protection of the court. We, as yet, know nothing of the sale of the petitioner; it might have been *bonâ fide*; it might have been conducted in such a manner, as would call upon the court to order the biddings to be opened. If the petitioner, therefore, takes any order, it must be, without prejudice to the rights of any creditor, to impugn the sale to the petitioner.

Mr. *J. Russell* objected to those words being inserted in the order, as they would of course be recited in the proposed conveyance, and thus throw a slur upon the title.

Sir *J. Cross*.—It appears to me, as the assignees have offered no objection to the validity of the sale to the petitioner, that he is entitled to the order he now asks. If the assignees had opposed this petition, then, and only then, it would have been incumbent on the court to interfere, on the ground of there having been a profit made by the second sale. But here the assignees appear, and state nothing whatever to impugn the sale.

ERSKINE, C. J.—I really think, that the order would sufficiently protect the assignees, without the introduction of the words objected to.

The order was, that the counsel for the assignees not alleging any thing against the sale to the petitioner, the assignees should convey and assign the estate and premises in the petition mentioned to the petitioner, or to such person or persons as he should direct; and that it should be referred to Mr. Gregg, to settle and approve of the proper instrument of conveyance, if the parties differed about the same.

#### Ex parte ROBINS.—In the matter of PHILLIPS.—p. 587.

Where a creditor, who had proved a bond debt, had subsequently lost the bond, the court made an order that he might receive the dividends on his debts, without producing the bond, upon affidavit of the facts, and indemnifying the assignees.

THIS was the petition of the administrator of a creditor, who had proved the amount of a bond debt under the commission, praying for an order that he might receive the dividends payable on the proof, without producing the bond. The petition was supported by an affidavit, which stated, that diligent search had been made for the bond among the intestate's papers, without effect;—that the bond itself was twenty-six years old;—that no assignment of it had been made by the intestate, or the administrator;—and that the administrator was ready to indemnify the assignees against any other claim upon it.

Mr. *Stinton*, for the petitioner, having read the affidavit stating these facts

The court made the order as prayed.

**Ex parte WATTS.**—In the matter of **SCHELINGSER.**—p. 588.

One of three petitioning creditors may apply for the taxation of the solicitor's bill, without the others joining in the application.

Notwithstanding an action is commenced by the solicitor, before such an application is made, still, if more than a sixth is taken off the bill, the solicitor pays the costs of taxation.

A conditional order to that effect, to save expense, was made in the first instance.

THIS was a petition by the petitioning creditor, for an order to tax a solicitor's bill of costs, containing a charge for suing out a fiat, on which there had been no adjudication, another fiat having been subsequently taken out and duly prosecuted. The bill also contained various charges for other business.

Mr. *O. Anderdon*, in support of the petition, said that there was no doubt of the jurisdiction; and cited *Ex parte Cross*, 2 Mont. & A. 170. (a)

Mr. *T. Parker*, contra. There are two reasons, why the petitioner is not in a situation to present this petition: 1st, that he is only one of three petitioning creditors who employed the solicitor; and, 2dly, the solicitor has already commenced an action against them jointly, to recover the amount of the bill; and the court will not order the taxation while that action is pending.

ERSKINE, C. J.—The solicitor having done business for this petitioner, the petitioner is entitled to apply himself for the taxation of the solicitor's bill. In the action at law, the court at the trial only inquires whether the business has been done; for it is a settled rule, that a bill cannot be taxed at the trial of an action brought to recover the amount of it. But the act of Parliament, 2 Geo. 2, c. 23, expressly provides, that the bill may be taxed after the commencement of the action. If there is any item in the bill for business done in this court, then our officer may tax the costs; though if the greater part is for business done in another court, then it would be proper to apply to that court for the taxation of it. The legislature has said, that if a party applies for the taxation of a bill after an action is brought against him for the amount, all the proceedings shall be in the mean time stayed. The order to tax will, therefore, only have the effect of suspending the action.

Sir J. Cross.—If the amount of the bill, after being taxed, is not paid to the solicitor, then the solicitor has a right to go on with his action.

Sir G. Rose.—The objection, that only one of the petitioning creditors applies for the taxation, would be, perhaps, a valid objection in equity; but it does not hold in bankruptcy, where one partner constantly acts.

ERSKINE, C. J., suggested, that to save the further expense to the parties of coming here again after the costs were taxed, it would be better to provide for the costs of taxation in the present order; in which the other judges concurring,

The court made the following

Order: that the petitioner undertaking to pay the costs incurred in the action brought by the solicitor against the petitioner and his partners, in respect of the bill of costs mentioned in the petition, and further undertaking to give to the solicitor the benefit of any sum to be received out of the bankrupt's estate in respect of his costs as petitioning creditor, so far as the fiat had been worked

by him,—and the petitioner also undertaking to pay to the solicitor what shall appear to be due to him upon the taxation of his bill of costs, as between solicitor and client,—it should be referred to Mr. Gregg to tax the said bill of costs, as between solicitor and client; that the solicitor and all proper parties should be examined before him upon interrogatories, and produce, upon oath, all books, papers, &c., and account for all sums of money, if any, received by him on account of the said bill; and that upon the petitioner paying to the solicitor what should appear to be due to him upon such taxation, the solicitor should deliver up to the petitioner, upon oath, all deeds, papers, and writings, &c.; and if, upon taxation, the bill should be reduced by a less sum than one-sixth part of the amount, then that the petitioner should pay to the solicitor his costs of and occasioned by this application, and of the said reference, and incidental thereto; but that in the event of more than one-sixth being taken off the bill on taxation, the solicitor should then pay to the petitioner such last mentioned costs; and that the petitioner should be at liberty to set off such costs against the amount of costs to be paid by the petitioner to the solicitor; and that all proceedings at law in respect of the bill should be in the mean time stayed.

Mr. *Parker* now (May 9) applied to the court to vary the minutes of this order.

Mr. *Anderdon*, contra, said, that as the order was already drawn up, such an application could only properly be made, on a petition for rehearing; but that he waived the objection.

Mr. *Parker*. The first objection to the order is, that business done under a fiat is not business done “in law or equity,” within the meaning of the 2 Geo. 2, c. 23, s. 23; *Crowder v. Davies*, 3 Y. & J. 433; and therefore the court has no jurisdiction to order this bill to be taxed. In *Taylor v. M<sup>c</sup>Gaugan*, 4 C. & P. 96, (19 E. C. L. R. 293,) it was held, that a solicitor may maintain an action for the amount of his bill up to the choice of assignees, without having had it taxed by the commissioners; for that the 6 Geo. 4, c. 16, s. 14, applied only to cases between the assignees and the estate. The second objection to the order is, that it directs the solicitor to pay to the petitioner the costs of taxation, in the event of more than a sixth part being taken off the amount. But in *Harbin v. Miles*, 9 B. & C. 755, (17 E. C. L. R. 491,) it was determined, that where the order for taxation is not obtained by a party, until after an attorney has commenced an action against him to recover the amount of his bill, the party is not entitled to the costs of taxation, although more than one-sixth is taken off. The same point was also decided in *Benton v. Bullard*, 4 Bing. 561, (15 E. C. L. R. 72.) [ERSKINE, C. J. *Benton v. Bullard* was decided according to the practice of the Court of Common Pleas. In bankruptcy, I understand the practice of the court has been different.] When a solicitor has regularly delivered his bill, and a month has elapsed previous to commencing an action, a party has no right, because there are a few items in it relating to bankruptcy, to apply to this court to stay the action and have the bill taxed; more especially if, as in this case, he might have had it taxed in one of the Common Law Courts, there being more items in it relating to business done in that court, than in bankruptcy.

Mr. *Anderdon*. The practice in Chancery has been so well settled,

to give the costs of the taxation of a bill, if a sixth be taken off,—and this, whether an action has been commenced or not,—that it would be monstrous to interfere with it.

Mr. *Parker* was heard in reply.

ERSKINE, C. J.—Strictly speaking, a motion to vary the minutes of an order only applies, where they differ with the order as pronounced by the court; but, in this case, they are in accordance with such order. That objection, however, having been waived by the counsel for the petitioner, it remains to dispose of the motion, on the merits. The 1 & 2 Will. 4, c. 56, s. 1, gives this court all rights, incidents, and privileges, “as fully to all intents and purposes, as the same are used, exercised, and enjoyed, by any of his majesty’s courts of law or judges at Westminster,” and the 2 Geo. 2, c. 23, gives the courts at Westminster power to tax solicitors’ bills of costs; there can be no doubt, therefore, that this court has jurisdiction to order the taxation of the present bill. Then, with respect to the costs of taxation,—it appears to me, that the language of the act of Parliament does not give any discretion to the court, in the allowance of such costs, where more than a sixth is taken off. The words of the act are, “if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill.” The statute therefore seems to me, to impose on the court the necessity of ordering the attorney or solicitor to pay the costs of taxation, if more than a sixth be taken off. The Court of King’s Bench, however, does not think there is such necessity; but that it has the same discretion, as when less than a sixth is taken off. It is not for this court to interfere with the practice of the Court of King’s Bench, as to the exercise of their discretion, in executing the provisions of this statute. But this court does not proceed altogether on the statute, but on its own practice; and the practice here appears to me to be founded on, and to follow, the statute. The Court of King’s Bench might probably think, that the client had not a right, after putting an attorney to the expense of an action to recover his costs, to have the costs of the taxation, in any event. But the practice in bankruptcy has been to give costs, when more than a sixth is taken off, whether an action has, or has not, been commenced; and I think it is right, that this court should abide by its practice.

Sir J. Cross.—I am of the same opinion. The application now made, to alter the minutes of the order, is to induce the court to make a substantial alteration in the order itself. In *Harbin v. Miles*, 9 B. & C. 755, (17 E. C. L. R. 491,) the Court of King’s Bench gave no reason for its decision. The point to be considered is, whether this is a question of law, or practice. If it is discretionary in the court, either to allow, or disallow, these costs, then it is a question of practice; and the practice of this court has been to allow the costs in dispute. That is a matter, therefore, which must be considered as *res judicata*. But if the words of the statute are in this instance to be considered as peremptory, then it becomes a question of law, and one on which I must respectfully beg leave to differ with the opinion expressed by the Court of King’s Bench. I see no reason, therefore, for any alteration in the minutes.

Sir G. Rose concurred.

Motion refused, with costs.

## Ex parte BELL.—In the matter of EWER.—p. 594.

he court has no power, since the 5 & 6 Will. 4, c. 29, to order distribution of unclaimed dividends among the general creditors, notwithstanding a preliminary order has been obtained for that purpose.

THE common preliminary order had been obtained in this matter, before the recent act of 5 & 6 Will. 4, c. 29, upon a petition to distribute unclaimed dividends.

Mr. *Bethell* now applied for an order, that the unclaimed dividends might be distributed, under the provisions of the 6 Geo. 4, c. 16, s. 110; contending, that the subsequent statute had not deprived the court of the power to make such order. By the 5 & 6 Will. 4, c. 29, s. 6, "all dividends unclaimed *as hereinafter mentioned*," are directed to be "paid into the Bank of England, to the credit of the accountant-general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall be appointed." The only unclaimed dividends *after-mentioned* in the act, are those specified in the seventh section, which directs, "that if any assignee, under any commission of bankruptcy, or fiat in bankruptcy, now issued, or hereafter to be issued, shall have either *in his own hands, or at any bankers', or otherwise subject to his order or disposition*, or shall know that there is or are in the hands, or subject to the order and disposition, of himself and any co-assignee or co-assignees, or any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of £20, &c., such assignee shall, as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends, within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends," either pay the same to the creditor, or cause a certificate thereof to be filed in the bankrupt office. The act, therefore, does not operate on any unclaimed dividends, which are not in the hands of the assignees, or at any bankers', or subject to the order and disposal of the assignees. Now, in the present case, the unclaimed dividends are in the hands of the court, and not of the assignees; and, therefore, not within the provisions of the 5 & 6 Will. 4, c. 29, s. 6; the wording of which section would, moreover, seem to give it a prospective, and not a retrospective effect. At any rate, the costs of the proceedings, under the former order, ought to be paid out of the unclaimed dividends.

ERSKINE, C. J.—The fifth section of the last statute expressly repeals all the power, which the lord chancellor had under the 6 Geo. 4, c. 16, s. 110; and therefore leaves this court no authority to make any order for distribution of the unclaimed dividends, under the provisions of the former act. But, in the present instance, the unclaimed dividends have actually been paid over to the accountant in bankruptcy, so that they are expressly within the provisions of the new statute. All that we can do is, as we have done before, on applications of a like nature, to order the dividends to be paid to those creditors, on whose proofs they are due, if they shall come in and claim them. With respect to the costs, the court cannot order them to be paid out of the fund. It is but just, however, that those creditors, who take the benefit of the former order, should pay the costs *pro rata*, according to the amount of their } roofs!

Order accordingly. (a)

(a) See *Re Pocklington*, ante, 491; *Ex parte Curtis*, ante, 608.

**Ex parte WILLIAMS.**—In the matter of **BAKER.**—p. 596.

The quorum commissioners, in a country fiat, are entitled to be summoned to the meetings, in priority of the other commissioners; and if the solicitor to the fiat wilfully omits to summon them, the court will compel him to indemnify any quorum commissioner, for the fees of the previous meetings, besides visiting the solicitor with costs.

THIS was the petition of one of the quorum commissioners, in a country fiat, complaining of the conduct of the solicitor, in omitting to summon him to attend the meetings. The petitioner stated, that he was the senior of two quorum commissioners in the first list, appointed under the 1 & 2 Will. 4, c. 56, s. 14, for the district including Birmingham, the four other commissioners being attorneys; and that he resided within the borough of Birmingham. That on the 16th of March last, the fiat issued against the bankrupt, directed to the petitioner and another barrister, and four attorneys; but that the petitioner was not summoned or applied to, to attend at the opening of the fiat, nor at any subsequent public sitting. That the petitioner thereupon wrote to Mr. Hodgson, the solicitor to the fiat, complaining that he had not been summoned; and that Hodgson stated in answer, that he had been informed at the office of Lee, one of the attorneys named in the fiat, by one of his clerks, (a person unknown to and unauthorized by the petitioner,) that the petitioner was from home, and that Hodgson therefore concluded, that the petitioner could not attend to open the fiat. That upon receiving this statement, the petitioner assured Hodgson, that he would have attended if he had been summoned, and referred him to the decision of the Court of Review, in *Ex parte Douglas*, 2 Mont. & A. 218, and proposed that he, the petitioner, should receive his fees for the previous meetings, and that Hodgson should engage to summon him in future. This proposal was rejected by Hodgson, who said, he was advised that he ought to abide by the decision on any petition, which the petitioner might think proper to present in the matter. The petitioner alleged, that if Hodgson had sent a note to him before the opening of the fiat, there would have been no difficulty, at a few hours' notice, in fixing a time with the other commissioners for opening it.

The prayer was, that the proceedings had under the fiat might be declared void, and that the petitioner might be regularly summoned to attend the future meetings; that Hodgson might be ordered to pay all the fees, which the petitioner would have received, if he had been regularly summoned, as well as the costs of the petition.

In answer to the statements of the petition, Hodgson made an affidavit, stating, that he was led to believe, that the petitioner was absent from home on business, and unable to attend the meeting for opening the fiat; and that since the petition was presented, he had summoned the petitioner, and promised to summon him for the future.

Mr. J. Russell, in support of the petition.

This question has been already before the court, in *Ex parte Douglas*; where it was decided, that the quorum commissioners named in the fiat are entitled to be summoned; and if not summoned, that the court would interfere to enforce their right; a decision, which is merely in conformity with the provision of the legislature on the subject. For, by the twenty-third section of the 6 Geo. 4, c. 16, it is enacted, "that at every meeting, under any commission to be executed in the country, wherein

any one or more of the commissioners named may be a barrister or barristers, such barrister or barristers, or as many of them as shall be willing to attend, not exceeding three at each meeting, shall be the acting commissioner or commissioners, and shall be entitled to his or their summonses and fees accordingly, in priority to any of the other commissioners in the said commission named." And, indeed, long before this enactment, it was provided by Lord LOUGHBOROUGH's order, (a) that the solicitors, in delivering the names of the commissioners to be inserted in any commission applied for by them at the bankrupt office, should insert in such list the names of two barristers resident at or near the place where such commission was to be executed, and that on no account they should insert the name of any gentleman to be nominated as a quorum commissioner, unless he was a barrister. (b) An improper practice, it seems, prevails at Birmingham, in summoning only one of the barristers named in the fiat, which it is the object of this application to put a stop to; it being the wish of the petitioner, to protect the interests of the creditors of bankrupts in general, as much as to maintain his own rights as a quorum commissioner. The omission to summon both the barristers named in the fiat is the less excusable, as the following directions are printed in the margin of every fiat issued from the bankrupt office:

"N. B. By the terms of the fiat, no meeting can be held, at which at least one barrister (if there be two or more in the list) does not attend. But the solicitor must also observe, that by the act 6 Geo. 4, c. 16, s. 23, it is provided, that where one or more barristers are named as commissioners, they, not exceeding three in number, shall be entitled to attend, in preference to the solicitors. It is the duty of the solicitor, therefore, to summon all the barristers, not exceeding three, to give them the option of attending."

Mr. Swanston, contra.

The petitioner prays, in the first instance, that the proceedings under the fiat may be declared void; but he has omitted to serve the assignees with the petition. This is a conclusive objection to that part of the prayer of the petition. Then, as to the rest of the prayer,—it has been decided by the vice-chancellor, and his decision has been confirmed on appeal by the lord chancellor, that a barrister cannot petition to have his name inserted in a commission; as he is not the party aggrieved, but the creditors of the bankrupt; *Ex parte Ward*, 2 Mont. & A. 219, in note. The complaint here made is, that the petitioner has not been summoned by the solicitor, pursuant to the directions in the margin of the fiat. It appears, that the lord chancellor has, under the 1 & 2 Will. 4, c. 56, s. 14, appointed two lists for Birmingham, each list containing six commissioners, of whom two are barristers, and four solicitors; and that every fiat, executed at Birmingham, is directed to one or the other

(a) 12th August, 1800. See 2 Desc. B. L. 95.

(b) The directions of Lord Loughborough's order seem to be superseded by the new enactment of the 1 & 2 Will. 4, c. 56, s. 14, by which it is provided, that the judges who go the circuits, "may be directed by the lord chancellor, from time to time, to return to him the names of such number as he shall think fit to require, of barristers, solicitors, and attorneys, practising in the counties to the said circuits belonging; and upon such persons being returned and approved by the lord chancellor, the fiat or fiats aforesaid, not directed to the Court of Bankruptcy, shall be directed to some one or more of such persons in rotation, to act as commissioners of bankrupt, according to the districts or places for which such persons shall be so returned, and to no other person than such as shall be included in such return." The solicitor, therefore, who now sues out a fiat to be executed in the country, has no power to name the commissioners to be inserted in it.

of those lists. Now, the rights of the petitioner are founded on the fiat itself, and not on any memorandum printed in the margin of it; for that cannot be considered as an integral part of the fiat. The fiat is directed to the petitioner and a Mr. Bartlett, as quorum commissioners, and four solicitors; and it authorizes any three of the commissioners to execute it, "of whom one of the quorum commissioners is to be one." Mr. Bartlett, the other quorum commissioner, was duly summoned, and has acted all along in the execution of the fiat; and the petitioner has no right to say, that he shall be the quorum commissioner to execute the fiat, when the fiat says, that *either* of the two quorum commissioners may execute it. The statute of 1 & 2 Will. 4, c. 56, s. 14, appears to have established a different line of policy, in this respect, from what is contained in the 6 Geo. 4, c. 16, s. 23. The present petition brings before the court a mere matter of rotation in summoning commissioners; which, under the former bankrupt law, was settled privately in the London lists by the commissioners themselves, and is not a proper subject for arrangement by this court.

Mr. *Russell*, in reply, was stopped by the court.

ERSKINE, C. J.—The arguments that have been just addressed to the court, appear to me to furnish no answer to the present application. By Lord LOUGHBOROUGH's general order, the names of two barristers were to be inserted in every list as quorum commissioners. The 6 Geo. 4, c. 16, s. 23, does not merely enforce this general order, but goes further; for it declares, that all the barristers named in a commission shall be entitled to their summonses and fees accordingly, in priority to any of the other commissioners. The 1 & 2 Will. 4, c. 56, s. 14, made no alteration in this enactment, but merely altered the mode of nominating commissioners, by giving the power of selecting them to the lord chancellor, instead of the solicitor, who was accustomed to name them under the former practice. Then, as soon as this fiat was issued, directed to the commissioners approved of by the lord chancellor, all the directions contained in the 6 Geo. 4, c. 16, s. 23, ought to have been pursued. There can be no doubt, therefore, that the petitioner was entitled to be summoned as well as Mr. Bartlett, the other quorum commissioner. The form of the fiat resembles that of the commissions formerly issued, under which more than one barrister must have been summoned, if more than one was named in the commission; and here, there being two named, both ought to have been summoned. The petitioner is strictly entitled to the payment of his fees for all the previous meetings; and if, as in *Ex parte Douglas*, there had been a wilful determination of the solicitor to exclude the petitioner from attending those meetings, I should be of opinion, that he might reasonably press for an order to that effect. But as the solicitor here says, that the omission was a mistake on his part, and proceeded from an understanding that the petitioner was absent from home, I think Mr. Williams ought to be satisfied with the payment of the costs of this petition, and an engagement of the solicitor that the same thing shall not occur again.

Sir J. CROSS.—My impression is, that frequent invasions of the statute have occurred, in the execution of country fiats. The intention of the legislature was, that the nomination of the barristers as commissioners should be entirely independent of the choice of the solicitor; but if the solicitor is to be permitted to select which of the two barristers he pleases, who are named in the fiat, the intention of the legislature would be



wholly defeated. In this case, it appears that one of the solicitors named in the fiat as a commissioner, as well as the clerk of another commissioner, tell the solicitor to the fiat, that Mr. Williams had gone from home; upon receiving which information, and without any further inquiry, the solicitor to the fiat summons those two commissioners, to the exclusion of Mr. Williams. This ought not to have been done. The conduct of the solicitor cannot be defended. At the same time, he has acted with propriety in assuring the court, by his counsel, that the same omission shall not again occur.

Sir G. ROSE concurred.

Ordered, that the petitioner waiving his claim for the fees of the former meetings, and the solicitor undertaking to summon the petitioner to the future meetings, the solicitor should pay the costs of this application.

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Ex parte MICHAEL MOLINEUX.—In the matter of EBENEZER KEAT.—p. 603.

Upon a petition to remove assignees, on the ground of their having proved fictitious debts, and having fraudulently connived with the bankrupt to get elected to that office, the court will direct an inquiry into the truth of the allegations in the petition, if it has reason to suspect that the bankrupt in any way interfered in the choice, notwithstanding the more serious charges brought against the assignees are denied by them on oath, and only supported by the statement of the petitioner.

THIS was the petition of a creditor, praying for the removal of the assignees, under the following circumstances, as were alleged in the petition.

The fiat issued on the 1st of December, 1835; and part of the bankrupt's property, consisting of farming stock, at Hatfield, was advertised to be sold there on the 11th of December following. The petition alleged, that the bankrupt, being desirous to prevent the sale, concerted with two persons, named Bradshaw and Lamb, for that purpose; that it was agreed between the bankrupt and Bradshaw, that the bankrupt should induce the petitioner, and some other of his largest creditors, to consent to an application being made to the commissioners, to order the sale to be postponed until after the choice of assignees; and in the event of the application being successful, that Bradshaw should be appointed assignee, to further the bankrupt's wishes, and prevent the stock from being sold. That it was concerted between the bankrupt and Bradshaw and Lamb, that the latter should attend and prove debts at the meeting for the choice of assignees,—that the bankrupt should endeavour to prevent proofs being made by the petitioner and his other *bonâ fide* creditors,—and that the official assignee should be told, that many heavy debts, which would then be attempted to be proved, were either not due, or fraudulently contracted. That in pursuance of this scheme, the bankrupt called on the petitioner on the 8th of December, and represented to him that if the sale of his farming stock was not postponed, great loss would accrue, and that there was no necessity for any sale, as he had other property sufficient to pay all his creditors 60s. in the pound; and that by this representation he persuaded the petitioner to consent to an application to the commissioners to postpone the sale; which was, in consequence, ordered to be postponed. That the debt due to the peti-

tioner from the bankrupt was in respect of some building transactions, which were incomplete, and the value of which was not known by actual admeasurement; but that the petitioner estimated the amount at £500. That after the postponement of the sale, the petitioner inquired of the bankrupt who were likely to be chosen assignees; when the bankrupt replied, "Never do you mind about that—they are already cut and dried;" and that upon another occasion the bankrupt told the petitioner, that it was all arranged about the assignees, before the bankrupt left London. That the meeting for the choice of assignees was held on the 15th of December, when the petitioner attended to prove a debt for £491, which was opposed by the bankrupt, on the ground that no debt whatsoever was due to him; in consequence of which opposition the petitioner was unable to prove; but that Bradshaw and Lamb both proved fictitious debts, and were chosen assignees, against the wish of the petitioner. That upon the petitioner afterwards complaining to the bankrupt of his having been prevented from proving his debt, the bankrupt said, that it had been arranged the night before, that Bradshaw was to represent at the meeting that some heavy proofs expected to be tendered would require minute investigation, and must not be suffered to pass, unless the creditors attended with their ledgers; which, the bankrupt said, he was sure they would not do; and that by that means they secured the appointment of the assignees; which would not have been carried, if the petitioner had been admitted to prove, even to the extent of half the amount of the sum he claimed. The petitioner then went into a long statement of his reasons for believing, that Bradshaw and Lamb were indebted to the bankrupt, instead of being his creditors; but his assertions were entirely founded on the bankrupt's statements, and not on any admission of Bradshaw or Lamb. The petitioner finally alleged, that the bankrupt's farming stock had been lately sold, and that Bradshaw had become the purchaser of part of the effects at a sum considerably less than the real value; and that Bradshaw and Lamb were acting in collusion with the bankrupt to defraud his creditors; that the petitioner, at the second public meeting, proved a debt amounting to £460, after every opposition that could be made by them; and that Bradshaw was, in July, 1832, indicted and tried at the Old Bailey for receiving stolen goods.

The prayer was, that Bradshaw and Lamb might be removed from being assignees, and that some other persons might be appointed in their stead, and that the commissioners might be directed to call a meeting for that purpose; that Bradshaw and Lamb might account before the commissioners for the bankrupt's estate and effects received by them, and be ordered to deliver up to the new assignees, all books and papers relating thereto; and that they might be restrained from receiving any of the bankrupt's effects, and from all further interference with the estate, and be ordered to pay the costs of this application.

Mr. *Swunston*, and Mr. *Keene*, in support of the petition. It appears, that only two debts were proved at the meeting for the choice of assignees,—one for 20*l.* 10*s.*, and the other for £3; so that the assignees were in fact elected by only one creditor, whose debt amounted to 20*l.* 10*s.*; while the petitioner's debt, which was improperly rejected at that meeting, and which was proved at the following one, amounts to £460. It is alleged also by the petitioner, that Bradshaw, one of the assignees, purchased some of the bankrupt's goods, by the agency of the bank-

rupt, at a price considerably under their value. This is certainly denied by Bradshaw, who says, that the bankrupt purchased them on his own account; but we wish to see some letters that passed between the bankrupt and Bradshaw, which there is no doubt will prove the agency. The bankrupt has not ventured to deny what the petitioner alleges he said to him, when the petitioner inquired of him who were to be the assignees, namely, "Don't you mind—they are already cut and dried—they were fixed before I left London." Nor have the assignees denied the allegations in the petition, that they acted in concert with the bankrupt.

Mr. *Girdlestone*, and Mr. *J. Russell*, for the assignees, contended that there was no foundation for the charges against them in the petition; that the petitioner was actuated by malice; and that there was no proof of any allegation beyond his own assertion.

ERSKINE, C. J.—If this had been an application, in which the petitioner sought any thing personal for himself, I should certainly have been very indisposed to listen to it; for, although he was present at the meeting for the choice of assignees, he made no objection to the persons who were chosen, nor applied to the commissioners to adjourn the choice, until he could prove his debt. But the application now before the court is not for any personal relief to Molineux, but one that appears, on the face of it, to be for the benefit of the bankrupt's estate; and is, therefore, one, which, I think, the court is bound to regard, in the superintendence which it is its duty to exercise over the administration of the bankrupt's property: for I have always understood, that where the assignees are chosen by the interference of the bankrupt, the lord chancellor has uniformly said, and this court has acted in accordance with his decision, that such a choice of assignees shall not be permitted to stand. Now, it is charged in this petition, that the night before the meeting for the choice of assignees, it was arranged between the bankrupt and Bradshaw and Lamb, that those two gentlemen should be elected assignees; and that, in order to carry the election, they should object to the proofs of all the creditors who did not produce their ledgers, which, as it was not likely they would be prepared to do, their proofs would be by this means rejected, and they would thus be prevented from voting in the choice of assignees. Now, although the assignees have denied that they were parties to this conspiracy against the rights of the other creditors, they have not denied that they were parties to any previous arrangement with the bankrupt, that they should be chosen assignees. I should be sorry, I must confess, to make any order in this matter like that which is prayed in the petition. But still, where there is a positive allegation on one side, which is not contradicted on the other, the court, I think, ought to direct some inquiry into the matter, in order to arrive at the truth. The result of the investigation will enable us to make a more satisfactory order as to the payment of the costs of this petition, as well as to decide, whether we shall direct a further inquiry before the commissioners as to expunging the proofs made by the assignees, which are alleged by the petitioner to be fictitious. I confess that I, for one, should not be satisfied in the matter, without further inquiry.

Sir J. Cross.—It appears to me, that there is no ground for the prayer of this petition. With one single exception, the allegations in the petition are false and scandalous in every part. The charge of the assignees having proved fictitious debts, is mere matter of assertion by the peti-

tioner, unsupported by any evidence whatever; nor is there any proof, beyond the petitioner's own statement, that the assignees conspired with the bankrupt to get the proofs of the other creditors rejected, in order to carry the choice for themselves. We have no point in the case judicially before us; nor can I find that the petitioner has any *locus standi* whatever in this court. Then it comes to the pure question, whether, for our own satisfaction, we shall institute any inquiry into the matters alleged in this petition. I have no wish to resist the desire of the court in this respect; but it must be remembered, that the inquiry will be attended with delay and expense to the assignees; and it may become a question hereafter, whether they will not have a right to charge the costs of any inquiry which may be directed by the court, upon the estate. They may, indeed, have a remedy against the petitioner, if they can get them from him; but I apprehend the estate will be liable to the assignees in case of his default. The material question is, however, whether we should make any order on such a petition. All that we have specifically before us is, that there was an irregularity previous to the election of assignees, and that the assignees have not denied that irregularity.

Sir G. ROSE.—I perfectly agree with my learned colleague who has just addressed the court, as to the improper statements contained in this petition, which leaves little room to doubt, that the petition itself is founded on malice. But, as no application has been made by the assignees to take the petition, or the affidavit in support of it, off the file, I think we should not be justified in refusing the order now proposed for inquiry; for any objection which may be urged to the improper language used in the petition, does not go to the subject-matter of the inquiry. When the ground of complaint is, that the assignees have been improperly elected by the contrivance of the bankrupt, and this charge is not completely rebutted, I, for my own part, cannot withhold my consent to an inquiry, acting upon the general rule of protection, which the court is bound to give to bankrupts' estates. With respect to the costs of the inquiry, they ought certainly not to fall on the estate, but must be left to depend on the mere personal responsibility of the respective parties. If the assignees are not satisfied with the petitioner's responsibility, it is open to them to petition that he may be compelled to give security for costs. It remains, therefore, shortly to explain the principle on which I think this inquiry ought to be directed. There is certainly not sufficient stated or proved, on this petition, to induce the court to expunge the proofs of debts made by the assignees; nor does that, indeed, form any part of the prayer of the petition. But the validity of their debts becomes a ground of inquiry, from the proof of them being connected with the appointment of assignees under the fiat. The rule that guides the court on these occasions, proceeds upon the most salutary principle of administering assets in bankruptcy, namely, that the bankrupt should not interfere in any way with the appointment of assignees. The assignees here merely say, that there was *no fraudulent* arrangement between them and the bankrupt, previous to the choice; but they do not deny, that there was *any arrangement*, or any previous interference of the bankrupt. It does really appear to me, therefore, under all the circumstances, that the inquiry must go, as to the existence of any debts owing to Bradshaw and Lamb, and whether the bankrupt procured them to be appointed assignees, and also whether Bradshaw bought any part of the bankrupt's effects.

The order was, that it should be referred to Mr. Gregg to inquire and state whether, at the date and suing forth of the fiat, there was any and what debt due from the bankrupt either to Bradshaw or Lamb; and whether the bankrupt interfered, and in what manner, to procure the choice of these persons as assignees; and whether any and what part of the bankrupt's estate was purchased, directly or indirectly, by Bradshaw,—with the usual powers to examine all proper parties on oath, and to call for the production of books and papers, and with liberty to state special circumstances, at the request of either party; reserving further directions and costs, until Mr. Gregg should have made his report; and with liberty for either party to apply to the court.

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Ex parte JOEL EDWARDS.—In the matter of FRANCIS MOORE.  
—p. 611.

The bankrupt deposited the leases of two houses with the petitioner, for securing £600, accompanied with an agreement in writing; and on the same day he signed another agreement, engaging to pay £85 per annum, being the improved rental of the premises, "the leases of which are deposited" with the petitioner, viz., £45, being the improved rental of a house in the occupation of J. H.; £20, being the improved rental of the adjoining premises, let to J. H., as tenant at will; and £20, being the improved rental of premises in the occupation of A. B.; "the said £85 to be collected by me, and paid over" to the petitioner. The lease of the premises let to J. H., as tenant at will, had not been, in fact, deposited with the petitioner; but only the lease of the other premises in the occupation of J. H., and the lease to A. B.  
*Held*, nevertheless, that the petitioner had a lien, as equitable mortgagee, upon the premises comprised in all the three leases.

THIS was the petition of an equitable mortgagee, for the usual order for the sale of the property, and for leave to bid at the sale. The bankrupt, having borrowed £600 of the petitioner, deposited with him certain leases as a security, accompanied with an agreement in writing, dated the 28th of July, 1834; by which,—after reciting that the bankrupt had deposited with the petitioner a lease to the bankrupt of certain premises in St. Martin's Court, together with an under-lease from the bankrupt of the same premises, at an improved rent of £45, to John Howard, and also another lease to the bankrupt of certain premises in King Street, Covent Garden, together with an under-lease from him of the same property to Mr. Isaac Hill, at an improved rent of £20,—the bankrupt agreed to execute a legal mortgage of the premises respectively comprised in these leases, whenever requested by the petitioner, for further securing the sum of £600. On the same day, the bankrupt also delivered to the petitioner the following memorandum, which was distinct from the agreement containing the terms of the deposit:

"I hereby engage to pay to Mr. Joel Edwards, of Hanover Street, Hanover Square, the sum of £85 per annum,—being the improved rental of the premises in St. Martin's Court and New Street, *the leases of which premises are deposited* with Mr. Joel Edwards to secure the payment of £600, for which sum I have also given him my acceptance for the same amount,—viz., £45 per annum, being the improved rental of the house No. 36, St. Martin's Court, and now in the occupation of John Howard; £20 per annum, *being the improved rental of the adjoining premises, and now let to the said John Howard, tenant at*

*will*; also £20 per annum, being the improved rental of the premises in New Street, and now in the occupation of William Isaac Hill; the said £85 to be collected by me, and paid over to the said Joel Edwards in quarterly payments, which is to pay the interest and the principal of the £600 secured by the said bill of exchange; the first quarterly payment to be made on the 28th day of October next. Dated this 28th day of July, 1834.

FRANCIS MOORE."

The premises, stated in the last memorandum to be adjoining to the house No. 36, St. Martin's Court, and to be let to John Howard, tenant at will, at an improved rental of £20 per annum, were not, in fact, comprised in either of the leases recited in the first agreement, but were held by the bankrupt under another lease. And the petitioner alleged, that it was intended by the last memorandum to charge or make liable such last-mentioned premises, and the improved rent thereof, with the payment of the said sum of £600; that the deed relating to these premises was in the possession of the bankrupt, at the time of the issuing of the fiat, viz., on the 4th of March, 1836, and that the same has since been delivered up to the assignees; and that there was still due to the petitioner a balance of 582*l.* 10*s.*, with an arrear of interest from the 23d of May, 1835.

Mr. *Bichner*, in support of the petition.

The whole question in this case depends on the construction of the second agreement, namely, whether the lease of the premises underlet by the bankrupt to John Howard, as tenant at will, is not to be considered as subject to the terms of the first agreement. In order to establish an equitable mortgage in a Court of Equity, it is quite sufficient to show a charge on the rents and profits of the property in question; *Ex parte Willis*, 1 Ves. jun. 162. And in *Legard v. Hodges*, 1 Ves. jun. 477, it was held, that a covenant to set apart and pay annual profits of land was, in equity, a charge upon the land itself. It was plainly the intention of the parties in the present case, that the premises let to Howard, as tenant at will, should be charged with the lien for the £600, as well as those comprised in the under-lease to him mentioned in the first agreement; and it was decided in *Ex parte Leathes*, 3 Deac. & C. 112, that where freehold title-deeds were intended to be deposited with an equitable mortgagee, together with other deeds relating to leasehold property, and were accordingly specified in the memorandum of deposit, the freehold property ought to be included in the order for sale. In *Ex parte Greenhill*, 3 Deac. & C. 334, also, where a bankrupt, being indebted to the petitioners as the acceptors of two bills of exchange, entered into an agreement with them and W. L., that the bills should be paid out of the proceeds of certain property, the deeds of which were in the hands of W. L. for sale,—it was held, that the petitioners might claim as equitable mortgagees, though subject to the prior lien of W. L. These cases show, that there need not be an actual deposit of the deed, to enable a party to claim as an equitable mortgagee. (a)

\* Mr. *Swanston*, contra.

In this case, the petitioner founds his claim, as equitable mortgagee, on two documents of the same date. The assignees do not dispute his claim under the first; but, on the face of the second document, it is contended, that there is no ground for the claim of any lien, as equitable mortgagee, on

(a) And see *Powell on Mortgages*, (Coventry's edition,) 1049.

the adjoining premises let to John Howard, as tenant at will. There was no deposit whatever of any deed relating to this property, but merely an engagement to pay the improved rent to the petitioner. If it was the intention of the parties, that the same lien should be given by the second agreement, as by the first, why were not the same means adopted, by depositing the lease? There is no doubt, that an agreement to mortgage amounts to an equitable mortgage; but here there is no agreement to mortgage, but merely to pay to the petitioner the profit rent of a certain house. The question is, therefore, whether the agreement of the bankrupt in the second document, to pay £85 per annum to the petitioner, extended the security given by the first agreement. It cannot be supposed, that these persons, in the same day, intended to vary that agreement; and it is a principle, which has been often recognised by Lord ELDON, that it is not expedient to extend the doctrine of equitable mortgage. [Sir J. CROSS. The statement in the second agreement, that the leases of all the premises, which were the subject of the improved rental of £85, were already deposited with the petitioner, when in fact only two leases had been deposited, would seem to imply that the intention was to deposit the three.] That is merely an erroneous allegation, and not the case relied on by the petitioner. The memorandum merely amounts to an engagement to pay a certain sum per annum, with a specification of rentals amounting to that sum. The question is, whether that is more than a personal obligation. The engagement is, simply, to collect and pay over rents. Will that give a party an interest in the land? There is no case to be found, that carries so far the doctrine of equitable mortgage. The right of an equitable mortgagee is, to have a legal mortgage executed to him of the property, on which the lien was given,—or, what is equivalent to a legal mortgage, namely, a sale of the property in question. All the agreements of this kind enforced in a Court of Equity are, only, when they amount to an engagement, express or implied, to transfer the ownership of the property as a security for the debt. But there is no such an engagement in the present case, but merely an engagement to *collect and pay*. If the creditor is entitled to *receive*, the debtor is still entitled to *collect*. But here the creditor wants to deprive the debtor of that right. The collecting of the rent is as integral a part of the agreement, as any other stipulation contained in it. If the court, therefore, grant the prayer of this petition, they must expunge from the agreement the stipulation, that “the said £85 is to be *collected* by the bankrupt.” [ERSKINE, C. J. Does not that passage in the agreement, followed by the words “and to be paid over to the said Joel Edwards,” amount to a covenant to pay the rents to the petitioner, and become, in effect, a charge upon the estate?] It is submitted to be nothing more than a mere personal engagement. In the word “collection,” it seems to be implied, that the owner was to retain the management of the estate. If the petitioner could not come to this court for an order on the bankrupt to collect the rents, and then to pay them over to him, *a fortiori*, he cannot ask for the present order. The reason which the lord chancellor gave for his decision in *Legard v. Hodges*, ante, 623, justifies the argument now urged against the prayer of this petition. *Ex parte Leathes*, ante, 623, does not apply to this case; for, there, the deeds were specified in the agreement. [ERSKINE, C. J.—That case proceeded on the *intention* of the bankrupt to give the party an interest in the estate. Here you must show, that it was *not the intention* of the

bankrupt to charge this property with the lien.] It is no part of the petitioner's case, that it was the *intention* of the bankrupt to deposit this lease; but only an intention to charge the estate with the lien, which is disproved by the very fact of withholding the lease. All that is contained in this agreement is, an engagement to pay a certain annual sum, an indication of the funds out of which it was to be provided, and an arrangement as to the party by whom those funds were to be collected.

ERSKINE, C. J.—This appears to me to be one of the simplest propositions, that could possibly be presented for our consideration. The bankrupt, by the second agreement, engages to pay to the petitioner the amount of the improved rental of three houses specified in three different leases, which the agreement states to have been previously deposited with the petitioner; but the bankrupt stipulates, that the rents are to be collected by himself, and then paid over to the petitioner. The question is, therefore, whether it was the intention of the bankrupt to give the petitioner an interest in the premises specified in the agreement,—or whether his intention was merely to enter into a personal engagement to pay a certain annual sum. Now, if the latter was his intention, there was no necessity for making any stipulation about the *collection* of the rents; but the mere engagement to pay the money would have been sufficient. It is quite clear, I think, that the lien was meant to extend to all the premises mentioned in the second agreement.

Sir J. CROSS.—The question in this case is merely one of intention. The facts, on the first view, seem to be involved in a little confusion; but they require only a slight attention to understand them. The two agreements between these parties were both entered into on the same day; the agreements, therefore, being cotemporaneous, must be taken to form but one agreement. Now, by the second agreement, the bankrupt engages to pay the interest and principal of the sum of £600, which he had borrowed of the petitioner, by apportioning to such payment the improved rents of three sets of premises, the leases of which, the agreement expressly states, had been previously deposited with the petitioner. The understanding of both the parties seems to me to have been, that all the three leases should be deposited with the petitioner; and the not depositing the third, I think, was a mere inadvertence. No one, on reading the two agreements, can entertain a doubt but that it was the intention of the bankrupt to deposit the leases of all three houses.

Sir G. ROSE concurred.

Ordered as prayed.

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Ex parte ROLLS and others.—In the matter FOSSICK.—p. 618.

Where one of several assignees is removed, for whatever cause, the court will give the creditors an option of choosing another in his room.

THIS was a petition of three assignees, to vacate the assignment as to J. R. Warner, the fourth assignee, on the ground that he had become a lunatic, and could not therefore join with the petitioners in the execution of a conveyance of some property to a purchaser, which they had contracted to sell.

Mr. Rawlins, in support of the petition, cited *Ex parte Kersley*, Buck. 477, where one of three assignees, not having assented to the



assignment, and refusing to act, the assignment was ordered to be vacated, without directing a new choice of assignees.

Sir G. ROSE.—We cannot remove an assignee, without giving the creditors the right to choose another in his room. This is quite clear from *Ex parte Shaw*, 1 G. & J. 155, where one of three assignees being rejected, and the choice set aside as to him, Lord ELDON ordered a new choice altogether, to give the creditors an opportunity of choosing three assignees again, if they thought proper. (a) And there is no more authority in this court to remove an assignee, than what the lord chancellor formerly possessed.

Sir J. CROSS.—There may be, perhaps, some difference in the jurisdiction of the court, upon a question of this kind, since the passing of the recent statute; for I observe, there is a distinction between the wording of the 66th section of the 6 Geo. 4, c. 16, as to the removal of assignees, and that of the 36th section of the 1 & 2 Will. 4, c. 56; the former statute authorizing the lord chancellor *to order the assignment to be vacated*,—while the latter statute declares, “that the Court of Review shall have *power to remove any assignee* of any estate.”

ERSKINE, C. J.—It appears to me, that there is no essential difference in the operation of these two enactments, however different may be their language. By the former law, an assignee derived his title under a deed of assignment; and, therefore, the words used in the 6 Geo. 4, c. 16, were, that the lord chancellor might order the assignment to be vacated. There is, now, no necessity for an assignment; as, by the 25th and 26th sections of the act of Will. 4, all the estate of the bankrupt, both real and personal, is declared to become absolutely vested and transferred to the assignees, by virtue of their appointment, without any deed of assignment or conveyance for that purpose. In the present case, the three assignees, who are not removed, will have authority to execute the proposed conveyance to the purchaser. But it is right, that the creditors should have an option of choosing another to act with them, in the place of the one removed. If they are satisfied with the three, they need not choose another.

The order was, that J. R. Warner should be discharged from being an assignee of the estate of the bankrupt, and that the assignment, and bargain and sale, and enrolment thereof, should be severally vacated, without prejudice to any act done under the same respectively; that the commissioner of the Court of Bankruptcy, to whom the commission stood transferred, should cause a meeting to be holden, of which due notice was to be given, and that the creditors then present, who were entitled to vote in the choice of assignees, should proceed (if they should think fit so to do) to the choice of a proper person or persons, in the place and stead of the said J. R. Warner; that the commissioner should make and execute a new appointment of the other three assignees, as the continuing assignees of the bankrupt's estate,

(a) *S-d quære*, as to the propriety in that case of setting aside the choice of the *other two* assignees. The reason Lord Eldon assigns (1 G. & J. 155) for this decision is, that “if the creditors vote for three persons, to manage the affairs of the bankrupt, they thereby express their opinion that the affairs of the bankrupt should be committed to the three; and I cannot collect that they should be committed to two of three, if one of them be rejected.” But is it not quite consistent with this reasoning, to give the creditors an option of choosing, or declining to choose, a third assignee in the place of the one rejected, without vacating the choice as to the *other two*, to whom there is no possible objection?

together with such other person or persons (if any) as should be chosen in the stead of J. R. Warner; that the costs of vacating the assignment, and bargain and sale, and enrolment, and the costs of the meeting for the new choice, and the costs of and occasioned by this application, should be paid out of the bankrupt's estate; the last mentioned costs to be taxed by Mr. Gregg, and the costs, previously mentioned, to be taxed by the commissioner.

*In the Court of the Privy Council, 2 December, 1836.*

CORAM LORD BROUGHAM, SIR L. SHADWELL, SIR JAMES PARKE, SIR J. B. BOSANQUET, SIR E. H. EAST, AND SIR ALEX. JOHNSTON.

**JAMES YOUNG and Others, Appellants, and The BANK OF BENGAL, Respondents.—p. 622.**

Palmer & Co., having borrowed a large sum of the Bank of Bengal, deposited company's paper with the bank to a great amount, as a collateral security, accompanied with an agreement in writing, authorizing the bank, in default of repayment of the loan by a given day, "to sell the company's paper, for the reimbursement of the bank, rendering to Palmer & Co. any surplus." Before default was made in the repayment of the loan, Palmer & Co. were declared insolvents, under the Indian insolvent act, 9 Geo. 4, c. 73; by the 36th section of which it was declared, that when there had been mutual credit given by the insolvents, and any other person, one debt or demand might be set off against the other, and that all such debts, as might be proved under a commission of bankruptcy in England, might be proved in the same manner under the Indian insolvent act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them before the transaction of the loan and the agreement as to the deposit of the company's paper. The time for repayment of the loan having expired, the bank sold the company's paper; the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus.—In an action by the assignees of Palmer & Co. against the bank, to recover the amount of this surplus, *Held*, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the bankrupt act.

THIS was an appeal from a judgment of the Supreme Court of Judicature of Bengal, in a cause in which the appellants were the plaintiffs, and the respondents the defendants. The appellants were the assignees of the estate and effects of John Palmer, George Alexander Prinsep, and Charles Barber Palmer, lately trading at Calcutta, in the province of Bengal, under the firm of Palmer & Co., who were declared insolvents under the statute 9 Geo. 4, c. 73, intituled, "An Act for the relief of Insolvent Debtors in the East Indies, until the 1st of March, 1833;" and the action in the court below was brought by the appellants, for the purpose of recovering the sum of sicca rupees 30,176 10a. 1p. and interest. The plaint was a special declaration in assumpsit, containing special counts on the several agreements after mentioned, with counts for money lent and advanced, money had and received, for interest, and on an account stated. The defendants pleaded the general issue, *non assumpsit*, and gave notice of set-off. The cause came on to be tried in the Supreme Court at Calcutta, on the 21st of July, 1822, upon certain written admissions entered into on both sides, when a verdict was taken for the plaintiffs by consent, for the damages laid in the declaration, subject to the opinion of the Supreme Court on the following

CASE.

"The insolvents above named were, in the month of November, 1829, the members and partners of the firm of Palmer & Co., of Calcutta,

merchants and agents, and in the habit of taking up, for the purposes of their said firm, loans from the defendants, in their corporate capacity, as well on deposit of the promissory notes of the government of Bengal, commonly called company's paper, as upon discount of their own and other negotiable securities.

Previously to the adjudication of insolvency, and on the 12th November, 1829, the said firm of Messrs. Palmer & Co., in the course of business, borrowed from the defendants the sum of sicca rupees 103,900, as a security for which they deposited and delivered to the defendants several government promissory notes, for different sums, amounting in all to sicca rupees 113,000, and on the same date made and delivered to the defendants an agreement in writing, in the words and figures following :—

“Bank of Bengal, the 12th November, 1829. Three months after date we, Palmer & Co., promise to pay J. A. Dorin, Esq., treasurer of the Bank of Bengal, on account of the said bank, the sum of sicca rupees (103,900) one hundred and three thousand nine hundred, with interest thereon, at the rate of (5) five per cent. per annum; for which said principal sum, and interest, at the rate aforesaid, we have deposited in the said bank, as collateral security, company's paper to the amount of sicca rupees (113,000) one hundred and thirteen thousand; and in default of payment at the period above-mentioned, we authorize the treasurer of the said bank for the time being, absolutely to sell or dispose of the said company's paper, for the reimbursement to the said bank, on or after the expiration of the same period, by public or private sale, the said treasurer *rendering to us any surplus* which may be forthcoming from such sale, and we being bound to make good to him whatever deficiency there may be below the amount of the said principal sum and interest, and the sale price of the said company's paper to be made on the price, to be calculated at the premium or discount of the company's paper, on the day on which the said company's paper shall be sold; but if the said treasurer shall not proceed to sell or dispose of the said company's paper at such period, we, the said Palmer & Co., shall and will pay and allow unto the said Bank of Bengal interest, at and after the rate of 12 per cent. on the said sum, up to the day on which the said sum shall be paid off and liquidated, or up to the day on which the said treasurer of said Bank of Bengal shall, in pursuance of the power herein before contained, sell and dispose of the said paper so deposited as aforesaid, as the case may happen.

“PALMER & Co.”

In the same month of November, the said firm in like manner took up from the defendants five other loans on the like terms, that is to say, on the 17th day of November, a loan of sicca rupees 47,800, on deposit and delivery of like government promissory notes, to amount of sicca rupees 53,800; and, on the same 17th day of November, a further loan of sicca rupees 175,000, on deposit and delivery of like government notes, to the amount of sicca rupees 190,400; on the 18th of November, a loan of sicca rupees 29,400, on deposit and delivery of like government notes to the amount of sicca rupees 32,000; on the 20th of November, a loan of sicca rupees 20,300, on deposit and delivery of like government notes to the amount of sicca rupees 22,100; and on the 25th day of November a loan of sicca rupees 41,000, on deposit and

delivery of like government notes, to the amount of sicca rupees 44,600 ; on all which several occasions they signed and delivered written agreements, similar in form and purport to that of the 12th day of November, 1829, above set forth."

On the 4th day of January, 1830, and while the said several deposits were still in the hands of the said defendants, and the said six several agreements outstanding and unsatisfied, the said J. Palmer, G. A. Prinsep, W. Prinsep, and C. B. Palmer, the partners in the said firm of Palmer & Co., filed their joint petition of insolvency, in the Court for the Relief of Insolvent Debtors at Calcutta, pursuant to the provisions of the act of Parliament passed in the 9th year of the reign of his late majesty, King George the Fourth, intituled, "An act to provide for the relief of insolvent debtors in the East Indies, until the first day of March, 1833," and were thereupon on the same day duly adjudged and declared insolvent; and the whole estate and effects of the said partnership firm were duly assigned to the common assignees, and were, at the time of the commencement of this action, duly vested in the plaintiffs above named, as assignees of the said insolvent firm.

At the time of the said adjudication of insolvency, the defendants were also holders and endorsees of two several promissory notes, made by the said firm of Palmer & Co.,—that is to say, one promissory note of the said firm, bearing date the 21st of October, 1829, whereby the said firm of Palmer & Co., three months after date, promised to pay to Baboo Ruggoram Ghossain, or order, the sum of sicca rupees 40,000, for value received,—and one other promissory note, bearing date the 4th day of November, 1829, whereby the said firm of Palmer & Co., three months after date, promised to pay to the said Baboo Ruggoram Ghossain, or order, the sum of sicca rupees 60,000, for value received; which last-mentioned promissory notes, duly endorsed by the said payee respectively, had been discounted respectively by the said firm of Palmer & Co., in the ordinary course of business before the said insolvency, and on the dates thereof respectively, and the amount thereof respectively, after deducting discount, paid by the said defendants to the said firm; and both which last-mentioned promissory notes, at the time of action brought, were, and are still, wholly unpaid, in the hands of the defendants, as endorsees and holders thereof respectively.

After the said adjudication of insolvency, the time, expressed in the said agreement of the 12th day of November, 1829, for payment of the said loan of that date, having expired, and no payment or tender of payment having been made thereof, the said defendants, on the 15th day of February, 1830, sold and disposed of the said several government promissory notes, or company's paper, to the amount of sicca rupees 113,000, so deposited and delivered by way of security, as before mentioned, at the price or bazar rate of the day; and after retaining and satisfying themselves in full, out of the proceeds of the sale, the principal and interest of the said loan in the said agreement in writing, of the 12th day of November, mentioned, with interest, and of the stamp-duty thereon advanced by the said defendants, there remained a surplus arising from the said sale of sicca rupees 6,778 1s. 4p. in the hands of the said defendants.

Like default having afterwards been made in the payment, or tender of payment, of the said five other loans made on deposit and delivery of company's paper as aforesaid, on the days expressed for payment

thereof respectively in the said five other like agreements in writing, the said defendants sold and disposed of the whole of the company's paper deposited and delivered as a security for the said five loans respectively; and upon such last-mentioned sale there accrued a further surplus, after payment of the said loans and interest and stamp-duty thereon respectively, amounting in the whole to sicca rupees 23,398 8a. 9p., making, with the said surplus on the said prior sale, the total sum of sicca rupees 30,176 10a. 1p.; which is the amount sought to be recovered by the plaintiffs in this action, together with interest at the rate of 6 per cent. from the respective dates of sale, if the court shall allow the same.

At the time of the said sales respectively, the said two several promissory notes, so endorsed and discounted as aforesaid, had respectively fallen due, and were in the hands of the defendants, wholly unpaid. The defendants claim to set off the amount due on the said two discounted promissory notes respectively, against the said demand of the plaintiffs, assignees as aforesaid. If this honourable court should be of opinion that the defendants are entitled to such set-off, the said verdict is to be set aside, and a verdict entered for the defendants. If, on the contrary, the court should be of opinion that they are not so entitled, the verdict to stand for the plaintiffs, for sicca rupees 30,176 10a. 1p., together with interest at the rate and from the dates above mentioned, if allowed."

On the 25th of March, 1833, the special case came on to be argued in the Supreme Court of Calcutta, before the Honourable Sir JOHN FRANKS, acting chief justice, and the Honourable Sir EDWARD RYAN, another justice of that court; and after being adjourned to the following day, the court then gave judgment for the defendants in the action, and ordered the verdict for the plaintiffs to be set aside.

The plaintiffs, having entered into the usual recognisances in the Supreme Court, obtained leave to appeal; and thereupon presented their petition of appeal to his majesty in council, praying that the judgment might be reversed, and that the verdict entered for the plaintiffs might be ordered to stand for the sum of sicca rupees 30,176 10a. 1p. and interest, after the rate and from the dates mentioned in the special case, for the following

#### REASONS :

1st. Because, by the assignment made by the insolvents, in pursuance of the act of the 9 Geo. 4, c. 73, the whole interest, which the insolvents then had in the company's paper and government securities deposited with the respondents, and the right to redeem the same, became vested in the assignees, in trust for all the creditors of the insolvents, and the interest and right so vested in them could not be defeated by any subsequent default of the insolvents, so as to give the respondents a right of set-off which they did not possess at the date of the assignment.

2d. Because the company's paper and government securities in question were deposited with the respondents, under express contracts that the same should be returned upon payment of the respective sums, to secure which they were respectively deposited; and the assignees, therefore, by tendering the amount of such respective sums before default had been made, might have recovered the said company's paper and government securities in specie, by an action of trover, to which no set-off or other defence could have been made; and although default was afterwards made in payment of the loans, and the securities were sold before

any tender made, yet the surplus moneys arising from such respective sales, were moneys had and received for the use of Palmer & Co.

3d. Because no claim of lien upon such surplus moneys can be set up by the respondents, in opposition to their express contract, to render such surplus moneys to Palmer & Co.; especially having regard to the fact, that the five several agreements, made subsequently to the first agreement of the 12th of November, 1829, do not stipulate, either that any surplus upon the former deposits should be a security against any deficiency in the produce of the subsequent deposits, or that any surplus upon the subsequent deposits should be a security against any deficiency in the produce of the former deposits.

The respondents, on the contrary, prayed that the judgments might be affirmed, for the following

#### REASONS:

1st. Because the act of the 9 Geo. 4, c. 73, for the relief of insolvent debtors in the East Indies, provides, by section 36, that when there has been mutual credit given by the insolvents and any other person or persons, one debt or demand may be set off against the other; and all such debts, dues, and claims, as may be proved under a commission of bankruptcy according to the provisions of the English bankrupt act, may be proved under the Indian insolvent act, in the same manner, and subject to the like deductions, conditions, and provisions, as prescribed in the English bankrupt act.

2d. Because the contracts stated in the declaration, by which the bank of Bengal agreed to pay to the insolvents the surplus remaining after the sale of the government paper, beyond the amount of the loans which it was given to secure, were a credit given by the insolvents to the bank, to the amount of such surplus; and the promissory notes held by the bank were a credit, to the amount of such notes, given by the bank to the insolvents; thus constituting a mutual credit, and therefore a subject of set-off between the bank and the insolvents.

Sir *W. Follett*, and Mr. *Deacon*, (Mr. *Cockerell* was with them,) for the appellants, cited *Anon.*, 1 Mod. 215; *Chapman v. Derby*, 2 Vern. 117; *Hewison v. Guthrie*, 2 Bing. N. C. 755, (29 E. C. L. R. 477; ) *Ex parte Deeze*, 1 Atk. 228; *Ex parte Ockenden*, 1 Atk. 235; *Green v. Farmer*, (a) *Ex parte Prescott*, 1 Atk. 230; *Collins v. Jones*, 10 B. & C. 777, (21 E. C.

(a) In *Green v. Farmer*, 4 Burr. 2214, Lord Mansfield says, the hearing was in August, 1754, and that on the 20th of December, 1754, no precedents being found, Lord Hardwicke determined accordingly. Lord Mansfield also said, that *Ex parte Deeze* was well reported. But the accuracy of the report of that case does not appear to be very consistent with what Lord Hardwicke says about it in *Ex parte Ockenden*, namely, that there was evidence of an usage of a general lien, in the dealings of packers with their employers; for, in the report of the case in *Atkins*, there is certainly nothing said about such a custom having been proved. See post, p. 637. Lord Henley, in commenting on *Ex parte Deeze* in his treatise on the bankrupt law, (p. 180,) thinks the fact is obvious, that Lord Hardwicke had changed his mind in *Ex parte Ockenden*, upon the extent of the statute of mutual credit, and that he took hold of the circumstance of there being evidence of usage in *Ex parte Deeze*, to reconcile the two decisions. And if, indeed, he made the observations as reported in *Atkins*, it seems highly probable that such was the fact; for they are entirely at variance with the principle, on which he afterwards said he founded that decision. When he drew the distinction, however, between a general and a particular lien in *Ex parte Ockenden*, it may have escaped his memory, that one of the reasons assigned by him for thinking that *Ex parte Deeze* came within the clause of mutual credit was, that there was an account depending between the packer and the bankrupt,—there being on the one side £19 due for packing, and on the other side much about the same sum due to the bankrupt's estate for wine.

- L. R. 169;) *Hunkey v. Smith*, 3 T. R. 507; *Ex parte Hale*, 3 Ves. 304; *Gibson v. Bell*, 1 Bing. N. C. 743, (27 E. C. L. R. 562;) *Olive v. Smith*, 5 Taunt. 56, (1 E. C. L. R. 16;) *Rose v. Hart*, 8 Taunt. 499, (4 E. C. L. R. 185;) *Smith v. Hodson*, 4 T. R. 211; *Parker v. Carter*, 1 C. B. L. 548; *Sumpson v. Burton*, 2 Brod. & B. 89, (6 E. C. L. R. 28;) *Easum v. Cato*, 5 B. & Ald. 861, (7 E. C. L. R. 282;) *Rose v. Sims*, 1 B. & Adol. 521, (20 E. C. L. R. 437;) *Clarke v. Fell*, 4 B. & Adol. 404, (24 E. C. L. R. 87;) *Key v. Flint*, 8 Taunt. 21, (4 E. C. L. R. 5;) *Ex parte Flint*, 1 Swanst. 30; *Buchanan v. Findlay*, 9 B. & C. 738, (17 E. C. L. R. 486;) *Mountford v. Scott*, 1 Turn. 274; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Marsh*, 2 Rose, 239; *Ex parte Alexander*, 1 G. & J. 409; *Ex parte Hunnen*, 1 Deac. & C. 407.

The *Attorney-General*, and Mr. *Maule*, for the respondents.

We contend, that this is a case of mutual credit, within the meaning both of the 36th section of the Indian insolvent act, 9 Geo. 4, c. 7, and of the English bankrupt act, 6 Geo. 4, c. 16, s. 50. In the first place, we must take for granted, that both these statutes are to be interpreted in the same way, as to the right of set-off; for the 36th section of the Indian act expressly says, that debts may be set off, as well as proved, "in the same manner, and subject to the like deductions, conditions, and provisions, as prescribed in the English bankrupt act."

The court here said, that they were satisfied on this point, namely, that the same interpretation as to the right of set-off ought to govern both the English and the Indian act.

The *Attorney-General*, and Mr. *Maule*, proceeded and cited *Olive v. Smith*, 5 Taunt. 56, (1 E. C. L. R. 16;) *Gibson v. Bell*, 1 Bingh. N. C. 743; *Rose v. Hart*, 8 Taunt. 499; *Buchanan v. Findlay*, 9 B. & C. 738; *McGillivray v. Simpson*, 9 Dowl. & Ry. 35; 9 B. & C. 746, note (c), (17 E. C. L. R. 489;) *Easum v. Cato*, 5 B. & Ald. 861.

Sir *W. Follett*, in reply, cited *Adams v. Claxton*, 6 Ves. 226.

*Cur. adv. vult.*

LORD BROUGHAM now delivered the judgment of the court as follows:

This was an appeal from the judgment of the Supreme Court of Calcutta, in an action brought by the assignees of John Palmer & Co. against the Bank of Bengal, in which a verdict had been taken by consent, subject to the opinion of the court on a special case.

The case stated, that Palmer & Co. had been in the habit of obtaining loans from the bank, on the deposit of company's negotiable paper, as well as on the discount of their own and other securities. That in the month of November, 1829, Palmer & Co. obtained in this way six several loans from the bank, amounting in the whole to 417,000 sicca rupees, depositing company's paper to the amount of 460,000 sicca rupees, and giving their own promissory notes, at three months date, for the sums then advanced by the bank. By these six several promissory notes, Palmer & Co. engaged to pay the several sums advanced, with interest; and each note contained a further statement, that so much company's paper had been deposited as a collateral security, with an authority to the bank to sell the paper deposited, for the reimbursement of the bank, at the expiration of the three months' credit, rendering to Palmer & Co. any surplus arising from such sale; and with an undertaking of Palmer & Co. to make good any deficiency, and to pay 12 per cent. interest from the expiration of the credit, until the debt should be discharged, or the paper be sold.

The several credits expired in February, 1830; the first on the 15th of that month, the last on the 28th. And on the 4th of January, while the whole of the loans remained unpaid, and the whole of the deposits were in the hands of the bank, unsold, Palmer & Co. were adjudged insolvent under the 9 Geo. 4, c. 73, and the plaintiffs were appointed assignees of their estate and effects.

At the same period, the 4th of January, the bank held two promissory notes of Palmer & Co., at three months date, for 40,000 and 60,000 sicca rupees, payable, the former on the 24th of January, and the latter on the 7th of February, 1830. These notes the bank held as endorsees for value, Palmer & Co. having discounted them with the bank in the ordinary course of business, and before the first of the six loans, viz., on the 21st of October and the 4th of November, 1829.

None of the loans being paid by the insolvents, or their assignees, the bank proceeded to sell the paper deposited, according to the terms of the agreement; and there remained a surplus upon the six sales of 30,176r. 10a. 1p., after paying off the several loans, with the interest stipulated. For this sum, with interest at 6 per cent. after the dates of the several sales, this action was brought. The bank sought to set off the sum due upon the two promissory notes, which they held as endorsees for value, and which remained unpaid, against the surplus of the proceeds of the deposits made upon the subsequent loans; and the Supreme Court, on the case reserved, being of opinion that this set-off was competent to the bank, gave judgment for the defendants, which was entered up on the 29th of August, 1833, and is now brought before this court by appeal.

The act, under which the proceedings were had upon Palmer & Co.'s insolvency, (9 Geo. 4, c. 73,) contains a provision (sect. 36) similar to the 56th section of the English bankrupt act, 6 Geo. 4, c. 16, touching mutual debts and credits; and although there are some words of the latter omitted,—particularly those respecting “mutual debts between the parties,” and those requiring the commissioners “to state the account between them,”—yet, as there is a very general declaration, that “all such debts, dues, and claims, as may be proved under a commission of bankruptcy, according to the act of 6 Geo. 4, c. 16, may also be proved in a proceeding under the act, in the same manner, and subject to the like deductions, conditions, and provisions, as in the 6 Geo. 4, c. 16, are set forth and prescribed,” it is manifest, that the proceedings are entirely assimilated—that the difference in the preceding portion of the section is immaterial,—and that the present question is to be dealt with, and disposed of, exactly as if it had arisen in a proceeding in bankruptcy under the English act.

It is equally clear, that in this case the question turns upon the right of set-off given by the statute, which extended the set-off recognised by the common law; *Anon.*, 1 Mod. 215; *Peters v. Soame*, 2 Vern. 428. But for that extension, it never could be contended, that the bank had a lien upon the securities deposited, beyond the amount of the money advanced upon the credit of those securities; since, even in the most favourable view which could be taken,—that of the bank being Palmer & Co.'s bankers,—the lien for the general balance of the customer's account would, in this case, be restricted by the circumstances under which the deposit was made. This is clearly admitted in *Davis v. Bowsher*, 5 T. R. 488, where the general lien of bankers was perhaps first



distinctly ascertained. Nor can it be said, that the debt due by Palmer & Co. on the promissory notes discounted had any connection with their deposit of the securities; for that debt was contracted before those securities were deposited; and the bank could not have had them in contemplation, when it discounted the notes.

The claim of the bank is, accordingly, rested upon the fiftieth section of the bankrupt act, which is taken from the twenty-eighth section of the 5 Geo. 2, c. 30, with such additions, as were supposed necessary for enabling contingent debts to be set off; since these were, by the new act, rendered proveable. Every debt or demand made proveable by the act against the estate of the bankrupt, may, by this fiftieth section, be set off "against such estate;" that is, against any debt or demand of the bankrupt's estate. But the former provision is retained, with the addition of the word "demand," taken from the 46 Geo. 3, c. 135, namely, that where mutual credit has been given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, and the balance only be claimed or paid on either side.

The question then is, whether or not there were mutual credits, or mutual debts, between the parties to the transaction now under consideration. That there was both a debt from Palmer & Co. to the bank, and a credit from the bank to them, is undeniable. Palmer & Co. were both previously indebted on their notes discounted, and by the money advanced on the deposits. But that is not enough, unless either the bank was indebted to them, or they had given the bank credit. The only question then is,—had Palmer & Co., or had they not, given credit before the bankruptcy, within the meaning of the act? In other words, was the deposit of the negotiable paper,—with the power to sell, and pay over the surplus, in case the advance made on it should not be repaid,—a credit given to the bank by Palmer & Co.? If it was a credit, we may further observe, that it was so only to the extent of the surplus; for, as far as regarded the moneys advanced, to secure which the deposit was made, that deposit was only, *in presenti*, a bailment,—and, even *in futuro*, a payment of Palmer & Co.'s debt to the bank. The question is, whether or not the deposit, *quoad* the surplus, amounted to a credit given—whether, or not, the circumstances of Palmer & Co. giving the bank a power to possess itself of the surplus, after repayment of its own debt when that debt should become due, can be said to be a giving of credit to the bank?

Now, although, generally speaking, *debt* and *credit* are correlative terms,—and A. giving credit to B. may seem to imply, that B. is indebted to A.,—yet it may be admitted, that the introduction of the words "mutual credit" extends the right of set-off to cases, where the party receiving the credit is not debtor, *in presenti*, to him who gives the credit. Accordingly, the relation contemplated by the statute has been held to be established, where the debt is immediately due from the one party, and only due at a future day from the other. It was so held in *Ex parte Prescott*, 1 Atk. 230, where the mutual credit was constituted by simple contract debts presently due, on the one side,—and a specialty debt not due, on the other. *Smith v. Hodson*, 4 T. R. 211; *Hankey v. Smith*, 3 T. R. 507, and many other cases, affirm the same doctrine. But in none of these cases was there any *uncertainty*, as to the party

said to receive the credit becoming sooner or later debtor, *in present*, to the other; in none of them did the existence of the relation of debtor and creditor depend upon the pleasure of one party; in all of them, the party said to have given the credit had placed the other party in a situation, which he himself could not alter,—had given him funds of which he could not dispossess him,—or, which is the same thing, a power over funds, which he could not revoke.

The case is materially different, where one of the parties has actually become indebted to the other, and can only cease to be so, by paying the debt,—but the other has only acquired a power, which may end in making him debtor, or not, according as the donor of the power pleases. A. is indebted to B.; and B. is neither actually indebted to A., nor under any liability, which must needs end in his being A.'s debtor,—but has only been intrusted with a power over A.'s funds, to be executed at a future time, if A. pleases,—but, if A. thinks proper, never to be executed at all. Admitting, that in the event of A. never revoking the power, a debt will arise,—the existence of that debt is defeasable; the only certainty is, that A., in order to revoke the power, must do an act wholly unconnected with giving B. any credit, namely, discharge a debt due to B. Now, it is not denied, that Palmer & Co. could at any time have prevented the bank from ever receiving the surplus,—in respect of the possibility of which surplus arising, the credit is supposed to have been given. By repaying the moneys advanced, they could regain possession of the deposit, and the power of sale would be determined, without any consent of the pawnee.

Again,—not only could the existence of any debt at any time depend upon the depositor, but he had no such debt, as could have been proved under a commission against the pawnee; the words “and every debt or demand *hereby made proveable*” added to the recent act, for the purpose of including contingent debts, show, that debts, in order to be set off, are supposed proveable; which, indeed, appears to follow from the nature of the case. Suppose, the Bank of Bengal had been made bankrupt before selling the paper,—it is clear that Palmer & Co. could not have proved against their estate, for the contingent surplus. The paper was deposited, to answer a specific purpose; and if any use had been made of it, inconsistent with the terms of the deposit, the pawnee would have committed an offence, a breach of trust, amounting to a transportable misdemeanor, if the banker's act, (52 Geo. 8, c. 63,) (a) extends to Bengal. But, unless the power of sale was executed by the pawnee, (in which case he became the debtor at once,) he never could be said to have “contracted a debt,” either present or contingent, to the pawnor; and consequently the pawnor could make no proof.

Next, it must be observed, that though the question is on the statute, and though the statutory right of set-off extends the right known to the common law, yet the common law principle of mutuality, which is the essence of set-off, must prevail; and if the deposit, or rather its surplus, could not be set off against the demand of the pawnee, so neither shall the pawnee's debt be set off against the surplus. Lord HARDWICKE appears to have mainly proceeded on this view in *Ex parte Ockenden*, 1 Atk. 235. Could the miller, he asks, have refused to deliver up the corn, in an action at the cornfactor's instance, by claiming to set off

(a) This act is repealed by the 7 & 8 Geo. 4, c. 27; but its provisions are re-enacted by the 7 & 8 Geo. 4, c. 29, s. 49.

a debt due, unconnected with the deposit? And, *vice versa*, could the cornfactor have set off the value of the corn, in an action by the miller for the money lent at a former time? Holding that both questions must be answered in the negative, he considers this as decisive against the miller's right to set off the debt antecedently due from the pawnor. And Lord MANSFIELD, in giving the judgment of the Court of King's Bench some years afterwards, in *Green v. Farmer*, 4 Burr. 2224, after reading his own note of *Ex parte Ockenden*, observes, that Lord HARDWICKE thought he could not construe a dealing to be within the mutual credit clause of the bankrupt act, unless it could be so construed in an action of trover; and adds, "*that is certainly so.*" But, if the same test be applied to the present case, there is an end of the question. For, first, no one contends that had Palmer & Co. repaid the moneys advanced on the deposit, the bank could have retained the paper for their antecedent debt; which is one of the points made by Lord HARDWICKE; and next, had the bank brought their action upon the notes, which they held as endorsees, it is manifest, that Palmer & Co. never could have set off the surplus which *might* arise from the sale of the paper deposited, which is the second of Lord HARDWICKE's points.

No doubt the case would have been altogether different, had the bank actually sold the paper, and received the surplus, prior to the bankruptcy; for then they would have been debtors in that amount to Palmer & Co., and the case would have been one of mutual debts, supposing the notes discounted then due; or, supposing them not yet due, it would have been a case of credit given to Palmer & Co. by the bank, and of debt due from the bank to Palmer & Co.; and so, clearly, within the statute. This is the case of *Atkinson v. Elliott*, 7 T. R. 378, but is wholly different from the case at the bar.

There is nothing inconsistent with what has now been advanced, in the decision, or in the language used by the Court of Common Pleas, in the case of *Rose v. Hart*, 8 Taunt. 499, where the former case of *Olive v. Smith*, 5 Taunt. 56, was reconsidered, and a material qualification added to the generality of the doctrine, which had there been laid down. In *Olive v. Smith*, a broker had been allowed to set off a debt antecedently due from his employer, against the losses recovered from the underwriters on policies deposited in his hands. In *Rose v. Hart* the court held, that such a set-off is only competent to the pawnee, in cases where the thing alleged to be a giving of credit either constitutes a present cross debt, or must end in one. The limitation of the case of *Olive v. Smith* has been approved and followed in the subsequent cases of *Sampson v. Burton*, 2 Brod. & B. 89; and *Rose v. Sims*, 1 B. & Adol. 521. And although the court, in *Easum v. Cato*, 5 B. & Ald. 861, appeared to hold, that it was enough if the transaction would most likely terminate in a debt: yet it is to be remarked, that the argument went entirely upon other grounds; and the decision cannot justly be said to have relaxed the restriction, by which the Court of Common Pleas had, in *Rose v. Hart*, qualified its former opinion. If it be admitted that there can arise no right of set-off in respect of mutual credit, unless the dealing be, at the time of the bankruptcy, such as must necessarily, and at all events, terminate in creating the relation of debtor and creditor between the parties, then is the present case out of that rule, and the bank's claim of set-off defeated. Nor will the reversal of the judgment below be found repugnant to any of the cases, except *Ex parte Deeze*, 1 Atk. 228

and *Olive v. Smith*, of which the latter appears to have proceeded almost, if not altogether, upon the authority of the former; not to mention, that it falls, in some measure, within the scope of Lord MANSFIELD's observations in *French v. Fenn*, 1 C. B. L. 536, which I shall presently remark upon.

It is impossible to regard *Ex parte Deeze* as resting on the ground upon which the report in Atkyns places it; and although Lord MANSFIELD, in *Green v. Farmer*, seems to vouch for the accuracy of that report, (a) as well as of the report in the same book of *Ex parte Ockenden*, he, nevertheless, refers to Lord HARDWICKE's statement in the latter case, that in the former there had been some evidence of an usage, and gives it as the result of his own inquiry respecting *Ex parte Deeze*, that the packer (the pawnee) was, by the usage, in the nature of a factor. A reference which we have made to Lord HARDWICKE's original notebooks has confirmed the statement, that the point of usage was made, and evidence adduced respecting it. (b) From hence, and from Lord

(a) See ante, p. 631, note (a).

(b) The following is an exact copy of Lord Hardwicke's note of the case of *Ex parte Deeze*, for which the author is indebted to the kindness of Lord Brougham, as well as for the transcript of the above luminous and learned judgment. The author makes no apology for giving to the profession this curious and interesting document, relating to a case which has been so often mooted, and has caused such conflicting decisions in Westminster Hall. The copy is a *fac-simile* as to the underscoring and the brackets.

" 1748.

(June 8th. Petitions.)

Ex parte Deeze.

Mr. Attorney General for Pet'.

Davis and Diston—10 Feb'. 1731, corm King C.

Ex parte Clare, 31. July, 1739, corm H. C.

Ex parte Le Franc, corm H. C.

Affidavit of Raymond Pet. Deeze the Pet'.

Debt £350. for money lent, & £39 for packing.

Idem.

John Baker's Affi'. Book-Keeper to Pet'.

Believes it is usual for packers in London to buy Goods for & lend money to their Merch<sup>ts</sup>., which they would not advance but on the credit of & by reason of their so doing business for & having often goods of such Merchants in their possession.

Mr. Sol. Gen.

3 Questions.

1. Whether Pet' had in Law or Equity any special property in the Cloths, either arising from Contract, or the course of the Trade.
2. If not, whether there has been mutual credit within the Act 5th Geo. 2. about bankrupts.
  1. No Evidence of any Contract.
  - Pet'. never bought any goods for the Bank<sup>t</sup>., or laid out any money for him on that account.
  - Only pressed the Cloths, & sent them on board the ships.
  - There were other dealings between them—money lent on Notes at Int<sup>t</sup>.
  - At the time of the Loan no Goods were in the Pet<sup>rs</sup> hands.

HARDWICKE's subsequent decision in *Ex parte Ockenden*, as well as from what has been said both in the Common Pleas in *Key v. Flint*, 8 Taunt. 21, and by Lord ELDON, in *Ex parte Flint*, 1 Swanst. 30, it may be considered that *Ex parte Deeze* is no longer law, as reported in Atkyns; and that, but for a special custom giving the pawnee a general lien, the mere deposit, whether of goods or of securities, for a particular

As to the £29 for packing, I don't dispute that may be a lien, like a Taylor for Cloths, a Horse to be shod, &c.; but as to that sum, we have a set-off by a Debt for Wine.

If no pledge by contract, none from the course of the trade—  
No proof of any such practice.

Not like the cases cited, for these were for the price of the very Goods—not for money lent.

2nd point, as to mutual credit within the Act.

That must be in case of mutual pecuniary demands.

[Not been held so strictly.]

In the case of Davis and Diston, the Cloth was sent to the Factor to be sold, and the Factor had a special property in it. Affi. of Norton Nichols, the Bankrupt.

He is indebted some £30 for packing—Deeze is indebted to him in £15 for Wine.

[this proves mutual credit.]

Wm. Price's Affi. a Packer for 14 years—never apprehended that he had any property in the Goods.

Usual for him & other Packers to buy Goods for their Merchants, & when they do so to name their principals, & the seller debits them for them.

Mr. Willbraham—ad idem.

If the Packer may lay his hands on the Goods, & stop them for another debt, it will be opening bad consequences to trade.

The bankruptcy do'n't give him a greater interest.

Mr. Green, ad idem.

Ordered an account to be taken, & the Money due on the Balance of the whole Account to Pet'. to be deducted out of the Money arising by sale of the Lancashire Bays in question, & the surplus paid to the Assignees."

It will be perceived from this extract, that the passage which Lord Hardwicke has underscored in John Baker's affidavit, bears out, to a considerable extent, what Lord Hardwicke afterwards said in *Ex parte Ockenden*, 1 Atk. 237, namely, that in *Ex parte Deeze* there was evidence before him "that it was usual for packers to lend money to clothiers, and cloths to be a pledge not only for the work done in packing, but for the loan of money likewise." The argument of the Solicitor-General also plainly shows, that this point had been previously made by the Attorney-General for the petitioner. It would seem, too, that Lord Hardwicke, from underscoring Baker's affidavit, dwelt more on the evidence in favour of the lien, than on the evidence against it in Price's affidavit, which latter, it will be observed, he has not underscored. Still, the brief memoranda he has made between the brackets appear to coincide with the opinion, which he is reported by Atkyns to have expressed, on the subject of mutual credit; and they certainly afford some ground for Lord Henley's inference in his work on the bankrupt laws, (Eden, B. I. 180.) that in *Ex parte Ockenden*, which occurred six years after the case of *Ex parte Deeze*, Lord Hardwicke had changed his mind upon the extent of the enactment as to mutual credit, and took hold of the circumstance of there being evidence of usage in *Ex parte Deeze*, to reconcile his two decisions. It is somewhat extraordinary, that no trace is to be found in Lord Hardwicke's note-book of the case of *Ex parte Ockenden*.

purpose, as it certainly will not constitute the pawnee a debtor, so it will not amount to a giving of credit at all, unless coupled with an authority given to the pawnee of selling them, such power being given absolutely, and not countermandable.

But it is equally certain, that *Olive v. Smith*, 5 Taunt. 56, was decided upon the assumption that *Ex parte Deeze* is a binding authority; and when we find, that the language of the court in *Rose v. Hart*, 8 Taunt. 499, so materially varies and narrows the principle which had been the guide in the former decisions, and that the case itself is disposed of in a way not easily reconcilable with *Olive v. Smith*,—and in no way whatever reconcilable with the report of *Ex parte Deeze*, upon which *Olive v. Smith* had been grounded,—and that the view now taken may be reconciled both with the latter and more correct, or rather more authentic, opinion of Lord HARDWICKE, and with the latter and more correct opinion of the Court of Common Pleas,—there seems to be no good reason for supporting a claim, which is both at variance with principle, and runs counter to a greater weight of authority than can be produced in support of it.

With respect to the case of *Parker v. Carter*, 1 C. B. L. 548, it may be observed, that the defendants there rested their title to set-off upon a lien which they claimed to have “as general agents” of the bankrupt; and the report of the case in Cooke’s Bankrupt Laws gives this as the ground of the decision in their favour. Lord Chief Justice GIBBS, in *Olive v. Smith*, though on granting the rule nisi he states *Parker v. Carter* as a case of mutual credit, yet afterwards, the particulars having been inquired into, seems to admit that it was a case of lien,<sup>(a)</sup> and, accordingly, he rests his judgment mainly upon *Ex parte Deeze*, and mentions also *Ex parte Boyle*, 1 C. B. L. 561, and *French v. Fenn*.

*Ex parte Boyle* was the case of a client, who owed a sum to his solicitor for work done and money lent, and who gave the solicitor, by way of loan, his notes of hand to a larger amount,—part of which notes were not due, and not paid by him till after the solicitor’s bankruptcy. There the notes, being payable to the solicitor’s order at the client’s bankers’, were treated as a loan by the parties; at the date of the bankruptcy, the lender of the notes had become liable to pay at all events the contents of them to holders chosen at the solicitor’s pleasure, they being made payable to the order of the solicitor; and nothing could prevent this liability from ending in a debt from the solicitor to the client, but the solicitor himself repaying the money advanced upon them. The client could not, by any act of his own, prevent the money coming into the hands of the solicitor, or of the payee chosen by him, to a fixed amount, and at specified times. This case, therefore, comes clearly within the distinction imposed by the case of *Rose v. Hart* on the doctrine laid down in *Olive v. Smith*. And the same observation applies to *Ex parte Wagstaffe*, 13 Ves. 65, where the credit in question arose from an acceptance of the bankrupt, payable after the bankruptcy, but certainly payable then.

The case of *French v. Fenn*, 1 C. B. L. 536, is also distinguishable from the one at the bar; although it must be allowed to have gone further than any decision which preceded it, excepting *Ex parte Deeze*. But it does not appear that the debt, against which the price of the pearls when sold was allowed to be set off, was in any part

(a) See 5 Taunt. 65.

contracted before the agreement respecting the pearls; and Lord MANSFIELD expressly says, that Fenn "had trusted Cox (the bankrupt) with other goods, which in all probability he would not have done, but for the pearls being left in his (Fenn's) hands." This would make the case nearly the same with *De Mainbray v. Metcalf*, 2 Vern. 698, where Lord COWPER relies mainly upon the debt set off being, in fact, an advance made on the pawn. Lord MANSFIELD, in *French v. Fenn*, seems also to rely much on the circumstance (peculiar to that case) of the other two partners in the adventure (Cox and Holford) having agreed to allow Fenn interest on the money, which he had advanced to pay for the pearls in the first instance; and one thing is quite clear, namely, that by the nature of the transaction the rights of each partner until sale being to an undivided third, and Fenn having the deposit for sale, neither of the others could have obtained his share,—nay, both the others joining could not have obtained their shares, nor gotten the whole pearls out of the pawnee's hands,—until the sale; which must at once render the credit to the pawnee certain. If it be said, that Cox might have assigned his right to his share of the eventual price, minus his proportion of the purchase-money, (in the same way that Palmer & Co., in the present case, might have assigned their right to the contingent surplus,) then, it must also be observed, that this consideration takes the case out of the rule laid down in *Rose v. Hurt*, and could not stand with the decision in that case. *Ex parte Deeze*, also, was relied on in deciding *French v. Fenn*, as were considerations of general justice.

Upon the whole, then, we are of opinion, that the judgment in this case must be reversed; and that the verdict taken by consent, subject to the opinion of the Supreme Court, should stand, and the postea be delivered to the plaintiffs. The interest, too, must be calculated subsequent to the time up to which the verdict for interest was taken; and this must be added to the amount of the verdict.

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Ex parte BELL.—In the matter of BROWN.—p. 690.

Minutes cannot be varied, after the order is drawn up; nor does a notice of motion to vary the minutes stop the drawing up of the order.

Mr. *Swanston* applied to the court to vary the minutes of the order in this case.

Mr. *Temple*, *contra*, objected that the order was already drawn up, and that the application was too late.

Mr. *Swanston* replied, that the order was drawn up after the other side had notice of this motion.

The court said, The rule is, that the minutes cannot be varied after the order has been drawn up; and that a notice of motion to vary the minutes does not stop the drawing up of the order.

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Ex parte BRADSTOCK and another.—In the matter of WILSON.—p. 691.

An order of reference, whether a contract was beneficial to the estate, was made to the deputy registrar, after the commissioner had refused to interfere in it. Such an order is reluctantly made.

IN this case, the court had made an order (a) for a reference to the commissioner to inquire and report, whether it would be for the benefit of the estate of the bankrupt, that a certain contract, entered into by the assignees for the sale of certain property of the bankrupt, should be completed.

Mr. *Swanston*, who appeared for the petitioners, said that Mr. Commissioner Evans, before whom the order had been brought, refused to interfere in the matter, or certify whether the contract would be beneficial, or not; and that to avoid the awkwardness which might be occasioned by this refusal, the parties had agreed that the reference should be to Mr. Gregg, one of the deputy registrars of this court.

The court said, that they always felt reluctance in making orders of this description, and that what had occurred in the present case did not diminish that reluctance; but that as the order for a reference had already been pronounced, the order might go to Mr. Gregg, instead of the commissioner.

(a) See ante, p. 461.

Ex parte GOODWIN.—In the matter of GOODWIN.—p. 695.

Upon a petition to annul the fiat, or reverse the adjudication, the bankrupt is entitled to copies of the depositions; and the proceedings are not evidence against him, unless previous notice is given to him of the intention to use them.

THIS was the petition of the bankrupt, praying for a reversal of the adjudication, under the 17th section of the 1 & 2 Will. 4, c. 56; or that the court would grant an issue to try the fact of the bankruptcy, and would also order the bankrupt to be furnished with copies of the depositions; the bankrupt undertaking not to withdraw his petition, or bring an action.

Mr. *Howard*, in support of the petition, cited *Ex parte Jackson*, 2 Deac. & C. 601, and *Ex parte Smith*, 3 Deac. & C. 101.

Mr. *Bird*, contra, objected to the bankrupt being furnished with the copies of any depositions, except that of the act of bankruptcy.

The court said, that the bankrupt was entitled to copies of the depositions, upon his undertaking not to withdraw his petition, or bring any action, and filing an affidavit that he *bonâ fide* wanted them for the purposes of this petition;—*ERSKINE*, C. J. adding, that the respondents, having filed no affidavit in answer, had no case, unless they depended on the depositions; and that if they used the depositions, they must give previous notice to the bankrupt of their intention to do so.

N. B. The petition was subsequently ordered to be amended, on the bankrupt's application, by confining the prayer to annul the fiat, generally, without coming in under the 17th section.

Ex parte PARRATT.—In the matter of J. A. BORRON.—p. 696.

A. and B., having a lease of certain salt-works for twenty-one years, entered into articles of agreement with the bankrupt, by which the latter undertook the manufacture of the salt, and it was provided, that the contract should subsist for the term granted by the lease, wanting three months; but that if there should be a failure of brine in the pits for ten days success-



ively, the bankrupt was to be exonerated from his liability to manufacture the salt, to an extent proportionate to the extent of the failure of brine. The bankrupt afterwards granted an annuity to the petitioner, charging it on the sums payable to the bankrupt from A. and B. for the manufacture of the salt.

*Held*, that notwithstanding the possibility of the discontinuance of the salt-contract, and of the forfeiture of the lease by non-payment of rent, or non-performance of covenants, the annuity was capable of valuation.

THIS was the petition of a creditor, praying that the assignees might be ordered to account to the petitioner for the proceeds of the sale of the bankrupt's interest in an agreement relating to certain salt-works, which it was contended was chargeable with an annuity payable to the petitioner; or that the commissioners might be directed to ascertain the value of the annuity, and the petitioner be admitted a creditor for the amount of such value. The following were the facts:—

Messrs. Broughton and Sutton, being lessees of certain brine-pits and salt-works at Anderton in Cheshire, for the remainder of a term of twenty-one years commencing from 1828, on the 26th of January, 1830, entered into articles of agreement with the bankrupt, by which the bankrupt undertook to manufacture certain stated quantities of salt annually for the benefit of Broughton and Sutton, "for the term or time, and upon, under, and subject to the several contracts, conditions, and agreements hereinafter contained;" and by a subsequent covenant it was declared, "that the contract hereby made shall subsist and continue for the term of twenty-one years (wanting three months) from July, 1828." And it was provided, "that in case at any time or times during the continuance of the said contract, there should be a failure of brine in the pits belonging to the said salt-works, enduring for the space of ten days successively, the said J. A. Borron, during the continuance of such deficiency, should be exonerated from his liability to manufacture salt under the said contract, to an extent proportioned to the extent of the failure of brine."

At the date of these articles, Broughton and Sutton agreed to become partners with one Reid and the petitioner, in the manufacture and sale of salt; and the above agreement with the bankrupt was declared to be for the benefit of that partnership.

On the 28th of January, 1830, the bankrupt and the petitioner agreed to become partners together, as to the matters specified in the above articles of agreement, and thereupon executed a partnership deed. But in June, 1833, it was agreed between the petitioner and the bankrupt, that the petitioner should retire from that partnership and assign his interest to the bankrupt, in consideration of an annuity of £400, to be paid to him during the continuance of the agreement between Broughton and Sutton and the bankrupt. On the 6th of August, 1833, a deed of dissolution was accordingly executed between the bankrupt of the first part, A. Borron, his brother, of the second part, and the petitioner of the third part, whereby the partnership between the bankrupt and the petitioner was dissolved; and the petitioner, in consideration of an annuity of £400 thereby secured, sold to the bankrupt "all the use and interest of the petitioner in the copartnership, and in the profits, and in the partnership effects." And the bankrupt and his brother, for themselves, their executors and administrators, jointly covenanted that they or one of them would, during the continuance of the articles of agreement of the 26th of January, 1830, pay to the petitioner an annuity of £400, and that such annuity should be a charge on the sums payable to the bank

rupt for the manufacture of salt under those articles of agreement. The dissolution of partnership between the petitioner and the bankrupt took place accordingly, and was advertised in the Gazette.

The annuity of £400 was regularly paid by the bankrupt to the petitioner until December, 1833. In August, 1834, the fiat issued against Borron. In September, 1834, the petitioner and Reid retired from the partnership between Broughton, Sutton, the petitioner, and Reid. The annuity was valued at £4483 at the bankruptcy, and the petitioner applied to prove for that sum; but the proof was rejected, on the ground that the annuity depended on contingencies not capable of valuation.

It was stated in the petition, that the assignees had made some bargain, for a sale of a portion of the bankrupt's property, for £1700, which included the bankrupt's interest under the articles of agreement with Broughton and Sutton; and the petitioner claimed to be entitled to have a proportion of the proceeds of such sale applied towards payment of the value of his annuity.

The prayer was for an account of these proceeds, and that the same might be applied in part payment of the sum of £4483, the value of the annuity, and the petitioner be permitted to prove for the difference; or that the petitioner might be admitted a creditor for the whole of such value.

Mr. *S. Sharpe*, in support of the petition. The first question is, whether the annuity of £400, granted to the petitioner by the deed of the 8th of August, 1833, is one on which a value can be set. The objection raised on the other side is, that the annuity was granted for an indefinite period, namely, during the existence of the salt contract between Broughton and Sutton and the bankrupt, and that it cannot therefore be valued. But it was decided in *Ex parte Saxe*, 2 Dea. & C. 172, that though a value could not be set upon the consideration for granting an annuity, where the giving up of a business constituted the consideration, yet that the annuity itself could be valued. [Sir G. ROSE. Was notice given to Broughton and Sutton of the annuity of £400 being charged by the bankrupt on the sums payable to him from them for the manufacture of salt?] The petitioner was then a partner with Broughton and Sutton, and notice to him would be of course notice to them.

Sir G. ROSE.—Notice to one partner is undoubtedly notice to all, if given touching a partnership transaction, or in the ordinary course of partnership transactions, but not otherwise.

ERSKINE, C. J.—*Ex parte Burbridge*, 1 Dea. 131, decides that the mere knowledge of one partner is not enough, but that regular notice must be given.

Mr. *Swanston*, and Mr. *Bacon*, for the assignees. The commissioners were right in rejecting this proof; for the payment of the annuity depends upon so many contingencies, that it is utterly incapable of valuation. It is only payable during the continuance of the articles of agreement of January, 1830; but the continuance of that agreement depends upon the terms of the lease of the salt-works granted to Broughton and Sutton. It is material for the decision of this question, therefore, that that document should be before the court; for it will be impossible for the court to determine, without reference to the lease, what is the duration of the contract between Broughton and Sutton and the bankrupt. [Sir J. CROSS. That contract recites the lease, and the subsequent contract between the petitioner and the bankrupt refers to the terms of the

previous contract. Is not each party then bound by that recital? If either party impugns the correctness of it, ought he not to prove it to be incorrect?] If the production of the lease would show that its continuance did not depend upon the lapse of time merely, but upon other acts and circumstances, that would be quite sufficient for our case. [ERSKINE, C. J. I presume the lease would only be forfeited by acts of waste, or other wrongful acts.] That does not appear; it may be forfeited by various breaches of covenant, of which we know nothing; and therefore the petitioner ought to satisfy the court on this head, by the production of the lease itself. The contract to pay the annuity is to subsist only during the continuance of the agreement of January, 1830, and that agreement is only co-extensive with the lease. Moreover, the parties to that agreement contemplated the determination of it, or at any rate the discontinuance of it, by other means than even the determination of the lease, namely, by a failure of brine in the pits belonging to the salt-works. Who can determine, then, the value of an annuity, which depends upon such accidental circumstances, as well as the acts or omissions of a third party? Would a Court of Law determine that the annuity in this case was payable absolutely before the year 1749, until which period the lease would not expire by effluxion of time? The 54th section of the bankrupt act directs the commissioners to ascertain the value of the annuity, and that for such value so ascertained the creditor shall be permitted to prove. Now, though it is admitted that an annuity payable on a contingency may be provable, yet the proof will depend upon whether the contingency is capable of calculation. The lease of the salt works was determinable upon other events than the mere lapse of time, such as the non-payment of the rent, or the non-performance of covenants; in either of which cases the lease would become forfeited, and this quite independent of the control of the bankrupt. The salt contract would then be necessarily determined, for it was never the intention of the parties that that contract was to survive the lease. [ERSKINE, C. J. If the lease had been forfeited by the act of the lessees, the bankrupt would have had a right of action against them for the damage he might have sustained from the forfeiture.] Still, as the annuity was to depend on the duration of the salt contract, and the latter was dependent on the uncertain existence of the lease, how can the value of the annuity be ascertained by any possible mode of calculation?

But, further, it appears from the affidavits filed on the part of the respondents, that the petitioner has by his own acts determined to contract for the annuity between him and the bankrupt; for, in January, 1834, the bankrupt told the petitioner, that a docket had been struck against him; upon which the petitioner, in February following, gave orders to carry on the salt-making for his own benefit; since which time the bankrupt has ceased to receive any moneys from Broughton and Sutton for manufacturing salt, nor have the assignees interfered in the matter since the bankruptcy. Having, therefore, treated the annuity contract as a nullity, the petitioner cannot now claim any benefit from it.

Then, as to the objection of the want of notice to Broughton and Sutton of the charge on the salt contract in favour of the petitioner, the annuity contract made by the petitioner with the bankrupt was not a partnership transaction of the firm of Broughton, Sutton, Parratt, and Reid, but was merely a private transaction of Parratt's. The private knowledge of Parratt, therefore, cannot be considered as notice to the

other members of the partnership; and all the interest of the bankrupt in the salt contract must consequently be taken to have been in his order and disposition at the time of his bankruptcy.

Mr. *Sharpe*, in reply, was stopped by the court.

ERSKINE, C. J.—The court is of opinion, that the petitioner is entitled to prove for the value of his annuity. The claim to prove is founded on the covenant, contained in the deed of 8th August, 1833, to pay an annuity of £400 to the petitioner during the continuance of certain articles of agreement, which were entered into by Broughton and Sutton with the bankrupt for the manufacture of salt. The commissioners seem to have rejected the proof, because the annuity was for so undefined and uncertain a period, that they could not put a value on it, and that the value was incapable of calculation. If the court were satisfied of this fact, its decision would necessarily follow, that the commissioners were right in rejecting the proof. But it appears to me, that the term for which the annuity was granted is definite and certain. By the deed of dissolution of the partnership between the petitioner and bankrupt, the annuity is to be paid during the continuance of certain articles of agreement of January, 1830, to which we must therefore refer, in order to ascertain its duration. Now, on reference to those articles, it appears that Borron undertakes to manufacture salt, for the benefit of Broughton and Sutton, for the term or time thereafter mentioned; and we find that the time after mentioned in the articles is, for the term of 21 years, minus three months, from July, 1828. That term must, therefore, be the period of time for which the annuity is payable. It was clearly in the contemplation of the parties to the deed of August, 1833, that the petitioner should receive the annuity till the end of the 21 years, if the petitioner lived so long.

Then it is contended by the petitioner, that he has not only a right to prove for the value of the annuity, but that he has also a lien on the proceeds of the sale of the bankrupt's interest in the salt contract. It has been stated, that the assignees have made some bargain relative to a portion of the bankrupt's property, which included his interest in the salt contract, and that they have gained by the bargain £1700. But how the fact is, does not appear in evidence. As to that, an inquiry may be directed; but I confess it appears to me, that no satisfactory result would arise to the petitioner from such inquiry; for the assignees can hardly have received any pecuniary advantage, by the sale of a contract for the personal services of the bankrupt. If the petitioner, however, chooses to take the inquiry, at the hazard of costs, there can be no objection to his doing so. But the inquiry should at the same time be extended to the fact, whether notice was given to Broughton and Sutton of the charge on the bankrupt's interest in the salt contract; for, otherwise, the property would be in the order and disposition of the bankrupt.

Sir J. Cross.—At one time during the argument, I entertained some doubt on the point; but, on referring to the articles of agreement of January, 1830, I am satisfied that the period, for which the annuity was payable, was a definite and certain period, namely, for the term of twenty-one years, wanting three months, as specified in that agreement.

Sir G. Rose.—It is impossible to say that the doubts of the commissioners, as to the petitioner's right to make this proof, were not fairly entertained by them, though their judgment appears to me to be incor-

rect; for I think, upon the whole, that the petitioner is entitled to prove for the value of the annuity. But some check should be laid upon the dividend, in order that any equities belonging to the estate may be worked out. When time is the ingredient of a contract to pay an annuity, that furnishes a means to calculate its value. Upon a reference to the deed of August, 1833, we find that the annuity is not determinable by the death of the grantor; for he covenants for himself, his executors, and administrators. Then, on referring to the agreement of January, 1830, we find, that a failure of brine in the pits belonging to the salt-works is the only circumstance provided for determining the contract. The mere possibility, that the lease from the ground landlord might be forfeited by the non-payment of rent or the non-performance of covenants, is not sufficient, I think, to prevent a valuation being put on this annuity. It appears to me, therefore, that the petitioner ought to be permitted to prove for the value of the annuity,—such value to be calculated with reference to the term specified in the articles of agreement of January, 1830.

Mr. *Sharpe* said, that after what had fallen from the court, the petitioner abandoned all claim of lien.

The order was, that the petitioner might prove for the value of the annuity, abandoning all claim of lien as against the assignees, but without prejudice to any claim against other parties.

Ex parte ABRAHAM HILTON LEES.—In the matter of JOHN LEES, J. A. SMITH, and ABRAHAM HILTON LEES:  
and

Ex parte HEATHERLY and another.—In the same matter.—p. 705.

B., a minor, living with A., his father, takes an active part in his father's business, who puts his son's name over his door in conjunction with his own. The father, without any authority from his son, enters into an agreement with C. to become a partner with him in a separate trade, and signs this agreement in his son's name, as well as that of himself. After B. becomes of age, a joint fiat is issued against A., B., and C., upon a debt contracted with that firm before B. attained his majority; and the only evidence to prove that B. was a partner with C. is, the agreement signed by the father, and the fact of B.'s name appearing over his father's door, but not over the door of C.:—*Held*, that B. was not precluded, under these circumstances, from petitioning to annul the fiat on the ground of infancy.

THE first of these petitions was presented by one of the bankrupts to annul the fiat, on the ground of his infancy. The second petition was by the assignees under a previous separate fiat against John Lees, to annul the subsequent joint fiat, on the same ground.

It appeared that Abraham Hilton Lees had carried on business with his father, as a provision-dealer, under the firm of John Lees & Son, which firm was painted on the outside of the shop by the directions of the father, when the son was only sixteen years of age; the son continuing to live with his father from that period, and forming part of his family. The father subsequently agreed with J. A. Smith, to admit the latter as a partner in a distinct concern in the truck trade, which was carried on at a different shop in the same town, called the Shakespeare shop. The father entered into the agreement with Smith in the name of his son, as well as his own; but the son swore that he was not a party to that agreement, that he never authorized his father to use his

name in making it, and that he never interfered in any way in the truck business. It was alleged, also, that the petitioning creditor knew the son was not of age when the alleged petitioning creditor's debt was contracted. On the 21st of August, 1835, a separate fiat was issued against John Lees, the father; and in December following a joint fiat against J. Lees, A. H. Lees, and J. A. Smith, which latter fiat it was the object of both petitions to annul.

Mr. *Spence*, in support of the first petition. We admit that the son traded as an infant with his father in the provision business, but not in the particular trade in respect of which he was made a bankrupt. This case is distinguishable from that of *Ex parte Watson*, 16 Ves. 265, where the bankrupt held himself forth to the world as an adult and *sui juris*, and had traded in that character for two years; for that was a case of fraud, and Lord ELDON, therefore, dismissed the bankrupt's petition to supersede, and left him to his action. And it is equally distinguishable from those cases where a *fême covert* is not allowed to avail herself of her coverture, after denying to her creditor that she is a married woman; *Partridge v. Clark*, 5 T. R. 194; *Wilkins v. Wetherill*, 3 Bos. & P. 220. But where there is no fraud practised by a married woman, or an infant, they may both avail themselves of their coverture and infancy, although they even make a representation to their creditor founded on a mistake; *Pitt v. Thompson*, 1 East, 16. And where the thing done by an infant is absolutely void, on the ground of infancy,—as where a warrant of attorney has been given by him,—a Court of Law has refused to confirm it, although the infant appeared to have given it, knowing that it was not valid, for the purpose of collusion; *Saunderson v. Marr*, 1 H. B. 73.

Sir G. ROSE.—As there is another petition by a third party to annul the fiat on the ground of infancy, the fiat must inevitably be annulled. The only question on the petition of the bankrupt is, as to the costs of that petition; which will depend upon whether he held himself out to the petitioning creditor and others as a partner in the truck concern.

ERSKINE, C. J.—There are two points on which the court must be satisfied in determining the question of costs: first, That A. H. Lees was never a partner with Smith, nor ever sanctioned the agreement entered into by his father with Smith; secondly, That the petitioning creditor knew that A. H. Lees was not of age when the debt was contracted.

Mr. *Bethell* appeared in support of the second petition, and merely wished to have a safe fiat.

Mr. *Swanston*, and Mr. *Faber*, for the assignees under the second fiat. The cases cited do not apply to this; for here the bankrupt, A. H. Lees, was of age when the joint fiat issued; and it is admitted, that he had previously held himself out to the world as a trader in partnership with his father. In *Belton v. Hodges*, 9 Bing. 365, (23 E. C. L. R. 309,) where a commission of bankrupt against an infant was held to be void, the court expressly reserved its opinion as to what might have been the result, if the commission had been taken out against an adult, who had previously traded as an infant,—as in the present case. Lord Chief Justice TINDAL, in delivering the judgment of the court, says, "We are not called upon to consider, whether a commission taken out against a person after his full age, upon a petitioning creditor's debt, a trading, and act of bankruptcy, during his infancy, may, or may not, be supported

In that case the conduct and acts of the bankrupt, after he attained his full age, may have been such as to confirm the debt of the petitioning creditor, and the several contracts which he made in his trade, so as to enable him to be considered such a trader as might commit an act of bankruptcy."

Mr. *Whitmarsh*, for the petitioning creditor under the second fiat. As the question of costs is to depend on the fact, whether A. H. Lees held himself out to the world as of full age, and whether the petitioning creditor knew that he was an infant, it may be material to refer the court to an examination of A. H. Lees before the commissioners; in which he admits that his name was over the door of his father's shop, and that in 1834 he claimed to vote in the election of a member of Parliament, as a person of full age.

Mr. *Spence*, in reply, was stopped by the court.

ERSKINE, C. J.—The question, as to the validity of the joint fiat, is brought before the court on two petitions, the first petition being presented on the part of the bankrupt, A. H. Lees,—and the second on the part of the assignees under a former fiat. The fact is indisputable, that A. H. Lees was a minor at the time of the contracting of the petitioning creditor's debt. That, of itself, is a complete ground for a supersedeas, unless A. H. Lees held himself out generally to the world as a trader in partnership with his father and Smith, and induced persons to give him credit as a party of full age. It appears, certainly, that he was held out to the world as a trader in partnership with his father, by his name being painted over the door in conjunction with his father's. But something more than this must have been done by him, to render him liable even as a partner with his father. He must have held himself out to his father's customers, and have dealt with them as an adult. For the mere fact of a youth of only sixteen years of age, as in the present case, permitting his name to be put over the door of his father's shop, would not of itself be enough to deceive the customers resorting to that shop, and induce them to believe that the son was of age; and here it is alleged in the petition, that the petitioning creditor knew the son was not of age—a fact which the petitioning creditor does not expressly deny; for he nowhere says, that he believed him to be of age at the time of the contracting of his debt, or was deceived by his name being put over his father's door. In the case of *Ex parte Watson*, where Lord ELDON dismissed the bankrupt's petition to supersede, he proceeded on the ground that the bankrupt had expressly held himself out to the world as an adult. I am of opinion, therefore, that the bankrupt, A. H. Lees, by the mere circumstance of his name being painted over the door, has not so held himself out of the world as an adult, and that he is entitled to an order for annulling the fiat.

But there is another point to be considered in the present case. The fiat now sought to be annulled is a joint fiat against three partners; and the only evidence of partnership is an agreement entered into by the father, on behalf of himself and his son, with J. A. Smith. The point, therefore, that we have to determine on this part of the case is, whether A. H. Lees authorized his father to enter into this agreement with Smith. Now, it is positively sworn by the son, and not denied, that he never gave any authority to his father to enter into this agreement, and that he never interfered in any way in the business, which was the subject such of agreement. On both grounds, therefore, the fiat is supersedeable,

and I think with costs. For the only ground on which the petitioning creditor has attempted to support the fiat is, that no case has been decided where a commission of bankruptcy has been superseded, which has been issued against an adult on a previous trading as an infant.

Sir J. Cross.—It does not seem to me, that there was any deception practised by this young man, so as to induce the persons coming to his father's shop to believe that he was of full age, and to deal with him as one *sui juris*; for, according to all appearances, he was not emancipated when the petitioning creditor's debt was contracted, but was living with his father, and formed part of his father's family; and the putting his name over the door was an act of the father, not an act of the son. As to his claiming a vote at the election of a member of Parliament, it appears that he was challenged on that occasion as being under age, and his vote for that reason disputed. That very circumstance shows the general opinion that prevailed as to his minority. But the question in this case is, not whether he was a trader in partnership with his father, but whether he ever traded in partnership with Smith. Now, it is not pretended that his name ever appeared over Smith's door; and the only evidence that has been offered to prove him a partner with Smith, is the agreement entered into with Smith by the father, who thought fit to use his son's name without his authority. On the 21st of August a fiat in bankruptcy issued against the father, when, of course, there was an end of all trading with the father. I think it was a wrong and wilful act of the petitioning creditor to make the son a bankrupt, and that the joint fiat ought therefore to be annulled, at the costs of the petitioning creditor.

Sir G. Rose concurred.

Ordered, that the joint fiat should be annulled at the costs of the petitioning creditor; and that the proceedings under it should be transferred to the proceedings under the separate fiat against the father.

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**Ex parte SAMUEL BIGNOLD.—In the matter of WILLIAM JOHN BRERETON.—p. 712.**

The Norwich Bank, having a branch establishment at Foulsham, sixteen miles from Norwich, open an account with B., a customer, residing twenty miles from Norwich, and give him a credit with the branch bank for such advances as he may require. B. receives various sums from time to time from the branch bank, which he does not draw for in the regular way, but applies for by letter to the agents at the branch bank when he wants them, and every week gives the agent an unstamped check, post-dated, for the amount of the advances during the preceding week, which the agent transmits to the bank at Norwich, as a voucher for himself:—

*Held*, that this was not a draft or order issued for the payment of money to the bearer on demand, within the meaning of the 13th section of the stamp act, 55 Geo. 2, c. 184; and that the bankers were not subject to the penalties imposed by that section for paying money on an unstamped check, post-dated, or issued beyond the prescribed distance.

A customer issues unstamped checks more than fifteen miles from the bank on which they are drawn. The bankers are not liable to the penalties of the stamp act for paying such checks, unless they know that the checks were issued beyond the prescribed distance, or did not truly specify the place where they were issued.

But striking balances in a running account between a banker and a customer, will not prevent the operation of the penal section of the stamp act.

An offer of composition by the acceptor of several bills of exchange to the holder, in the presence of the drawer, accompanied by a declaration that the acceptor could not and would not provide for them when due, does not dispense with the necessity of presenting them when due, and giving notice of their dishonour to the drawer, although the drawer urged the holder to agree to the composition.



THIS was a petition for the proof of a debt on behalf of the Norfolk and Norwich Joint Stock Banking company, under the following circumstances:—

The company was established under the authority of the 7 Geo. 4, c. 46, and the petitioner was the resident director, and one of the public officers of the company, duly returned and certified as such, according to the provisions of that act, and in whose name, as such public officer, proceedings under any fiat in bankruptcy on behalf of the company are thereby authorized to be prosecuted. The principal establishment of the company was at Norwich, but they had branch banks at Foulsham, and at Fakenham, in the county of Norfolk. The Foulsham branch bank, which was more than fifteen miles from Norwich, was managed by their agent, Mr. Waller. The bankrupt was a banker residing at Brinton, which is twenty miles distant from Norwich, but is only seven miles from Foulsham, and nine from Fakenham; and he had credit with the Norwich bank for such sums as he might require in the course of his business. For the convenience of the bankrupt, Mr. Waller was in the habit of supplying him with the amount of cash for which he had occasion on the receipt of notes or letters addressed by himself or his clerk to Mr. Waller, and conveyed by his servant to Foulsham. These notes were dated from Brinton on the days they were respectively written. The bankrupt, however, had received from the bank a book of printed checks, some dated "Norwich," and others "Fakenham," and "Foulsham," so that he might draw checks payable at each of these places. On Thursday in every week, the bankrupt, or his clerk, were accustomed to meet Mr. Waller at Fakenham, Thursday being the market-day at that place, when it was ascertained what money the bankrupt had received from Mr. Waller since the preceding Thursday; and if he had occasion for more money on that day, Mr. Waller advanced him what he wanted, and the bankrupt, at the close of the business of the market, drew a check on the bank at Norwich for the total amount of the week's advances, including any sum that might have been advanced in the course of that day. These checks, though delivered on the Thursday, were uniformly dated on the following Friday; and occasionally the checks so given for the money advanced were given to Mr. Waller at Foulsham on the Friday, on which day the latter made up his agency accounts with the bank, including therein the transactions of that day, and on the Saturday forwarded the bankrupt's checks to Norwich, as vouchers to account for the money that had been advanced to him.

The bankrupt had also given checks on the bank at Norwich to different persons in the ordinary way. On these checks the word "Norwich" was printed, but they were chiefly issued at or near Brinton or other places beyond the distance of fifteen miles from Norwich; though it did not appear that the Norwich bank were aware of this circumstance. The amount of these checks did not exceed £4000.

For securing other advances made by the bank, the bankrupt had deposited with them various bills of exchange, drawn by himself and accepted by a Mr. Elwall. On the 27th of January, 1836, one of these bills which had been presented for payment was dishonoured, and notice of the dishonour was given to the bankrupt. On the 28th of January a meeting took place between the bankrupt, Elwall, the acceptor, and two persons from the bank, when Elwall stated that he was completely in-

solvent, and wholly unable to provide for the payment of any of the bills, and distinctly declared that no provision would be made for the payment of them, but offered terms for a composition, which were rejected by the persons who attended on the part of the bank. The next day, the 29th of January, another bill was presented, and dishonoured; of which notice was given to the bankrupt on the 30th. Afterwards several others fell due; but the bank, to prevent the injurious effect of having bills held by them dishonoured, omitted to present any more of the bills for payment.

The bank also held a mortgage from the bankrupt, which was estimated at the value of £862, and two other securities, which were valued respectively at £240 and £700.

On the 4th of March, 1836, the fiat was issued against the bankrupt.

At the time of his bankruptcy, Brereton owed the Norwich Bank £29,720 on the balance of his current account, and £28,885 for money lent on the several bills of exchange; but four of these bills were subsequently paid, which reduced the whole debt to the aggregate sum of 44,986*l.* 9*s.* 8*d.* The petitioner applied to prove for this sum, but the commissioners rejected the proof, and adjourned the choice of assignees, in order that the petitioner might have an opportunity of applying to the Court of Review.

The following reasons were assigned for the rejection of the proof:—

1st, That the banking company was not a company duly authorized to prove under a fiat in bankruptcy by an agent; and that it was incumbent on the bank, in support of their proof, to show, that since the creation of the debt there had been no change of the members of the co-partnership of the company. 2dly, That no proof could be made on the bills of exchange, as they were not duly presented for payment when they respectively became due, and no notice of their dishonour was given either to the bankrupt or the provisional assignee or assignees under the fiat. 3dly, That the moneys advanced by the banking company, having been advanced and paid upon unstamped checks, the transaction was illegal; as the checks were drawn either at a greater distance from the city of Norwich than the law allowed, namely, the distance of fifteen miles, or were post-dated, or the place where the same were dated was not duly specified.

The prayer was, that the banking company might be declared entitled to stand as creditors of the bankrupt for the sum of 44,986*l.* 9*s.* 8*d.*; and that the petitioner, or any other public officer of the company, might be at liberty to go in under the fiat and prove for that sum, after allowing and deducting therefrom the several sums of 862*l.* 5*s.*, £240, and £700, the value respectively of the several securities held by the banking company; the petitioner undertaking, on behalf of the company, that if the several securities should, upon the sale thereof, produce more than the amount of such estimated value, the excess should be paid over to the assignees; but if the securities produced less, then the petition prayed that the proof might be increased for the difference.

Mr. *Swanston*, Sir *W. Follett*, and Mr. *O. Anderdon*, in support of the petition.

As to the first objection made to the proof, that the bank could not prove by an agent, we say, that Mr. *Bignold*, being the resident director, and one of the public officers of the company, and having been duly returned and certified to the Stamp Office as the public officer in whose

name the company may sue and be sued, is the proper party to make this proof, within the provisions of the 7 Geo. 4, c. 46, s. 4. And the affidavit in support of the petition positively states, that he was duly registered as such public officer at the Stamp Office. This question has already been before the court in two cases. In *Edwards v. Buchanan*, 3 B. & Adol. 788, (23 E. C. L. R. 187,) it was decided, that in an action brought by such public officer on behalf of a banking company, the return to the Stamp Office is not the only admissible evidence of his being one of the public officers, but that it may be proved *aliunde*. And in *Armitage v. Hamer*, 3 B. & Adol. 793, (23 E. C. L. R. 187,) it was held, that the return to the Stamp Office was sufficient, if the party was described merely as "a public officer" of the banking company, without specifying any other title of office. [Sir G. ROSE. There does not appear to be any necessity to argue that point at present.]

Then, the debt claimed to be due from the bankrupt to the banking company, may be divided into two parts; first, the sum of 29,720*l.* 19*s.* 8*d.*, being the amount of the sums paid on the bankrupt's checks, for which they held no security, except those valued respectively at £862, £240, and £700; and secondly, the sum of 15,265*l.* 10*s.*, for money advanced upon the credit of the bills of exchange.

The principal question in this case is, whether the checks given by the bankrupt to the agent of the banking company at Fakenham and Foulsham, or those issued to third persons, are subject to the penalties of the stamp acts. The 55 Geo. 3, c. 184, which imposes certain duties on bills of exchange, declares in the schedule, part 1, the following instruments to be exempted from those duties; namely, "all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes."

And by section 13 it is declared, that if any person shall *make and issue* any bill, draft, or order, for the payment of money to the bearer on demand, upon any banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the exemption in the schedule, unless the same shall be duly stamped as a bill of exchange according to the act, the party offending shall for every such bill, draft, or order, forfeit £100; and if any person shall knowingly receive the same in payment of, or as a security for, the sum therein mentioned, he shall forfeit £20; and if any banker or bankers upon whom the same shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the exemption, the party so offending shall forfeit £100, and shall not be allowed the money so paid on account against the person or persons by or for whom such bill, draft, or order shall be drawn, or

his or their executors or administrators, or his or their assignees or creditors, in cases of bankruptcy or insolvency.

By the 9 Geo. 4, c. 49, s. 15, the limited distance of ten miles, from the place where the draft or order may be issued, is extended to fifteen miles.

Now, to apply these provisions of the statute to the two different classes of transactions. In the first class of transactions, namely, those where the checks were delivered by the bankrupt to Mr. Waller for the amount of the week's advances, we contend that no draft or order was issued by the bankrupt, within the meaning of the act of Parliament. The statute contemplates three different parties to any bill, draft, or order, namely, the drawer, the party drawn upon, and the payee. But in this case there was no payee; for the checks were not given for the payment of any sum to bearer, as in ordinary cases, but were merely delivered by the bankrupt as vouchers that the agent of the bank had paid certain sums to him. It is stated that these checks were post-dated, that is, that they were dated on the Friday, though delivered to Mr. Waller on the Thursday; but that is immaterial, if the statute does not apply to this species of checks. The right of the bank, to prove for the amount of the sums advanced the bankrupt by Mr. Waller, is perfectly independent of the checks, nor do we want the checks to establish our right. [ERSKINE, C. J. The point seems to be, whether the bankrupt by giving subsequently an illegal document, vitiates the original contract.] An action might be maintained against the bankrupt for the amount of the advances, without any necessity to produce the checks in evidence. But in a case recently before the House of Lords, *Swan v. Bank of Scotland*, (a) it was decided, that a draft or order on a banker is not issued by the drawer, within the meaning of the provisions of the stamp act, unless it is delivered to a third party as payee. In that case a customer of the Bank of Scotland sent letters or orders for money by the post to the agent of the bank at Dumfries, which was more than fifteen miles from the residence of the customer; and the House of Lords determined that these were not drafts or orders for payment of money, within the meaning of the 55 Geo. 3, c. 184.

The same principle was also recognised in *Downes v. Richardson*, 5 B. & Ald. 674, (7 E. C. L. R. 227;) where it was held, that a bill of exchange was not issued, so as to render a fresh stamp necessary on alteration, until it was in the hands of some person entitled to claim payment,—even though it was accepted and endorsed. The object of the legislature, in the present instance, is to prevent the evasion of the stamp duties payable on a bill of exchange. But if a party lives a distance of even fifty miles from his bankers, and sends them a letter enclosing a check, requesting them to send him the amount, that is not within the mischief of the act; the intention of the plaintiff in drawing the check being to give the bankers a voucher for the desired remittance, and not to issue a negotiable instrument.

As to the second class of transactions, namely, those in which the bankrupt gave checks to third persons. These checks were dated Norwich, where the principal establishment of the bank was; and *non constat*, that the bankrupt was not at Norwich when the checks were issued. The contrary nowhere appears. Nor is there any evidence to show that the banking company had *any knowledge* that the checks

(a) See the next case.

were issued more than fifteen miles from Norwich; which is a most material ingredient in the case, for no penalty or disability would otherwise attach; the words of the statute are, "*knowing* that the place where the draft or order was issued is not truly specified, &c."

But there is a strong argument in favour of the petitioner, which applies to both classes of checks; and that is, that there is a settled account and balance struck between the banking company and the bankrupt up to the 5th of April before the bankruptcy. Vouchers were returned to the bankrupt every week with the pass-book, and the account was regularly made up and a balance struck at the end of every year. If the banking company, therefore, had brought an action against the bankrupt, this account so stated would be evidence against him. Is it contended then on the other side, that the stamp act is to operate so as to rip up a settled account? An account so settled is tantamount to payment; *Owens v. Denton*, 5 Tyrw. 359; S. C. Crompt. M. & R. 716; where it was held, that in an action against a defendant for wages, the defendant might prove a settlement of accounts as a payment of the plaintiff's demand; although one of the items of the account was the price of some malt which was sold by an illegal measure, and the price of which therefore could not be recovered in an action. [Sir G. Rose. There is a late case in the Common Pleas, which decides that an account, being settled, does not prevent either party from opening it.] It may be opened to point out any errors, but not so as to let in the operation of a penal statute. [ERSKINE, C. J. If a party was prevented from opening the account, the statute might be evaded by a settlement of accounts every week.] Supposing this to be a case within the act of Parliament, and the account so settled not to be an answer to it, still, this court, as well as any other court, is bound to require the proof of the fact by the clearest evidence. Now, it is positively sworn by the petitioner and two other persons, that none of the directors, agents, or clerks of the bank had, to the best belief of the deponents, any knowledge that the checks, which were drawn by the bankrupt payable to third persons, were post-dated, or drawn or issued at any greater distance than fifteen miles from Norwich; and that with respect to those checks, as well as the checks delivered to Mr. Waller as vouchers, no fraud was ever contemplated on the revenue. But, whatever portion of the debt the court may be of opinion cannot be proved, the proceeds of the sale of the securities held by the petitioner may be applied, as far as they will extend, to the payment of that portion of the debt, according to the doctrine laid down in *Philpott v. Jones*, 2 Adol. & E. 41, (29 E. C. L. R. 24;) where it was held, that if money be paid generally on account, and some of the items of the account are illegal,—as for spirits, in contravention of the restrictions imposed by the 24 Geo. 2, c. 40, s. 12,—and other items, are legal, the creditor may appropriate the payment to the illegal items, and proceed by action to recover the amount of the balance. [Sir G. Rose. Should not the petition stand over until assignees are appointed, with liberty to the assignees, when chosen, to proceed for any penalties that may have been incurred under the statute?] The assignees could not act; only the officers of the crown can proceed for penalties incurred under the stamp acts. (a) But there is a provisional assignee in this case, and he has been served with the petition. [Sir J.

(a) See 44 Geo. 3, c. 98, s. 10.

CROSS. The provisional assignee has all the powers of assignees, until others are chosen.]

The remaining question to be considered is, as to the want of presentation and notice of dishonour of the bills of exchange. It appears, that the two first bills that fell due were regularly presented for payment, and noted for non-payment, and that due notice of their dishonour was given to the bankrupt. And the only reason why the same formalities were not observed with respect to the others was, that the acceptor declared in the presence of the bankrupt that those bills would not be paid. The case of *Brett v. Levett*, 13 East, 213, is a decisive authority, that under these circumstances there was no necessity to give notice to the bankrupt; for it was there held, that the acknowledgment of a bankrupt drawer of a bill to the holder of it, that the bill would not be paid, is sufficient to dispense with notice to him of its subsequent dishonour, although the acknowledgment was made by him after he had committed the act of bankruptcy. Moreover, the bills in the present case were mere accommodation bills, and therefore the bankrupt was not entitled to notice of their dishonour.

Mr. Erle, Mr. Bethell, Mr. Cobbett, and Mr. Blair, for the petitioning creditor.

There are three questions in this case for the consideration of the court. 1st, As to the right of the bank to prove on the bills of exchange drawn by the bankrupt and accepted by Elwall. 2dly, Whether they can prove for the amount of the advances and payments made on the different checks. And, 3dly, Whether the petitioner is competent to prove as a public officer on the part of the bank.

1st, As to the right to prove on the bills. It is stated in the petition, that the bank only refrained from presenting the bills, in order to maintain appearances and save their credit, and not on account of any agreement of the bankrupt to dispense with notice. The authority of *Brett v. Levett* is doubted in some of the books of practice; (a) and the question there was, not so much whether the declaration of the bankrupt entirely dispensed with notice of dishonour, as whether such a declaration was receivable in evidence, as being made after the act of bankruptcy. It has been decided, however, in several cases, that notwithstanding the bankruptcy or insolvency of the acceptor or drawer of a bill, the holder must still give notice of its dishonour to the other parties to it. Thus, in *Esdaile v. Sowerby*, 11 East, 124, although the endorser of a bill had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor before and at the time when the bill became due, yet it was held, that that circumstance did not dispense with the holder giving notice of dishonour in due time to the endorser. And if the drawer or endorser, after being arrested, offer to give another bill to the holder by way of compromise for the sum demanded, this does not obviate the necessity of serving notice; *Cuming v. French*, 2 Camp. 106, note. [ERSKINE, C. J. Words spoken by a defendant in an action, by way of compromise, are never receivable in evidence against him in that action.] So, an offer by the endorser of a bill to pay part of the amount, with costs, will not dispense with notice; *Standage v. Creighton*, 5 Car. & P. 406, (24 E. C. L. R. 383.) Nor a proposal by the endorser to the holder to pay the bill by instalments, made without knowledge of the holder's previous laches, in omitting to give notice of

(a) See Bayley on Bills, Chitty on Bills, and Starkie on Evidence.

the dishonour of the bill to the endorser; *Goodall v. Dolley*, 1 T. R. 712. In the last case, the proposal was made by the endorser, before any action had been brought against him by the holder. So, an undertaking by the drawer to provide for a bill, before any laches have been committed by the holder, does not waive the necessity of giving notice to the drawer; *Pickin v. Graham*, 3 Tyrw. 923; S. C. 1 Crompt. & M. 725. [Sir J. Cross. There is another very strong case, that of *Baker v. Birch*, 3 Camp. 207, where the acceptor, a few days before a bill became due, informed the drawer that he would be unable to pay it, and told the drawer that he must take it up, and gave him part of the amount to assist him in doing so, and the drawer received the money, and promised to take up the bill accordingly. And yet it was held, in an action by the endorsee against the drawer, that the latter might set up as a defence, that the bill was not duly presented for payment, and that he had not regular notice of its dishonour.] And it is no excuse for the neglect of the holder to present a note or bill for payment, that the maker or acceptor had previously become insolvent, and refused payment of other notes and bills; *Bowes v. Howe*, 5 Taunt. 30, reversing *Howe v. Bowes*, 16 East, 112, (1 E. C. L. R. 8.) It is true, that notice of dishonour need not be given to the drawer, when he had no effects in the hands of the acceptor, either at the time of drawing the bill, or when it became due; *Bickerdike v. Bollman*, 1 T. R. 405. But the assertion that these bills were accommodation bills, and therefore that no notice of their dishonour was necessary to be given to the drawer, has not been established. The petitioner must prove this fact; for, *prima facie*, all bills are taken to be for consideration; and it is clear that Elwall the acceptor had effects of the drawer to a certain extent in his hands, from offering a composition. But even where the drawer of a bill called on the holder the very day the bill became due, and informed him that he had no effects in the hands of the acceptor, but that he would endeavour to provide effects, and call upon him again,—it was held that this did not supersede the necessity of a presentation the same day; *Prideaux v. Collier*, 2 Star. 57, (3 E. C. L. R. 242.) The general rule is, that the holder of a bill must try whether the acceptor has any effects of the holder's in his hands, notwithstanding his insolvency; and *non constat*, but that some one or more of the bills in the present case would have been paid, if duly presented to Elwall, notwithstanding his previous declaration. No circumstance that takes place before a bill becomes due, and that does not amount to an actual agreement to dispense with the presentation of it, does away with the necessity of presenting it for payment. *Borrodaile v. Lowe*, 4 Taunt. 93; *Lambert v. Oakes*, 12 Mod. 244; and *Whitfield v. Savage*, 2 Bos. & P. 277, were also cited on this branch of the argument.

Against this current of authorities there are only two cases, from which a contrary doctrine can be inferred. In *Phipson v. Kneller*, 4 Camp. 285, the drawer of a bill, a few days before it became due, stated to the holder that he had no regular residence, and that he would call and see if the bill was paid by the acceptor; and it was held, that under these circumstances he was not entitled to notice of its dishonour; but that amounted to a dispensation of notice by the drawer, and threw upon the drawer himself the duty of inquiring if the bill was paid. And in the more recent case of *Dixon v. Elliott*, 5 Car. & P. 437, (24 E. C. L. R. 400,)—where, in an action against the endorser of a bill, it appeared

that, two months after it was due, it was shown to him, and inquiries made concerning the drawer and acceptor, on which he said, if the holder would take 10s. in the pound, he would secure it,—this was held sufficient to dispense with notice of dishonour. That case, however, was merely a decision at nisi prius, and is, at most, only a peculiar case of exception to the general rule.

Secondly, The more material question in this case is, whether the banking company have a right of proof for the amount of their advances and payments on the different checks.

And, first, with respect to the advances made by Mr. Waller to the bankrupt on the security of the post-dated checks. We contend, that the money so paid was an illegal transaction, within the meaning of the stamp act. The advances were made to the bankrupt by Mr. Waller, the agent of the bank at Foulsham, on the faith that the bankrupt would draw a check; and the advances were so made in pursuance of instructions given by the Norwich bank to Waller, to honour the bankrupt's checks. Till the check was drawn, the transaction between Waller and the bankrupt was confined to themselves; but when the check was drawn, the advance must be considered to have been made by the bank on the credit of the bankrupt's check; for Waller, in every transaction of this kind, took the check and transmitted it to Norwich. Mr. *Erle* then proposed to read Waller's entire deposition before the commissioners, taken on the 22d of March.

Sir *William Follett* objected, that the examination was not evidence against the petitioner, as he was not present when it was taken, and the other side had given no notice of their intention to read it on the hearing of the petition, nor had furnished the petitioner or his solicitor with a copy of it.

Mr. *Erle*, and Mr. *Bethell*.—Where a party is cognisant of a deposition, it may be read in evidence against him, and he may answer it by affidavit. At all events, if the court think that the petitioner has not sufficient knowledge of its contents, they will allow the petition to stand over, for the purpose of delivering a copy of the examination to the petitioner, and serving him with notice of the intention to read it.

Sir *William Follett*.—There can be no ground for any indulgence, as to giving time to the respondent to serve the petitioner with a copy of the deposition, when it is considered that the object is to enforce against him the provisions of a penal statute.

The court said, that the only question was, whether the petitioner was present at the examination of Waller, or had been served with a copy of it, and with notice that it was to be read on the hearing of the petition. If the petitioner was present when it was taken by the commissioner, and might have cross-examined the party, it would then be evidence against him, without notice to read it. Or, though the petitioner was absent, it might still be read as evidence, if he had been served with a copy of it, and notice of the intention to read it. But as it was taken behind the back of the petitioner, and he has never been furnished with a copy of it, nor has received any notice that it would be used against him on the hearing of the petition, it cannot now be read. As to the adjournment of the hearing, for the purpose of enabling the respondents to serve a copy of the deposition on the petitioner, the court thought that the respondents were not entitled to this indulgence.



The argument for the respondents then proceeded :—It has been contended, in support of the petition, that the checks delivered by the bankrupt to Waller were not *issued*, within the meaning of the act. But the word “issue” must be taken in its common and ordinary acceptation ; there is no technical meaning attached to it. To *issue* any thing, is to part with or deliver it to another person ; as cards of invitation, or prospectuses, are said to be *issued* to the parties to whom they are addressed, without any intervention of third parties. [Sir G. ROSE. The legislature has said, that the awarding and *issuing* of a commission of bankrupt shall be notice of an act of bankruptcy ; and yet the Court of King’s Bench has held, that where a commission was *issued*, but remained in the hands of the petitioning creditor, this was not an *issuing* within the meaning of the act.] The *issuing* of a check must be considered to be the first parting with it by the person who draws it. If this were not so, a check, which is given by a person living within the prescribed distance to his servant to carry to a creditor living beyond that distance, would become bad when delivered to the creditor, though it was good when delivered to the servant. A check also is equally issued, whether it is given to a servant of the drawer to receive and bring him back the amount, or whether it is given to a third person for his own benefit. So if a customer goes to his bankers with a check payable to himself, and receives the amount, and delivers the check to the bankers, that amounts to an issuing. There is no distinction in the act of Parliament between paying the check to the drawer, or to a third person. [ERSKINE, C. J. The act of Parliament says, “if any banker, upon whom a check is drawn, shall pay the sum of money therein expressed.” Now, in this case the money had been previously advanced, and the check was afterwards given as a voucher. The question is, therefore, whether this can be considered as a payment on a check.] The circumstance of the check being given some time after the money was advanced by Waller makes no difference in the case, the illegal draft being contemplated when the money was advanced. That makes it all one transaction, as money paid upon the check. If the argument founded on the interval of time, between the advance of the money and the delivery of the check, is to prevail, parties will reduce the time to hours and minutes, till it may become a question whether the check or the money first passed over the counter. This would open a door to all the evils which the statute meant to guard against. It has been urged, that in this case no fraud upon the revenue was intended, and that it is not a case within the mischief contemplated by the act. But it is quite sufficient, if it is within the meaning of the act ; it is not necessary to be within the mischief. The terms of the act are so clear, that there is no occasion to explain its meaning. According to the plain construction of it, it is evident, that although a check is drawn at a place but one mile distant from a banking-house, and is dated at a different place from that where it is drawn, it would come within the meaning of the act. Thus, in *Watts v. Brogden*, 1 Young & G. 457, where a party residing only four miles from Llanelly drew a check at his house on his bankers at that place, and dated the check at Llanelly, it was held, that the check was void, as not being dated at the place where it was issued, and that it was inadmissible in evidence for want of a stamp. Now, in that case the check was not drawn in fraud of the revenue ; for it was drawn only four miles distant from the place where the bankers carried on their business ; and

yet it was held to be void. It is sufficient, therefore, to invalidate the transaction, if it tends to facilitate an evasion of the statute.

With respect to the checks issued by the bankrupt to third persons,—the respondent is willing to take an issue on the question, whether the bank knew that the checks were not drawn at the place where they were dated, or were issued more than fifteen miles from Norwich. But we contend, that there is sufficient evidence that the petitioner was aware of the fact; and as he was one of the partners in the bank, the partnership must suffer for the act of the partner.

The third question is, whether the petitioner is competent to prove, as a public officer, on the part of the bank, within the provisions of the 7 Geo. c. 46, s. 5. Now, in April last, when the petitioner tendered the proof, he had not been actually registered at the Stamp Office, pursuant to the provisions of that statute; he was, therefore, not competent to prove as a public officer. There have been also fluctuations in the partnership of the banking company, since the petitioner was first returned as a public officer by them, and he now comes to prove a debt due to the present partners. [ERSKINE, C. J. Did not the bankrupt acknowledge the continuation of the firm, by continued dealings with the new partners?]

It has been contended on the other side, that the penal provisions of the stamp act cannot be made to operate so as to rip open a settled account. But an account is only binding, as a settled account, where it is signed and concluded by the parties. In the present case there were only annual rests on the 5th of April, for the purpose of settling on what sum interest was to be paid; and the account here, therefore, was an account current, and not a settled account.

Sir *William Follett*, in reply, was told by the court, that he might confine his argument to the point, whether the omission to present the bills of exchange for payment, and to give notice of their dishonour to the bankrupt, amounted or not to a discharge of the bankrupt from his liability as drawer.—The bankruptcy or insolvency of the drawer, it is admitted, will not of itself dispense with the necessity of giving him notice of the dishonour of the bill; but when the drawer waives the necessity of the presentment, or the notice, or acquiesces in the omission of those formalities, that is a sufficient excuse for the non-presentment or omission to give such notice. It is no uncommon practice for the drawer of a bill to write to the holder, requesting him not to present it for payment; and no merchant ever imagined that compliance with such a request would discharge the drawer. The question in *Brett v. Levett*, 13 East, 213, was, whether the acknowledgment made by the drawer of the bill in that case to the holder, that the bill would not be paid, was sufficient to dispense with notice, the acknowledgment having been made by the drawer after he had committed an act of bankruptcy; if it had been made before, no doubt could have been entertained. But most, if not all, of these bills were accommodation bills; and therefore there was no necessity to give notice to the drawer. The main question, however, is, here, whether the drawer acquiesced in the omission to present and give notice; for his acquiescence is enough to dispense with that obligation; it is not necessary that he should make an actual request. It is sworn distinctly by Mr. Booth, a director, and by the chief clerk of the banking company, that when they attended the meeting of the 28th January, on the subject of the outstanding bills of ex-

change, which had been drawn by the bankrupt on Elwall, that Elwall, in the presence and hearing of the bankrupt, expressly stated his complete insolvency and total inability to take up or provide for these bills when they would become due, and declared that no provision would be made for the payment of them; and he then strongly urged Mr. Booth, on the part of the banking company, to accept a composition in respect of the bills. Nobody can doubt, from what then occurred, that the understanding was, that the bills were not to be presented for payment. The proposition then made by Elwall, and acquiesced in by the bankrupt, was to take a composition, and not to present the bills. Can the bankrupt, then, or those who represent him, now turn round and say to the banking company, you ought to have presented the bills? The statement in the affidavits is quite sufficient to show, that the bank were perfectly justified in omitting to do so. With respect to the suggestion of postponing the proof till after the choice of assignees, the court would not be justified in directing such postponement; for the proof of a creditor is not to be suspended, because the amount of his debt would turn the choice of assignees; *Ex parte De Tastet*, 1 Rose, 324; S. C. 1 Ves. & B. 281.

ERSKINE, C. J.—This is an application by Mr. Bignold, the managing director of the Norfolk and Norwich Joint Stock Banking Company, for leave to prove a debt, which has been rejected by the commissioners on several grounds; one of which is, that the petitioner was not the proper person to make the proof, according to the requisitions of the 7 Geo. 4, c. 46. But that objection is hardly worth considering; because, although the commissioners could not allow the proof without an order, yet if an application had been made to this court, it would have ordered any person duly authorized to go in and prove on behalf of the company. The main point for our consideration is, whether any proof can be made for the amount of the moneys paid and advanced by the company to the bankrupt; and if these sums can be proved, then a second question arises, namely, whether the company have not been satisfied a portion of their debt, by the receipt of bills drawn by the bankrupt upon a third person, which were not presented for payment, nor any notice of their dishonour given to the bankrupt.

As to the first question, whether any proof can be made for the amount of the company's advances, there are two classes of transactions. The greater proportion of the advances were made by Mr. Waller, the agent of the company, who managed a branch bank at Foulsham. The way in which the bankrupt obtained money from Waller was as follows:—when he wanted money he sent a servant with a letter to Waller for the amount he required, which was transmitted him by the servant. On Thursday he usually wanted a large sum, as that was the market-day at Fakenham; and on Thursday in every week he drew a check for the amount of all the money he had received during that day and the preceding week, which was afterwards sent by Waller to the principal establishment of the bank at Norwich, as a voucher that Waller had paid sums to that amount. It has been contended, that the bank cannot be allowed these payments on account, because they were made contrary to the provisions of the stamp act. It is obvious, that the agent of the company knew the circumstances under which these checks were drawn, and, therefore, the company must be taken to have had notice of these circumstances. But it is

incumbent on the party, who impugns the validity of the checks, to show that they come within the words of the act in question. The legislature, having imposed certain duties on bills of exchange, excepts bankers' drafts; and to prevent any evasions of the duties, it is directed by section 13, (a) that the draft shall not be post-dated, and shall specify and express the place where it shall be issued. It is quite clear that, on the present occasion, there was no intention to defeat the object of the legislature. But still I admit, that although there is no such intention, yet if the transaction comes within the words of the statute, the court must hold it to be illegal. [His honour here read the words of the 13th section of the act.] (a) That the drafts in question were post-dated seems to be admitted, and that they were not drawn at Norwich, although they purported to be so drawn. But, to bring the case within the penalty of the act of Parliament, the draft must be dated on a day subsequent to the day on which it shall be *issued*, or must be one which does "not truly specify and express the place where it shall be *issued*." The *issuing*, therefore, is the very essence of the transaction. Now, it appears to me, that the *issuing* a check means the placing it in the hands of the party entitled to demand cash for it; as a bill of exchange is not issued, until it is in the hands of the party entitled to receive the payment of it; for till then it may be altered, without requiring a fresh stamp. In the present case, I think the checks given by the bankrupt to Waller were not only not *issued*, but were never intended to be *issued*. They were given merely as vouchers to the agent, that he had advanced so much money to the bankrupt. But the issuing is not all—the money must be *paid* upon a check so issued, to render a banker subject to the penalty of the act. Now, here the sum for which each of these checks was drawn, was not paid by Waller to the bankrupt on the check, but had been previously advanced to him in various sums, and at different times, wholly independent of the check. If Waller had advanced cash to the bankrupt out of his own moneys, and the check had been given to enable him to procure the amount from the bank and repay himself, the case would have been different; for there would have been then both an *issuing* by the bankrupt, and a *payment* by the bank, of the money on the check.

An argument has been raised, that if these checks are not held to fall within the 13th section of the stamp act, a consequence will be, that if a gentleman draws a check and delivers it to his servant, to carry to a creditor living beyond the prescribed distance in payment of his bill, the check, which was originally good, would thus eventually become bad. But if a check be actually drawn for the purpose of having money afterwards paid thereon to a third person, it is issued the moment it is delivered to the servant to carry to the distant creditor; as putting a letter containing a libel into the post-office, is held to be an issuing it where the post-office is situate.

But there are other checks drawn by the bankrupt at Brinton, more than fifteen miles from Norwich, and issued to third persons, who obtain payment of the checks at Norwich. These are clearly within the 13th section, so far as the person issuing is concerned. But the only point in the present case is, the *knowledge* of the banking company that they were not drawn at the place where they purported to be issued, or were drawn more than fifteen miles from Norwich. If there had been any

conflicting evidence on this point, that would be a ground certainly for further inquiry. But I can see no evidence here, that the Norwich bankers *knew* these checks to be drawn at a different place from what appeared on the face of them. It is argued, that the knowledge of the bankers must be presumed, because they knew that the bankrupt, upon some other occasion, drew checks at Brinton, dating them at Norwich. But it is incumbent on those who call upon us to fix a party with the penal consequences of an act, to prove his knowledge of the illegal act; and the court cannot assume the fact. I think, therefore, that the bankers are entitled to prove the amount of their payments on this last description of checks.

It seems, however, that there was a long account between these parties, and that payments had been made by the bankrupt on account, part of which payments consisted of bills of exchange drawn by the bankrupt upon a third person. Most of these bills were not presented for payment when due, nor was any notice of their dishonour given to the bankrupt. These bills, therefore, must, I think, be treated as so much money paid, and the amount deducted from the proof. It has been contended, that the bankrupt waived the necessity of presentation and notice; but it does not appear to me, that there is sufficient evidence of such waiver. I admit, that if the facts amounted to an agreement on the part of the bankrupt, that these bills should not be presented for payment, he could not afterwards disaffirm such agreement. But I do not think, that the facts of the case warrant such a construction. It appears that one of these bills having fallen due and become dishonoured on the 27th of January, a meeting was held on the following day between the bankrupt, the acceptor, and two persons on the part of the bank; the acceptor stated his inability to pay the dishonoured bill, as well as all the others about to fall due, and that he had not and should not make any provision for their payment; and then proposed a composition to the parties attending on behalf of the bank, which was rejected. There was no agreement, therefore, either to pay, or accept a composition; it was a mere offer on the part of Elwall, the acceptor, who might afterwards have altered his intentions, and have paid the bills. All that took place at the meeting cannot be carried further than this, that the bankrupt knew of the insolvency of the acceptor; and it has been decided, that the bankruptcy or insolvency of a party is not sufficient to dispense with the necessity of a presentation or notice. It was the interest of the bankrupt to prevail upon the holders of the bills to accept a composition, for he would have then been relieved from all liability. But as a proof that there was no agreement to accept a composition, or dispense with the presentation of the bills, the bankers, on the very next day, presented another bill which fell due, and gave notice of its dishonour to the bankrupt. The amount, therefore, of all the bills, except the two which were duly presented, and of which notice was given to the bankrupt, must be deducted from the sum sought to be proved.

Sir J. Cross.—This is a complaint of the rejection of a claim; and it has been therefore contended, that it is an *appeal* from the judgment of the commissioners, in which it lies upon the appellant to show sufficient ground for its reversal. This appears to me to be a mistake, and one that is so very often made, that it is necessary to endeavour to clear it up. An appeal, in the proper and legal sense, is a suit removed into a Court

of Error from another Court of Judicature competent to hear and determine such suit, and whose judgment is final and conclusive, till reversed by a Court of Error. And on such appeal, no new evidence can be received. In this sense, the present proceeding is not an appeal. It is an original complaint, in a court of original jurisdiction, of a claim having been wrongfully and unjustly opposed and rejected. It does not come from a Court of Judicature competent to hear and determine a civil suit, and to pass a judgment binding upon the parties. The admission or rejection of a claim is not properly a judicial, but a ministerial act. The term "appeal" is, however, often applied in acts of Parliament to other proceedings; and I am aware there is one act, in which the present proceeding is so called. In this vague sense, an appeal lies to the quarter sessions against the allowance of a rate by justices of the peace. But it has never been considered, that such allowance was a *judgment* in any suit at law or in equity; or that it was any thing more than a *ministerial* act, though an act done by persons who in other matters have *judicial* authority. I think, therefore, that this case has now, for the first time, taken the shape of a civil suit in a Court of Law and Equity competent to hear and determine the matters in question upon original evidence, and to give a judgment binding and conclusive upon the parties; but subject, like the judgments and decrees of all other courts, to reversal in a Court of Error. And I think that we are now exercising, not an appellate, but an original jurisdiction.

I agree with his honour the chief judge, that there is nothing in the objection raised as to the petitioner having no *locus standi* in court; and that the question of form, who is to tender the proof, is easily arranged.

I agree also in the observations of the chief judge, as to both classes of checks; being of opinion, that checks are not *issued*, within the meaning of the act of Parliament, unless delivered to a third person as payee, or some one on his behalf; and that the customer of a banking-house, who signs a check for the purpose of drawing out his own money for his own use, cannot be said to issue the check. The only ground on which the case could be put is, that in the course of the bankrupt's dealings with Waller, the checks were issued to him, as being given in his favour, and to enable him to receive the amount from the bank at Norwich. But there is no evidence that goes this length. All that appears is, that Waller was an agent of the Norwich bankers, and had authority from them to answer the checks of the bankrupt. The course of dealing between them was this—the bankrupt generally wrote a letter to Waller, which he sent by a servant, for the money he wanted; sometimes he sent his clerk with a verbal message for it; and at the end of the week he gave Waller a check for the gross amount of the money he had so received. Now, this check was not given for the purpose of being issued, but merely as a voucher for the previous payment, and therefore does not fall within the 13th section of the stamp act.

As to the other checks, the question is, did the bankers know that they were issued beyond the prescribed limits, or were not dated at the place where they were issued. The only scintilla of evidence, that the bankers knew either of these facts, is the evidence of Kendal, the bankrupt's clerk, (a) who says that he has no doubt that the banking company were

(a) In a subsequent affidavit made by Kendal, he stated, that he inadvertently swore as to his having no doubt that the banking company were aware that the checks were not drawn within fifteen miles from Norwich; and that what he meant to state was, that the company were aware,

aware of the fact, that the checks were not drawn within fifteen miles from Norwich. But this is not sufficient evidence to enforce a penalty. The court have been asked to grant further inquiry on this subject; first, to prevent the petitioner from voting in the choice of assignees; secondly, to enable the respondents to collect better evidence of the fact, in order to fix a party with a penalty. I think it would be gross injustice to the banking company to grant an inquiry for either of these objects.

The last point for our decision relates to the dishonoured bills. Now, the only question here is a question of fact, and not one of law or bankruptcy. Was it the understanding of all the parties present at the meeting on the 28th of January, that it would be unnecessary to present the bills for payment, and give notice of their dishonour to the drawer? I own, on this point, I feel great difficulty, which is increased by hearing the opinion of his honour the chief judge. The facts stated in the petition, and not contradicted, are as follows:—The first bill, which became due on the 27th of January, and was payable at Messrs. Smith, Payne, and Smith's, was dishonoured, and notice of the dishonour given to the bankrupt. In consequence of the dishonour of this bill, a meeting took place on the following day between two gentlemen on the part of the banking company, Elwall, the acceptor of the bills, and the bankrupt; when Elwall distinctly stated that he was insolvent, and could make no provision for the payment of that, or any other of the bills that were about to fall due. The bankrupt makes no observation on the subject, but joins with the acceptor in requesting the banking company to accept a composition. It is true, that the composition was not accepted. But if, at the moment of parting, the holders of the bills had said to the bankrupt, "Do you wish us to go through the form and ceremony of a presentation and notice of dishonour, as to the other bills?" there can be no doubt that the bankrupt would have answered, "Certainly not." This, though not said, I cannot help thinking was so understood. Now, as our decision is final as to the facts of a case, and the respondents have expressed themselves desirous to take the opinion of a jury, I would only suggest to the court that, there being some doubt on this point, it might be advisable to direct an issue as to whether or not it was the understanding of the parties at the meeting of the 28th of January, that the presentation and notice were to be dispensed with.

With regard to the costs, it appears that the proof is opposed by the petitioning creditor, the provisional assignee having been served with the petition, but declining to offer any opposition to it. The question of costs, therefore, is between these two parties; but at present I give no opinion upon that point.

Sir G. ROSE.—I think that no essential difference of opinion will prevail in the court, and that there will be no necessity for resorting to a jury. The subject has been thoroughly argued by the bench as well as the bar, and I should not now add any thing to what the other judges have said, if I did not think it might be more satisfactory to the parties.

The petitioner applies that he may go in under the fiat, on behalf of the Norwich Banking Company, and prove a debt which he claims to be due to them to a large amount. Part of this debt, it appears, is covered by security, which, without waiting to have sold, the petitioner asks to

as he believed, that the checks given by the bankrupt and by himself at Fakenham, were drawn at that place. This explanation does not appear to have been alluded to in the argument or the judgment.

take at a stated amount, and prove for the difference, so as to be able to vote in the choice of assignees. If there were no objections alleged against the debt, the mere fact that the security was unsold and not given up, would not be sufficient to prevent the petitioner from proving the debt, so as to vote in the choice of assignees. The commissioners have adjourned the choice, to enable the banking company to present this petition; but I think they have done wrong in postponing the choice for this purpose. In the election of assignees, the great object is to secure the payment of the dividend; that is the right of the great body of creditors, to which the right of any one creditor to vote in the choice must be considered as secondary.

I took the liberty of throwing out a suggestion in the course of the argument, that this court was not the proper tribunal to adjudicate on the legality or illegality of the transactions of the banking company with the bankrupt, with reference to the provisions of the stamp act; and that the better course would be for the assignees, when chosen, to sue for the penalties; when the matter would be more satisfactorily decided by a jury. But when I find that the case cannot be disposed of in that manner, as any proceeding to recover the penalties must be by authority of the Stamp Office, and the only action the assignees could bring would be for recovery of the property, which might be defeated by proof of a lien to the smallest amount of the Norwich Bank, I do not think that sending this case for decision by a jury would answer any useful purpose.

There are three questions to which the attention of the court has been directed: 1. The want of presentation and notice of dishonour of the bills of exchange: 2. The checks given by the bankrupt to Waller: 3. The checks issued by him to third persons.

As to the first question, I should agree with his honour, Sir JOHN CROSS, that this would be a proper case to be decided by a jury, if it were a petition to expunge a proof already admitted; because then our decision, being on a question of fact, would be final. But in the present case, the petitioner may, if he thinks he can succeed, go again before the commissioners and tender a proof on these bills, as being mere accommodation bills between the acceptor and the drawer, and therefore requiring no notice of dishonour to the drawer; though if such notice was originally requisite, I agree in opinion with the chief judge, that what took place at the meeting between the parties on the 28th of January, did not amount to a dispensation of it; and that when the proposal for a composition was rejected by the bank, the parties were remitted to their original rights.

In regard to the checks given by the bankrupt to Waller, I think that there was not the making and *issuing* of a draft for the payment of money to the bearer on demand, within the provisions of the 13th section of the stamp act. The drafts so given were not intended to be payable to any bearer on demand, but were given only as vouchers for the previous payments made by Waller to the bankrupt.

With respect to the drafts issued by the bankrupt to third persons, the evidence does not enable the court to arrive at the conclusion contended for by the respondents. The commissioners have assumed the fact, that the Norwich Bank knew these checks were drawn beyond the prescribed distance, because they knew that the bankrupt lived beyond that distance. But I think this is not a sound conclusion. The *onus* of proving



the fact of knowledge on the part of the bank lay upon those who opposed the proof; and parties might have been summoned and examined as to the fact, which ought not to have been decided by inference.

The mischief of the commissioners not having proceeded to the choice of assignees presents itself in a striking manner to the court, now that it is about to pronounce its order. It is admitted, that the banking company wish to elect themselves, or their nominees, to be assignees of this estate; but as the amount of their debt is challenged, and their security not realized, the court cannot make the order, without giving the petitioning creditor a right to act as assignee, for the purpose of protecting the estate. If the bankers are elected assignees, the petitioning creditor must have liberty to take upon himself the arrangement of the sale of the securities held by the bank; for the court cannot part with this petition, without clothing the petitioning creditor, in that event, with the rights of an assignee.

As to the costs, the petitioning creditor and the official assignee get their costs out of the estate. The petitioner gets no costs at all.

The order was, that as to the several bills of exchange, of which notice of dishonour was not given to the bankrupt, the petition should be dismissed, without prejudice to the tender of any further or other proof upon such bills; that the petitioner was entitled, on behalf of the banking company, to prove for the two first-mentioned bills, in respect of which, notice was given to the bankrupt, and likewise for all other sums advanced by the banking company to the bankrupt, notwithstanding the same might have been advanced upon or vouched by the checks in the petition mentioned, without prejudice to any question affecting the securities held by the banking company; and that the costs of the respondents should be paid out of the bankrupt's estate.

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*In the House of Lords.*

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SWAN *v.* The BANK OF SCOTLAND.—p. 746.

A bond to secure all moneys which a party may draw out from, or owe to a bank, does not cover sums paid by the bank on such unstamped drafts as are declared illegal by the provisions of the stamp act, 55 Geo. 3, c. 184, s. 13.

THIS case, which was much dwelt upon in argument in the preceding one of *Ex parte Bignold*, involves a similar question as to the species of drafts or orders, which, when issued more than the statutable distance from the banker's residence, are subject to the penalties of the stamp act. The facts are so fully given in the judgment, that it is unnecessary to encumber the cause with a preliminary statement of them. (a)

LORD BROUGHAM.—My lords, the Scottish banks, both public and private, have for more than a century past been in the practice of granting accommodation to their customers, by way of what is called "cash credits,"—a mode of conducting business which may almost be said to

(a) The author was not present at the argument of this case; but having been favoured with a MS. copy of Lord Brougham's judgment, he thought it would not be misplaced in these reports, relating as it does to the law of insolvency in Scotland, and to the provisions of the stamp act, with regard to bankers' checks.

have become classical, from the description and commendation given of it by Mr. Hume, in one of his most celebrated political essays. It consists in the opening an account to a certain limited amount with the customer, on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the banks, and these are honoured up to the specified amount. During the whole period of the party's occasion for this accommodation, he pays interest for the sums actually drawn; and thus the party only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, besides the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring from them the state of his circumstances.

These credits are used not only by trades, but by persons in any other occupation or profession requiring supplies of money to a moderate amount, as little dealers, agents, and writers, and sometimes by private individuals living on their means.

William Martin, writer, of Lockerbie, obtained a credit of this description with the Bank of Scotland in June, 1819, and gave a bond for securing the latter, in which he was joined by Mr. Swan, the present appellant, and others, formally and nominally, as principal co-obligors, but in reality as his sureties. In September, 1835, this was extended to £10,000, and the sureties joined in a second bond, whereby they became liable in the same manner with William Martin, but to the extent of £5000, "for all such money as should be drawn out from the said bank, or its agency office at Dumfries, or as might be respectively owing, due, paid, payable, or claimable, on any drafts, orders, bills, notes, receipts, or guarantees, letters, documents, or obligations whatever, drawn, accepted, granted, endorsed, or any how signed by William Martin, or by procuration, or liable on him by any legal construction, and chargeable to the said account." And it was further stipulated by the bank, that "any account or certificate signed by their principal accountant, or by their agent at Dumfries, should be sufficient to ascertain, specify, and constitute the sums or balance to be due on principal and interest, and should warrant all execution at law against the obligors jointly and severally for such sums and balances."

William Martin continued to operate upon this credit, until he became insolvent and was sequestered, when a balance of 4378*l.* 0*s.* 11*d.* principal, and 326*l.* 10*s.* 2*d.* interest, was due upon the account. The sureties or cautioners were sued upon the bond; and it was stated in the defence, that the manner of drawing had been chiefly in two ways:—William Martin had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer; and sometimes he had discounted bills, and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank, or bank agent. In order to save the stamp, it is alleged, he made them payable to bearer; but as Lockerbie is said to be beyond the distance of 10 miles (*a*) specified by the stamp act, he dated the checks at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office.

(*a*) By 9 Geo. 4, c. 49, s. 15. The limited distance of ten miles, from the place where the draft or order may be issued, is extended to fifteen miles.

Dockets and balances, certified by both the accountant and agent were regularly made and produced; and the cause was reported upon cases by the lord ordinary to the lords of the second division, who directed a hearing in presence, and then decided that the suit, being brought only on the second bond, that of 1825, the pursuer could not recover on the bond of 1819 in this action; but their lordships decreed in his favour upon the former instrument.

Nothing here turns upon the form of the action, which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transactions were averred; and the facts alleged by the parties being in many, indeed in most particulars, denied on either side, nothing is to be taken for concluded or ascertained by the process. But the respondents, the chargers, were sufficiently confident in their grounds of law to let the case be determined upon the fact of admitting, for argument's sake, the allegations of the appellants, the suspenders. And as it was on this assumption that the court decided, so it is upon this that the appeal is brought, and that your lordships are called upon to determine here.

It is to be regretted, that some steps had not been taken to ascertain the facts, more especially as the matter of law was, in the estimation of the court below, sufficiently difficult to require cases, and a hearing in presence. It does not seem, that any difficulty could have attended this settlement of the facts; for nothing material was in dispute, except the fact of the drafts having been such as the appellants contend they were, namely, payable at Dumfries, and drawn at Lockerbie,—of their having been issued to parties, whom William Martin was paying money to,—of Lockerbie being above the legal distance,—and of the bank agents being aware of all this; the facts being denied, perhaps, only for form's sake, and which probably would have been admitted, or at least easily substantiated, if denied. I suppose there will not be any difficulty in admitting these facts, if the cause is remitted. What part of the balance was made up of money obtained on such drafts, and what part on letters sent for money to be transmitted from Dumfries by William Martin's messenger, would probably have been ascertained with equal ease; and these are the only facts in the case. The consequence of settling these things would have been, that, should the point of law be decided against the respondents, the cause would have been at an end. Whereas, if your lordships reverse this decision, a new litigation will be necessary, in case the chargers deny the suspender's allegations. However, we have to deal with the case as it is now before us; and I regret to find, that I cannot come to the conclusion at which the learned judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that, upon the facts, which the case for the respondents assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of, and turns upon, the stamp act, 55 Geo. 3, c. 184, s. 13; and we may at once lay out of view all that portion of the alleged balance, or debt, which arose from letters or orders, such as those set forth in the case, namely, directions given at Lockerbie in writing to the bank agent to send William Martin sums of money. I do not consider that these are drafts or orders for the payment of money at all; they are directions to send money to the party, who either has it in the bank, or takes it on credit from the bank; they are not

negotiable instruments at all, and they are not issued; therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section. But we are to consider the point argued and decided below, whether, upon a balance arising out of sums paid by the bank to the bearers of unstamped checks issued at Lockerbie, beyond the privileged distance, the agent who honoured those checks being cognisant of the distance and the place of issue, the co-obligors or sureties in William Martin's bond of £1825 were liable to make good William Martin's deficiency; in other words, to pay the debt found due and arising out of such dealings.

Now, it must first of all be observed, that it seems mainly, though not exclusively, to be the ground upon which the respondent rests his case, and the court below their judgment, that the bondsmen had bound themselves by the certificate of the accountants or agents of the bank, and that whatever balance those persons should certify, was to be regarded as the true balance for which they were liable to the bank. This argument seems to admit, that, but for such a special provision between the parties, the want of a stamp would be fatal. But, certainly, something has been said of a more general nature, respecting the difference between enactments for protecting the revenue, and other statutory provisions. We shall therefore begin, by considering the question in its more general shape, and then inquire, if the special obligation adverted to makes any difference in the present case.

First, there seems no reason at all to doubt, that if, for the purpose of protecting the revenue, any thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it; thus, if dealing in tobacco without a license, as in *Johnson v. Hudson*, 11 East, 180, is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear, that in this case no action could arise from such void dealing; not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect, by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie, where that prohibition was broken; *Law v. Hodgson*, 11 East, 300. So no action was held maintainable for printers' work, where the act requiring the printer's name to be given, had not been complied with; not following a direction, being held equivalent to disobeying a prohibition; *Bensley v. Bignold*, 5 B. & Ald. 335, (7 E. C. L. R. 121.) But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy, as any such prohibition. Be it so, that the provision is to protect the revenue; still, if it operates not by penalty, nor yet by mere prohibition, but by declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived; it is not, as in *Law v. Hodgson*, a consequence drawn by argument from the statutory enact-

ments, but it is the very enactment itself; it stands in the place of penalty; it is, in truth, the penalty denounced. The wrongdoer, the person breaking the law, forfeits £100, and forfeits also the validity of his contract; he incurs two penalties—the fine and the nullity.

Now, what does the stamp act provide, with reference to the present case? The 13th section is precise: "And for the more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts, or orders for the payment of money, under colour of exemption in favour of drafts, or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, be it further enacted." [His lordship here read the first part of the 13th section.](a)

Thus far all is description, and penalty, and statement of the purpose, viz., to prevent fraud, and evasion of the duties. But there follows a clear declaration of nullity, or avoidance; for it goes on to provide, that "moreover"—that is, over and above forfeiting the penalty,—“the banker, or other person, shall not be allowed the money so paid, or any part thereof, in account against the person or persons, by or from whom such bill, draft, or order shall be drawn, or his, her, or their executors or administrators, or his or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under her, him, or them.” To say, that a party shall not be allowed in account any money paid in a particular way, is equivalent to saying, that the party shall have no claim against the payee, or person on whose account, or for whose behoof, the money was paid; or, in other words, that no credit should arise to the party, and, which is the same thing, no debt should be incurred towards him by the other person. The statute has, therefore, in terms said, that no debt shall arise from dealings contrary to the stamp provisions,—and, in all but express terms, that whatever is done shall be void, *quoad* creating a demand or claim by the party paying against the party receiving. This is any thing, then, rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, by declaring that payments upon unstamped instruments, made by parties knowing that the instruments do not come within the exemption, shall not be valid, to the effect of charging the payee with a debt to the party paying.

Secondly. Now, what is the ground of the bank's action of the charge given against William Martin's co-obligees or sureties? It is the debt alleged to be due from him to the bank, in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrongdoer is forbidden from having any claims against the cautioner in account, there is no liability incurred by the co-obligors, or indeed by William Martin himself. That is the immediate and direct consequence of the statutory provisions. It is, as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, no balance, the obligation to make that good itself amounts to nothing. The operation of banking is this:—we speak of deposits by customers, and of their keeping money at a banker's; but, both in fact and in contemplation of law, they give their money, or securities for money, to the banker, who becomes their debtor, and is bound to repay it on demand. So, the operation of a cash credit is the reverse of the

former. The customer becomes the debtor to the bank, by so much as the bank advances on his drafts; and the surety becomes bound to pay that debt, if the customer fails. Then, if the statute says, no debts shall arise or become due upon money drawn out by the customer, or paid by the banker, in a particular way, it also says, that no bondsmen shall be liable on such a security given. It is as if the cash credit stood, and the bond for securing the balance stood, but nothing had been done under the credit; and so no balance had arisen, or could arise, which the bondsmen could have to make good.

But the peculiar form of the bonds is relied upon. It is said, that whatever the accountant or agent should certify as the balance, is to be taken as that balance. How can this alter the case? They are to ascertain the *quantum*; the *quantum* of what? of a balance or debt due to the bank. But the act of Parliament has said, that there can, out of transactions of this kind, arise no debt whatever. Then, there is no balance of a debt for the certifier to ascertain. The words, taken even most literally, will not bear out the contention of the respondents; "any account or certificate, signed as provided, shall be sufficient to ascertain, specify, and constitute"—What? not how much the obligors shall be bound to make good or pay, but "the sums or balances such as aforesaid, to be due hereon in principal and interest, and shall warrant all executorial for such sums or balances." Now, what are balances such as aforesaid? They are plainly balances in the transactions aforesaid,—the drawing money out and paying it in; in a word, the balance of debt due from William Martin to the bank. And how are they further described? As "to be due hereon in principal and interest." This plainly means due on this bond, by reason of the claims arising to the bank, for money advanced on William Martin's cash credit; so that the obligation is, to pay the balance or debt arising and due. If there is no debt—no claim, there is no obligation. The statute has taken away the debt, and the obligation vanishes with it. It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, what is the main purpose of it, and to which all besides is accessory and ancillary: it is, that the obligors are bound to pay any debt incurred by William Martin to the bank on his cash credit; now, if there could be no debt, there must be an end of the obligation to pay.

Nothing can be more plain than that if such decisions as the present could be supported, the 13th section of the statute becomes at once a dead letter, as far as the nullity goes. For parties would only have to frame their securities like these bonds of June, 1819, and September, 1825, and then the unstamped checks would constitute a balance available to the one party, and payable by the other: for then it would always be contended, and with success, that the party was not suing for money paid by unstamped drafts; that would be admitted to be impossible, by virtue of the 13th section; but he would be represented as suing on the balance declared by the account; and the parties would thus be concluded, and the court precluded from going into the fraudulent and illegal dealing, which had rendered the whole dealing void, by prohibiting any claim or debt from arising out of it. All drafts, whether drawn within ten, or beyond 400 miles,—whether payable to bearer or not,—whether on demand, at sight, or at six, or twelve, or eighteen months' date,—would become valid, because a single bond executed

would make the party drawing and receiving liable. Nay, without even paying a bond stamp, a written memorandum agreeing to pay, and with an agreement stamp only affixed to it when it was put in suit, would suffice to legalize the whole transaction, as far as efficiency in law and equity is concerned. The statutory protection to the revenue of the nullity declared, would be gone, and the penalty alone remain.

A recent case in the Exchequer, *Owens v. Denton*, 1 Crompt. M. & R. 711, was relied on for the respondent; but it is in no respect repugnant to the opinion which I have been giving. There a settlement of accounts had taken place, upon a selling of malt by an illegal measure the court admitted, explicitly, that such a sale could not either be enforced by action, or set off in defence against a claim; but they held, that the settlement was equivalent to payment, and could thus be set off. It is quite unnecessary to say, whether this was or not a correct view of the law, and whether it let in or not plain evasion of the revenue; at all events, it does in no way conflict with the grounds of the present case, which stand wholly and separately apart.

I am, therefore, of opinion, and would move your lordships, that the decree appealed from must be reversed, and that the case must be remitted, with a declaration to this effect,—that no obligation arises upon this bond to pay any balance alleged to be due to the bank on William Martin's drafts, in so far as they were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time; and in so far the court will be directed to suspend the charge, and to find expenses due, according to the result of the inquiry touching the manner in which the balance is constituted.

Ordered accordingly.

## APPENDIX.

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### NEW ORDERS.

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COURT OF BANKRUPTCY, 21st July, 1835.

It is ordered, that when any person shall have been chosen and appointed to act as official assignee, he shall, upon filing his appointment, and lodging his securities with the chief registrar, be forthwith attached to the list of one of the commissioners having the smallest number of official assignees on their lists; and where the number upon several lists shall be equally small, he shall be allotted by the chief registrar to one of these by ballot, except where it shall be otherwise especially ordered by the Court of Review.

T. ERSKINE, C. J.  
J. CROSS, J.  
G. ROSE, J.

Approved, C. C. PEPPYS, C. S.  
LANCELOT SHADWELL, C. S.

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LORD CHANCELLOR, 14th May, 1836.

In the matter of Bankruptcy. (a)

WHEREAS it was ordered, on the 31st of October, 1835, by the lords commissioners for the custody of the Great Seal, that no dividends should be paid to any creditor holding any security for his debt, until such security shall be produced, without the special direction of a commissioner in that behalf; and whereas the mode of proceeding in such cases has been attended with doubt and difficulty, I do order, that from henceforth, upon the statement by a creditor, that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner, as to the cause of such inability, and his examination shall be filed with the proceedings; and the commissioner shall adjudge, whether, in his opinion, the creditor is or is not able to produce the security; and if the commissioner is of opinion, that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by a commissioner; and upon such indemnity being given, the official assignee shall pay the dividend to the creditor.

COTTENHAM, C.

(a) This order appears to have been made in consequence of the decision of *Ex parte Wallis*, ante, 570.



LORD CHANCELLOR, *1st July, 1836.*

In the matter of Bankruptcy.

I do order, that when a check has been signed by the accountant in bankruptcy, for the payment of a dividend to a deceased creditor of a bankrupt, the endorsement of such check by the executor or administrator of such creditor shall be deemed sufficient.

COTTENHAM, C.

LORD CHANCELLOR, *1st September, 1836.*

In the matter of Bankruptcy.

WHEREAS, it appears to me to be expedient, that the several accounts of bankrupts, now kept at the Bank of England, should be united in one general account, I do order, that from henceforth, the Bank of England shall not keep an account of each particular estate, but only one general account with the accountant in bankruptcy.

And whereas, by an order, dated the 31st day of October, 1835, it was ordered, that each official assignee shall pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands, as soon as they shall amount to £100, and at the time of paying in such moneys shall state in writing, delivered therewith to the cashier of the Bank of England, the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy, and of such particular estate; and that the official assignee shall take a receipt for the same from the cashier of the Bank of England, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt in the books kept in the office of the accountant in bankruptcy; I do order, that the said order, dated the 31st day of October, 1835, be varied, and for the future be as follows, viz: That each official assignee shall pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands, as soon as they shall amount to £100; and at the time of paying in such moneys shall state in writing, delivered therewith to the Bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts, to whose estate the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the bank, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the bankrupt or bankrupts, in the books kept in the office of the accountant in bankruptcy.

COTTENHAM, C.

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## TO THE PRINCIPAL MATTERS.

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*Gillaspie*

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### ACQUIESCENCE.

#### See BANKRUPT, ESTOPPEL.

A bankrupt is not bound by acts of acquiescence, when he is ignorant of his rights. *Ex parte Chambers*, 609

### ACTIONS (BY ASSIGNEES).

Where the solicitors to the commission received from the assignees the amount of their bill of costs, which had been bona fide incurred, for defending a suit in Chancery brought against the assignees; and the major part of the creditors and the official assignee applied for an order on the solicitors to refund the amount, on the ground that the commissioner had certified that the suit was improvidently defended, and that he had disallowed the amount of the costs in the assignees' accounts; the petition was dismissed with costs, except as against the official assignee. *Ex parte Benham, re Bramwell*, 525

### ANNUITY.

A contingent annuity, granted by the bankrupt to C. D., in case she survived A. B., may be proved before the happening of the contingency, under the 54th section of the 6 Geo. 4, c. 16. But if such an annuity is not provable under the 54th section, it is not provable under the 56th section. *Ex parte Vanhousen*.—In the matter of *Phibbs*, 674

### ANNULLING FIAT.

#### See SUPERSEDEAS.

1. After the issuing of the fiat, the petitioning creditor heard and believed that the party, against whom it was issued, was a married woman. The court would not, for this cause, on the petition of the petitioning creditor, order the fiat to be annulled, but merely suspended the prosecution of it. *Ex parte Harland*.—In the matter of *Tardieu*, 549
2. The court will not annul a fiat on the bankrupt's petition, though consented to by the petitioning creditor, on the ground that the bankrupt had made an arrangement for payment of the petitioning creditor's debt; without being satisfied that there were no other creditors of the bankrupt,—or, that if there were any such, they consented to the application. *Ex parte Parr*.—In the matter of *Parr*, 550
3. Where the bankrupt, who carried on business as a draper in the town of Carnarvon, and had contracted debts with various creditors in Lancashire, was described in the fiat as "of Geufron, in the county of Carnarvon, draper, dealer, and chapman," a place where he merely resided, and did not carry on the drapery business,—the fiat was annulled, at the costs of the petitioning creditor. *Ex parte Morris*.—In the matter of *Jones*, 741

### APPROPRIATION.

One of several partners, previous to his marriage, agreed with his intended wife's trustees, that he would assign to them a portion of his capital in the business, to secure to them certain periodical payments of £500, on the trusts of his marriage settlement. In pursuance of this agreement, the partnership open an ac-

count in their books with the trustees, in which they place to the credit of the trustees the sum of £3000, and debit their partner with the same sum, giving the trustees notice that they have transferred this sum from their partner's private account. Default having been made in the payments of £500, and the firm having become bankrupt:—

*Held*, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage. *Ex parte Hill*.—*In the matter of Brown*, 573

### ASSIGNEES.

#### See OFFICIAL ASSIGNEES.

1. A commissioner finds that one of two assignees retained in his hands a sum of money for a certain period, without paying it into the hands of the bankers chosen by the creditors, and then charges both assignees with interest thereon at £20 per cent. per annum, under the 6 G. 4, c. 16, s. 104:—*Held*, that the commissioner had no right to charge both assignees for the retainer of one, unless he found that the other assignee "knowingly permitted" the retainer; nor was the commissioner justified in charging even the one who retained the money, unless he found that it was culpably retained by him. *Ex parte Benham*.—*In the matter of Bramwell*, 525
2. Where two assignees were elected, one of whom was chosen without his own consent, and refused to serve, the court directed a new choice altogether. *Ex parte Cattaral*.—*In the matter of Bird*, 597
3. When an assignee, without leave of the court, purchases any portion of the bankrupt's property, it is the invariable rule, on the complaint of any creditor, to order him to be removed from the office of assignee, and to account for the profits he has made by such purchase. *Ex parte Alexander*.—*In the matter of Hobbs*, 631
4. A reference to the commissioner was directed, to report whether a contract made by the assignees for the sale of certain portions of the bankrupt's property, would be beneficial to the estate. *Ex parte Bradstock*.—*In the matter of Wilson*, 631
5. Where a creditor petitions for the removal of an assignee, without alleging sufficient grounds for that purpose in his petition, but merely states them on affidavit, his petition will be dismissed with costs. *Ex parte Paramore*.—*In the matter of Greenway*, 634
6. An assignee, anticipating that the bankrupt's estate would pay 20s. in the pound, is induced to make up that sum to a creditor who has already received a dividend of 14s. in the pound. The assignee becomes bankrupt; the creditor is chosen assignee in his room, and the estate does not pay more than the dividend already

declared:—*Held*, that the party was liable to refund the surplus above 14s. in the pound, on the petition of a creditor who had proved under the commission; and he was accordingly ordered to pay the amount into court. *Ex parte Grimwood*.—*In the matter of Harvey*, 691

7. Where the notice of the meeting for the choice of assignees was advertised in the Gazette, only three days before the meeting took place at Carnarvon, and the creditors at a distance had no opportunity, from the shortness of the notice afforded them, of attending such meeting; *semble*, that this was a sufficient ground for setting aside the choice of assignees. *Ex parte Morris*, 741
8. Upon a petition to remove assignees, on the ground of their having proved fictitious debts, and having fraudulently connived with the bankrupt to get elected to that office, the court will direct an inquiry into the truth of the allegations in the petition, if it has reason to suspect that the bankrupt in any way interfered in the choice, notwithstanding the more serious charges brought against the assignees are denied by them on oath, and only supported by the statement of the petitioner. *Ex parte Molineux*.—*In the matter of Keat*, 788
9. Where one of several assignees is removed, for whatever cause, the court will give the creditors an option of choosing another in his room. *Ex parte Rolls*.—*In the matter of Fossick*, 796

### ASSIGNMENT OF BOND.

Although a fiat is annulled, on the ground of its being taken out fraudulently and maliciously, yet the court will not recommend the lord chancellor to assign the bond, without a previous inquiry as to the damage the party has sustained from the fiat; and the proper course to adopt in the prosecution of such inquiry seems to be, to refer it to one of the officers of the court, to ascertain and report the amount of such damage. *Ex parte Hall*.—*In the matter of Hall*, 668

### AUDIT.

1. Where the accounts of the assignees have been audited by the commissioner, in which certain items have been allowed, the accounts cannot be re-opened for the purpose of disallowing those items, without an order of the court. *Ex parte Benham*.—*In the matter of Bramwell*, 525
2. Although the period of six calendar months from the last examination of the bankrupt may have elapsed, without the accounts of the assignees being audited, the commissioners have nevertheless authority to appoint a meeting for that purpose. *Ex parte Holyland*.—*In the matter of Elliott*, 677

## BANKERS.

1. The Norwich Bank, having a branch establishment at Foulsham, sixteen miles from Norwich, open an account with B., a customer, residing twenty miles from Norwich, and give him a credit with the branch bank for such advances as he may require. B. receives various sums from time to time from the branch bank, which he does not draw for in the regular way, but applies for by letter to the agents at the branch bank when he wants them, and every week gives the agent an unstamped check, post-dated, for the amount of the advances during the preceding week, which the agent transmits to the bank at Norwich, as a voucher for himself:—

*Held*, that this was not a draft or order issued for the payment of money to the bearer on demand, within the meaning of the 13th section of the stamp act, 55 Geo. 2, c. 184; and that the bankers were not subject to the penalties imposed by that section for paying money on an unstamped check, post-dated, or issued beyond the prescribed distance.

A customer issues unstamped checks more than fifteen miles from the bank on which they are drawn. The bankers are not liable to the penalties of the stamp act for paying such checks, unless they know that the checks were issued beyond the prescribed distance, or did not truly specify the place where they were issued.

But striking balances in a running account between a banker and a customer, will not prevent the operation of the penal section of the stamp act. *Ex parte Big-nold.—In the matter of Brereton.* 819

2. A bond to secure all moneys which a party may draw out from, or owe to a bank, does not cover sums paid by the bank on such unstamped drafts as are declared illegal by the provisions of the stamp act, 55 Geo. 3, c. 184, s. 18. *Swan v. The Bank of Scotland.* 886

## BANKRUPT.

1. A bankrupt is not estopped from petitioning to supersede, although he has surrendered to his commission, interfered in the choice of assignees and the disposition of the estate, and has also passed his last examination, and endeavoured to obtain his certificate.
2. A bankrupt is not bound by acts of acquiescence, when he is ignorant of his rights. A judgment at law, establishing the validity of a commission, is not conclusive on the Great Seal, on a subsequent petition to supersede; and the court is bound to look into all the circumstances of the case, as affecting the requisites to support the commission.
3. Although injury may arise to some parties from superseding a commission, yet, if the bankrupt is clearly entitled to a supersedeas, he must have justice done him,

the court taking care of the interests of those parties who may be affected by the supersedeas.

4. Where several actions had been brought by and against the bankrupt and the assignees, disputing the validity of the commission, and there were conflicting verdicts and judgments at law, the whole case turning upon the credit of the witnesses,—the court refused to decide the question whether the commission ought to be superseded; but, not being satisfied of the proof of an act of bankruptcy, directed an issue to try that fact.
5. The examination of a third party before the commissioner, which is taken behind the back of the bankrupt, cannot be read in evidence on the bankrupt's petition to supersede; but the court, for its own satisfaction, has a right to look at it.
6. A party has no right to read a document in evidence, merely because he has offered the other side a copy of it; nor can his counsel, on the hearing of the petition, do hypothetically what he cannot do directly.
7. A rule of the Court of King's Bench, made in an action pending in that court, cannot be read on a petition of bankruptcy, without being verified by affidavit; and notice ought to be given to the other party of the intention to read it on the hearing.
8. *Quære*, as to the validity of a joint commission against two of three partners, on a debt jointly due from the two.
9. The court will not make any order for an allowance to the bankrupt, for the purpose of meeting the expenses of an issue to try the validity of the commission, unless the assignees consent. *Ex parte Chambers.—In the matter of Chambers.* 609
10. A party, who bought six carcasses of houses, for the purpose of finishing them and selling them again when he had made them habitable, and who ordered materials for this purpose, representing himself to be a builder, may be made a bankrupt as a builder, within the 6 G. 4, c. 16, s. 2.
11. Where a bankrupt, on a petition to annul a fiat, pressed for further inquiry as to the validity of the petitioning creditor's debt, against the opinion of the court, and the matter was accordingly referred to the deputy-registrar, who reported that the debt was a good one; the court ordered the bankrupt to pay the costs of the inquiry, there being no estate in the hands of the assignee. *Ex parte Neirinks.—In the matter of Neirinks.* 551
12. Order made to prevent the bankrupt from availing himself of a sequestration, obtained by him before his bankruptcy, of the rents and profits of a rectory. *Ex parte Hall.—In the matter of Iveson.* 555

## BILL-BROKER.

A person, ostensibly carrying on the profession of a proctor, is made a bankrupt as a bill-broker; and the evidence to prove the

trading is, generally, "that he procured bills to be discounted, that he carried on the business of a bill-broker, and that on one occasion he was employed to get a bill for £48 discounted."—*Held*, that this was insufficient evidence of the trading; as the affidavits did not specify the name of any party, to whom the bankrupt applied to discount any bills, or with whose money the same was cashed, nor even state the whole particulars of any one of such bills. *Ex parte Harvey*.—*In the matter of Boz*, 778

## BONDS.

1. The bankrupt, previous to his marriage, entered into a bond, that in case his wife should survive him, and should within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her £2000. The wife survived the bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so:—*Held*, that the bond was not provable, either under the first, or the last part of the 56th section of the bankrupt act, inasmuch as the contingency had not happened, and no value could be set upon it. *Ex parte Davies*.—*In the matter of Harvey*, 569
2. Where a creditor, who has proved a bond debt, had subsequently lost the bond, the court made an order that he might receive the dividends on his debts, without producing the bond, upon affidavit of the facts, and indemnifying the assignees. *Ex parte Robins*.—*In the matter of Phillips*, 780

## BOOK-DEBTS.

A creditor of a bankrupt who has absconded with his books of account, and has never surrendered to the fiat, applies to prove on two bills, one for £200, and the other for £123, the consideration for which the creditor alleges to be goods sold by him to the bankrupt; but no entry appears in the creditor's books of the sale of those goods, nor does he adduce any evidence of the fact, beyond his own statement: *Seem*, that the commissioner was, under the circumstances, justified in rejecting the proof.

*Quere*, whether the commissioner is justified in rejecting a proof, merely on the ground of the non-compliance of the creditor with a general rule, which the commissioner has adopted for his own practice, namely, not to permit the proof of a debt, unless the books of the party applying to prove contain satisfactory evidence of the debt. *Ex parte Knight*.—*In the matter of Lewis*, 698

## CERTIFICATE.

1. Where one commissioner had attended to the proceedings under a fiat, and had taken the bankrupt's last examination, and the bankrupt obtained the signature of another commissioner to his certificate, the court referred the certificate back to the first commissioner, in order to examine the bankrupt, and decide whether he would sign his certificate. *Ex parte Burn*.—*In the matter of Isaacs*, 607
2. A trustee, who was directed to convert the whole of the testatrix's property into money, and place the same out at interest upon mortgage for the benefit of the *cestui que trusts*, employs the money in his business, paying interest to the parties entitled to it; and afterwards becomes bankrupt and obtains his certificate, without any proof having been made under his commission for the amount of the trust-money, either by himself, or the *cestui que trusts*, who were entirely ignorant of his misapplication of the trust-money; and he continued to pay the interest to them after his bankruptcy, the same as before. He becomes bankrupt a second time: when the *cestui que trusts* discover that he had not invested the money pursuant to the trusts of the will.—*Held*, that his certificate under the first commission was a bar to any proof for the amount under the subsequent fiat. *Ex parte Holt*.—*In the matter of Makin*, 619
3. Where a creditor delayed proving his debt, in the belief that no dividend would be paid, an order was made that he might go in and prove, for the purpose of assenting to, or dissenting from, the certificate. *Ex parte Perring*.—*In the matter of Campbell*, 628

## COMMISSIONERS.

1. Where both the quorum commissioners are unable to attend to open the fiat, the court cannot make an order that the other three commissioners may open it; but the proper course is to annul the fiat, and take out a new one. *In the matter of Sutton*, 533
2. When a country commissioner is prevented by his private business from attending a meeting under the fiat, to which he has been regularly summoned, he ought to pay the costs of another meeting, rendered necessary by his default. *Quere*, as to the jurisdiction of the Court of Review to enforce the payment of such costs. *Ex parte Hall*.—*In the matter of Hilton*, 756
3. The quorum commissioners, in a country fiat, are entitled to be summoned to the meetings, in priority of the other commissioners; and if the solicitor to the fiat willfully omits to summon them, the court will compel him to indemnify any quorum commissioner, for the fees of the previous meetings, besides visiting the solicitor

with costs. *Ex parte Williams.*—*In the matter of Baker,* 785

### COMPOSITION.

The bankrupt entered into a deed of composition with his creditors, by which they released him from his debts. *Held,* that a promissory note subsequently given to a creditor for the remainder of the debt, was a *nudum pactum*, and consequently a bad petitioning creditor's debt. *Ex parte Hull.*—*In the matter of Hull,* 568

### CONTINGENT DEBTS.

A. and B., having a lease of certain salt-works for twenty-one years, entered into articles of agreement with the bankrupt, by which the latter undertook the manufacture of the salt; and it was provided, that the contract should subsist for the term granted by the lease, wanting three months; but that if there should be a failure of brine in the pits for ten days successively, the bankrupt was to be exonerated from his liability to manufacture the salt, to an extent proportionate to the extent of the failure of brine. The bankrupt afterwards granted an annuity to the petitioner, charging it on the sums payable to the bankrupt from A. and B. for the manufacture of the salt:—

*Held,* that notwithstanding the possibility of the discontinuance of the salt-contract, and of the forfeiture of the lease by non-payment of rent, or non-performance of covenants, the annuity was capable of valuation. *Ex parte Parratt.*—*In the matter of Borron,* 812

### CONTRACT.

An order of reference, whether a contract was beneficial to the estate, was made to the deputy registrar, after the commissioner had refused to interfere in it.

Such an order is reluctantly made. *Ex parte Bradstock.*—*In the matter of Wilson,* 810

### COSTS.

1. Where petitioners come voluntarily before the court, to enforce an illegal order made by a commissioner, they will not be protected by such order from having their petition dismissed with costs. *Ex parte Benham,* 525
2. One of several respondents not having been served with the petition, the court ordered it to be re-answered, on payment of the costs of the day. *Ex parte Potter.*—*In the matter of Potter,* 688

### DEPOSIT.

Palmer & Co., having borrowed a large sum of the Bank of Bengal, advanced company's paper with the Bank to a great amount, as a collateral security, accom-

panied with an agreement in writing, authorizing the bank, in default of repayment of the loan by a given day, "to sell the company's paper, for the re-imbursment of the bank, rendering to Palmer & Co. any surplus." Before default was made in the repayment of the loan, Palmer & Co. were declared insolvents, under the Indian Insolvent Act, 9 Geo. 4, c. 73; by the 36th section of which it was declared, that when there had been mutual credit given by the insolvents, and any other person, one debt or demand might be set off against the other, and that all such debts, as might be proved under a commission of bankruptcy in England, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them before the transaction of the loan and the agreement as to the deposit of the company's paper. The time for repayment of the loan having expired, the bank sold the company's paper; the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of Palmer & Co. against the bank, to recover the amount of this surplus, *held,* that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the bankrupt act. *Young, appellant, The Bank of Bengal, respondent.* 797

### DIVIDENDS.

1. Before the passing of the 5 & 6 Will. 4, c. 29, s. 5, a preliminary order had been obtained under the 6 Geo. 4, c. 16, s. 110, with a view to the distribution of certain unclaimed dividends among the bankrupt's creditors; but no final order had been made for their distribution:—

*Held,* that the court had no power, after the passing of the 5 & 6 Will. 4, c. 29, to make such final order. *In the matter of Pocklington,* 861

2. Where a bill of exchange exhibited by a creditor at the time of his proof is lost before a dividend is declared, the commissioner should, on the application of the creditor, give special directions to the official assignee to pay the dividend, without requiring the production of the bill.

But see lord chancellor's general order, 1 Sept., 1836, App. *Ex parte Wallis.*—*In the matter of Hambly,* 749

### EQUITABLE MORTGAGE.

1. The bankrupts deposit only one of their title-deeds, which however was the principal conveyance of the property, with the petitioners, as a security for a debt, leaving the other deeds in the hands of their own solicitors:—*Held,* that this was

- a good equitable mortgage. *Ex parte Chippendale*.—*In the matter of Potter*, 545
2. The agreement for an equitable mortgage must be free from all taint and suspicion; otherwise the court will not make the usual order for the sale of it. *Ex parte Nunn*.—*In the matter of Jarmain*, 690
  3. The bankrupt deposited the leases of two houses with the petitioner, for securing £600, accompanied with an agreement in writing; and on the same day he signed another agreement, engaging to pay £85 per annum, being the improved rental of the premises, "the leases of which are deposited" with the petitioner, viz., £45, being the improved rental of a house in the occupation of J. H.; £20, being the improved rental of the adjoining premises, let to J. H., as tenant at will; and £20, being the improved rental of premises in the occupation of A. B.; "the said £85 to be collected by me, and paid over" to the petitioner. The lease of the premises let to J. H., as tenant at will, had not been, in fact, deposited with the petitioner; but only the lease of the other premises in the occupation of J. H., and the lease to A. B. :—

*Held*, nevertheless, that the petitioner had a lien, as equitable mortgagee, upon the premises comprised in all the three leases *Ex parte Edwards*.—*In the matter of Moore*, 792

#### EVIDENCE.

1. The examinations of the bankrupt and other persons before the commissioners, may be read in evidence, after notice has been given to the other side of the intention to read them, and may then, in all respects, be treated as affidavits. *Ex parte Crosley*.—*In the matter of Kidder*, 565
2. Upon a petition to annul the fiat, or reverse the adjudication, the bankrupt is entitled to copies of the depositions; and the proceedings are not evidence against him, unless previous notice is given to him of the intention to use them. *Ex parte Goodwin*.—*In the matter of Goodwin*, 811

#### EXECUTORS.

One of several trustees cannot prove, without an order of the court; *aliter*, one of several executors. *Ex parte Smith*.—*In the matter of Manning*, 686

#### FACTOR.

The petitioners, who were the factors of the bankrupt, held a large quantity of sugars in their hands at the time of the bankruptcy, on which they had a lien for 41,591*l.* 15*s.* 4*d.* and interest, in respect of previous advances. They had deferred the sale of the sugars, at the request of the bankrupt before the bankruptcy, and of the assignees afterwards, in expectation of a rising market; and the sugars were eventually sold to great advantage:

—*Held*, that the petitioners were entitled to apply the proceeds of the sugars in payment of the interest on their debt accruing after the bankruptcy, and to prove for the balance of the principal, without any deduction being made in respect of the interest so received. *Ex parte Kensington*.—*In the matter of Lancaster*, 541

#### FIAT.

1. The court will not annul a separate fiat, to give effect to a subsequent joint one, on the ground that the only witness who could prove the act of bankruptcy is kept out of the way,—nor will they, for such cause, make an order for the inspection of the proceedings under the separate fiat,—but will merely enlarge the time for opening the joint fiat. *Ex parte Burdakin*.—*In the matter of Hanks*, 540
2. A separate fiat having issued against one of three partners, it was ordered, that another separate fiat, which was about to be issued against one of the other partners, should be directed to the same commissioners as those named in the first fiat. *Ex parte Blake*.—*In the matter of Calcrafft*, 606
3. Where a creditor issued a country fiat, without being able to prove that the bankrupt had previously committed an act of bankruptcy, though he could prove he had committed one since, the court refused permission to him to issue another fiat before the expiration of the twenty-eight days. *In the matter of Gerrish*, 634

#### FIXTURES.

The bankrupt contracted to purchase a factory, with a steam-engine and other fixtures, for £3600; and upon payment of £1000, the vendor delivered him possession. The bankrupt did not work the factory, or occupy it himself, but retained the same man to take charge of it, who had been employed for that purpose by the vendor. The remainder of the purchase-money not being paid, the bankrupt, on the day before he committed an act of bankruptcy, requested the vendor to resell the property, and pay himself what was due to him: and the vendor immediately took possession, and gave notice to the man in charge of the property, that he was thenceforth to take charge of it for the vendor, which he agreed to do:—*Held*, that the steam-engine and fixtures were not in the order and disposition of the bankrupt at the time of the bankruptcy. *Ex parte Watkins*.—*In the matter of Reinagle*, 643

#### GAMING.

1. A petition to stay a certificate, alleging, that the petitioner was informed that the bankrupt had lost £20 and upwards by gaming in one day, is defective; the petitioner must positively allege the fact, not-

withstanding it is positively sworn to by a witness in support of the petition. *Ex parte Perring.*—*In the matter of Campbell,* 628

2. On a petition to stay the bankrupt's petition certificate, for having lost £20 at play, where the affidavits are contradictory as to the fact, the court will direct an issue. *Ex parte Fife.*—*In the matter of Phibbs,* 708

### IMPERTINENCE.

1. The hearing of a petition referred for scandal will be stayed; *aliter*, of a petition referred merely for *impertinence*. But if certain affidavits only are referred for scandal, and the party can proceed without them, the hearing may proceed. *Ex parte Gomm.*—*In the matter of Gomm,* 677
2. When affidavits, not read on the hearing, are alleged to be impertinent, the court will direct the officer, on taxation of costs, to disallow the costs of them, if he shall consider them to be impertinent. *Ex parte Harvey.*—*In the matter of Boz,* 778

### IMPOUNDING COMMISSION.

- A commission issued against the bankrupt in 1823, under which a creditor omitted to prove his debt, being informed there were no assets. A subsequent fiat was issued against the bankrupt in 1834, who had not then obtained his certificate under the former commission, when the court ordered the commission to be impounded. A petition by the creditor, praying that the commission might be delivered out of the office, to enable him to go in under it, and prove his debt, was dismissed with costs. *Ex parte Martin.*—*In the matter of Kenton,* 534

### INFANT.

- B., a minor, living with A., his father, takes an active part in his father's business, who puts his son's name over his door in conjunction with his own. The father, without any authority from his son, enters into an agreement with C. to become a partner with him in a separate trade, and signs this agreement in his son's name, as well as that of himself. After B. becomes of age, a joint fiat is issued against A., B., and C., upon a debt contracted with that firm before B. attained his majority; and the only evidence to prove that B. was a partner with C. is, the agreement signed by the father, and the fact of B.'s name appearing over his father's door, but not over the door of C.:—*Held*, that B. was not precluded, under these circumstances, from petitioning to annul the fiat on the ground of infancy. *Ex parte Lees.*—*In the matter of Lees:* and *Ex parte Heatherly.*—*In the same matter,* 816

### INSOLVENT.

- Notwithstanding a trader take the benefit of the insolvent act, and the debt of a

creditor be duly inserted in the schedule, the debt is still a good petitioning creditor's debt to support a subsequent fiat. *Ex parte Barrington,* 514

### INTEREST.

See ASSIGNERS.—FACTOR.

### JOINT CREDITORS.

- A., B., and C. dissolved their partnership, by B. retiring from the concern, and assigning all his share in the partnership stock, debts, and effects to A. and C., but no notice of such assignment was given, individually, to the debtors of the partnership. A. and C. continue to carry on the trade till the death of A. A fiat is then issued against B. and C. as surviving partners of A., when some of the debts due to the firm of the three still remain uncollected:—*Held*, that the joint creditors of the firm of the three could not prove against the *separate* estates of B. and C., as the outstanding debts due to the three constituted joint property of that firm existing at the time of the bankruptcy. *Ex parte Leaf.*—*In the matter of Windross,* 599

### JOINT-STOCK COMPANY SHARES.

1. By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. A proprietor who was already the holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor, up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder:—*Held*, on appeal, that this was such a secret trust as was not within the 79th section of the bankrupt act, and that the shares were in the order and disposition of the bankrupt as reputed owner. *Ex parte Burbridge.*—*In the matter of Kidder,* 577
2. By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally



declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued:—*Held*, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to his assignees. *Ex parte Ord*, 594

### JURISDICTION.

1. The court has not power to order a trustee, who refuses to submit to the jurisdiction, to convey an estate to the assignees, which was devised to the trustee for the absolute use of the bankrupt's wife. *Ex parte Abbott*.—*In the matter of Sykes*, 663
2. The petitioner, who was an equitable mortgagee, discovered that the bankrupt had made other mortgages, and given other liens on the same property, of which the legality of some, and the priority of others, were disputed by the petitioner; who prayed a sale of the property, and that the proceeds might be applied towards the reduction of his debt,—and in case the other parties should come in and submit to the jurisdiction of the court, then that the court would settle the respective priorities of those parties and the petitioner:—*Held*, that the court could make no such order, unless those parties were regularly before their court; and that it would be disadvantageous to the bankrupt's estate to make an order for the sale of the property, until the interests of the respective parties were precisely ascertained. Under these circumstances, the petition was dismissed with costs.

*Semble*, that the Court of Review has no jurisdiction in those matters relating to the estates of bankrupts, over which the lord chancellor was accustomed to exercise jurisdiction only by bill in equity.—*Quære tamen*. *Ex parte Bignold*.—*In the matter of Francis*, 745

### LEASE.

1. The petitioner covenants with the bankrupt, that he will procure a lease to be granted to him of certain premises by a third person:—*Held*, that this was an agreement for a lease, within the 75th section of the bankrupt act; and that the petitioner was entitled to call on the assignees to elect, whether they would accept or decline such agreement. *Ex parte Benecke*.—*In the matter of Pearson*, 604
2. An order was obtained and served upon an assignee, that he should elect whether he would accept or decline an agreement for a lease, but he took no notice of the order; in consequence of which a fresh petition was presented for an order that

the agreement might be rescinded, and the possession of the premises delivered up to the petitioner; which was ordered accordingly. *Ex parte Blandy*.—*In the matter of Foster*, 634

3. A bankrupt, to whom two estates were devised, charged with the payment of legacies, had mortgaged each of them separately; and the assignees sold the estates, subject to the unpaid legacies and the mortgages. One of the estates was sold for £1000 more than the amount of the mortgage-money with which it was charged, and which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it.

*Held*, on the application of the mortgagees of the last-mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate. *Ex parte Hartley*.—*In the matter of Tristram*, 639

### LIEN.

*See* DEPOSIT, EQUITABLE MORTGAGE.

- A testator devises freehold property to trustees, of whom the bankrupt is one, upon trust to sell and divide the proceeds equally among his brothers and sisters, including the bankrupt and his co-trustee. The *cestui que trusts*, in consideration of a specific sum stated in the deed to be paid to each of them, but which was in fact not paid, convey the estate to the bankrupt, who, a few days afterwards, gives each of the *cestui que trusts* two promissory notes for the payment of the money by instalments, but the notes are never paid:—*Held*, that the *cestui que trusts* had a lien on the estate in the hands of the bankrupt's assignees, for the money still remaining unpaid. *Ex parte Latcy*.—*In the matter of Davis*, 766

### LIMITATIONS.

1. The bankrupt and the petitioner had numerous dealings together, from January, 1820, to June, 1835, of which no account was actually delivered by the bankrupt to the petitioner, but the various items of which were entered in the bankrupt's books; the date of the last item being in April, 1835, which was an entry of a payment of £300 by the bankrupt to the petitioner, on account:—*Held*, that the petitioner was not barred by the statute of limitations, or by the 9 Geo. 4, c. 14, from proving such balance as he could prove to be due to him, on the result of these transactions; and that they constituted a running and continuous account between the parties. *Ex parte Seaber*, 759
2. The bankrupt had been in the habit, for a long course of years, of making payments and receiving moneys for the petitioner; no account of which had been rendered by the bankrupt, but the ac-

count was extracted from his books after his bankruptcy. It did not appear, however, that for the last six years he had made any payment to the petitioner, or had received any money for him, but that the only transaction, during that period, was an annual payment made by him for the petitioner, of the drainage tax. *Held*, that such payment was evidence of a running account between the parties, so as to take the case out of the statute of limitations. *Ex parte Peachy.*—*In the matter of Seaber*, 763

### MARRIAGE SETTLEMENT.

M. and A. being in partnership, A. marries M.'s daughter, upon which occasion M. gives to four trustees a bond for payment of £5000 at the expiration of a twelve-month after his decease, and A. also agrees to pay to the trustees £5000 by instalments, subject to the trusts of the settlement, namely, to invest the money in the funds, and pay the interest of one moiety to A., and the other moiety to his wife, for her sole use, with remainders over to the children, &c. M. and A. became bankrupt, only one instalment of £1000 having been paid by A., and two of the four trustees are resident abroad. *Held*, that the two other trustees might, without the concurrence of those abroad, prove against the separate estate of M. on the £5000 on his bond, and the balance of £4000 against the separate estate of A., and receive the dividend, subject to further order. *Ex parte Smith.*—*In the matter of Manning*, 686

### MORTGAGE.

See EQUITABLE MORTGAGE, LANDLORD AND TENANT.

A legal mortgagee is not entitled to the rents of the mortgaged premises, until he enters; and the commissioner's order for the sale of the property is not equivalent for this purpose. *Ex parte Living.*—*In the matter of Tombs*, 518

### MUTUAL CREDIT.

See DEPOSIT.

### OFFICIAL ASSIGNEE.

1. An official assignee ought not, except under very peculiar circumstances, to present a petition to the court, in his own name. *Anon.*, 564
2. Where an official assignee made default, in not accounting for moneys received, the court permitted the creditor's assignee to use the names of the chief registrars in suing the sureties upon the bond. *Ex parte Topham.*—*In the matter of Bath*, 606

### PARTNERS.

See JOINT CREDITORS, MARRIAGE SETTLEMENT.

1. H. takes a house in his own name, and puts his own furniture therein, for the use

of the firm of H. and J.; the rent and other expenses are paid by the partnership, the apprentices are boarded and lodged there, and the house is occupied entirely for the purposes of the trade; J. living in the house, and H. himself residing elsewhere: *Held*, that the furniture must be considered as in the reputed ownership of H. and J., and as forming part of the joint capital and stock of the partnership. *Ex parte Hale.*—*In the matter of Fear*, 520

2. An arrangement made by A. B., with C. D., to give him a moiety of the profits in the business, instead of a previous salary, for his services, constitutes him a partner. *Ex parte Buckton.*—*In the matter of Blenkin*, 665

3. A., B., and C., dissolve their partnership, by A. retiring, and assigning his share and interest in all the partnership property to B. and C., who continue to carry on the business. By the deed of dissolution, B. and C. covenant to pay £49,600 to A., by instalments of £3000 annually; and it was provided, that if any instalment should be in arrear for sixty days, A. might enter and take possession of all the partnership property for his own use; and that from and after such entry, the assignment thereby made of A.'s share should be void; and B. and C. further covenanted, that immediately after such entry, "or in lieu of such entry, so soon as any such right of entry should arise" they would re-assign all the partnership property to A. B. afterwards retires from the concern, and assigns his share to C., who subsequently becomes bankrupt; and the instalments fall into arrear; some of which, however, continue to be paid to A. by C.'s assignees after his bankruptcy; and the assignees, also, receive some of the debts owing to the original firm of A., B., and C.:—*Held*, that these debts were not to be considered as left in the order and disposition of C. at the time of his bankruptcy, with the assent of A., and that the assignees were accountable to A. for the amount received. *Ex parte Pemberton.*—*In the matter of Stokes*, and *Ex parte Hancox.*—*In the same matter*, 704

4. A creditor, having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint estate, and did not discover till seven months afterwards, that they were bought on the separate account of one of the partners:—*Held*, that he might transfer his proof from the joint to the separate estate. *Ex parte Vining.*—*In the matter of Bowerman*, 765

### PETITIONING CREDITOR.

1. Although the petitioning creditor's costs up to the choice of assignees have been taxed by the commissioners, and paid to the solicitor, for a period of two years,

yet, where objectionable items are stated on affidavit, the court will make an order for a retaxation of the bill, as against the solicitor to the petitioning creditor, without bringing the petitioning creditor himself before the court. *Dissent. Sir J. Cross. Ex parte Moore.*—*In the matter of Cartwright,* 776

2. One of three petitioning creditors may apply for the taxation of the solicitor's bill, without the others joining in the application.

Notwithstanding an action is commenced by the solicitor, before such an application is made, still, if more than a sixth is taken off the bill, the solicitor pays the costs of taxation.

A conditional order to that effect, to save expense, was made in the first instance. *Ex parte Watts.*—*In the matter of Schellingser,* 781

#### POWER OF ATTORNEY.

- A creditor, at the solicitation of a certificated bankrupt, executes a power of attorney to A. B., to receive the dividends on his debt for the bankrupt's use, the bankrupt undertaking to pay the debt in full, and for that purpose giving the creditor a bill of exchange, which is, however, never paid. A second commission issues against the bankrupt, under which the assignees claim to be entitled to the dividends under the first commission, by virtue of the power of attorney.

*Held,* that the power of attorney was revocable by the creditor, the consideration failing for which it was given; and that the creditor, and not the assignees under the second commission, was entitled to the dividends. *Ex parte Smither.*—*In the matter of Gowell,* 700

#### PRACTICE.

1. After a petition has been called on, and the hearing postponed to a future day, by consent of both parties; if the petitioner does not then appear to support it, the respondent is entitled to have the petition dismissed, with costs, without an affidavit that he has been served with the petition. *Ex parte Ward.*—*In the matter of Torie,* 555
2. Where an application is made to rescind an order, on the ground of irregularity, the party ought to state in his notice of motion, what the irregularity is. *Quare,* whether such an application should not be by petition. *In the matter of Walker,* 556
3. Minutes cannot be varied, after the order is drawn up; nor does a notice of motion to vary the minutes stop the drawing up of the order. *Ex parte Bell.*—*In the matter of Brown,* 810

#### PRINCIPAL AND AGENT.

On the 3d of January, the petitioner pays a

sum of money to the bankrupt's agent at Edinburgh, for the purpose of being remitted to London to retire a bill; on the 4th of January, the agent receives notice that his principal had stopped payment on the 2d of January; and he did not, therefore, remit the money to London. On the 6th of January, the petitioner requires the agent to return the money, which he declines. On the 26th of January, a fiat is issued against the principal; and the assignees, in stating an account with the agent, allow £2000 on account in his hands on account of a counter-claim he had against the bankrupt, and receive a balance from the agent:—

*Held (ERSKINE, J. dissent),* that under these circumstances the presumption was, that the assignees had received the money so paid to the bankrupt's agent, which, having been paid on a trust, and for a particular purpose which had failed, the assignees were bound to restore to the petitioner, unless they could prove that the money never actually came to their hands. *Ex parte Simpson.*—*In the matter of Maberly,* 536

#### PROOF OF DEBTS.

1. A. and B. enter into a joint promissory note for the debt of B., and A. becomes bankrupt. The payee may prove the amount of the note against the estate of A., unfettered by the rule that applies in the case of partnerships, where it must appear that there is no solvent partner, and no joint estate. *Ex parte Croxfield.*—*In the matter of Cooper,* 614
2. A holder of the bankrupt's promissory note, having a security in his hands for the full amount, endorses the note to B., but still retains the security. *Quare,* whether B. can prove the note, without deducing or mentioning the security. *Ex parte Paramore,* 634
3. A. agrees to be responsible to B. for the due payment to him by C. of £24,000 by yearly instalments of £1200. B. afterwards agrees to accept six joint notes of A. and C., for £2000 each, and delivers up the original agreement to C.; but only one of these notes is paid:—*Held,* that B. could not prove, under a fiat against A., the original debt of £24,000, but only the amount of the five notes remaining unpaid. *Ex parte Powell.*—*In the matter of Lorymer,* 683
4. A petitioning creditor fraudulently sues out a commission, and prevails upon twelve persons to make proofs of fictitious debts for the purpose of carrying the choice of assignees; which object was attained, in opposition to the *bona fide* creditors. These assignees are afterwards removed, but not till one of them absconds with a large sum belonging to the bankrupt's estate; and when the whole fraud is at length discovered, the proofs are ordered to be expunged, and the divi-

dends received on them repaid. Two of the parties, however, having become insolvent, and unable to repay the dividends, and the estate in other ways sustains considerable loss from the fraudulent proofs. The fresh assignees, who had been appointed under an order of the court, petitioned, that five of the parties, who had made such fraudulent proofs, might be ordered to make good the sum abstracted by the defaulting assignee, and all the other loss which had thus been occasioned to the estate.

*Semle*, 1. That as there was no proof of a general conspiracy among these parties to put any one fictitious debt on the proceedings, but merely a conspiring of each individual with the petitioning creditor to prove his own fictitious debt, the court could not make the order prayed for.

2. That, as it did not appear that any of the parties contemplated the abstraction of the funds by the defaulting assignee, at the time of their respective proofs, the court had no jurisdiction to order them to make good the loss experienced by his default, which was only a substantive ground of charge against him, in his character of assignee.

3. That the circumstance of a party having proved a debt under a commission, merely vests in the court a jurisdiction to the extent of the proof. *Ex parte Brand*.—*In the matter of Smith*, 648

#### REPUTED OWNERSHIP.

##### See JOINT-STOCK COMPANY, PARTNERSHIP.

A bankrupt, whose wife, previous to her marriage, was entitled to some shares in a gas company which were still standing in her name, deposited the certificates with a banking company, for the security of advances; but no notice was given to the gas company, until after the act of bankruptcy:—*Held*, that the banking company were not entitled to those shares, as against the creditors of the bankrupt.

The bankrupt's wife, it was also held, ought to have been served with the petition. *Ex parte Spencer*.—*In the matter of Mitchel*, 727

#### REVIVOR.

Where a creditor enters into an agreement with his debtor to accept a composition on his debt, and to execute a release upon certain conditions, but the debt is never actually released: a subsequent promise of the debtor, either expressed or implied, will revive the debt. *Ex parte Crosley*.—*In the matter of Kidder*, 565

#### SOLICITOR.

1. It is no objection to a petition to tax the solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor; for, if such allegations are improper, they

may be referred for scandal. *Ex parte Wells*.—*In the matter of Wells*, 541

2. Where the solicitor to the commission prepared and charged for an assignment to the assignees, which he neglected to get properly executed, he is bound to remedy this defect, at his own costs. *Ex parte Bennett*.—*In the matter of Stephens*, 547

3. The court has power to order the taxation of a solicitor's bill, in which is contained a charge for attendance before the commissioners on behalf of an equitable mortgagee. *Ex parte Williams*.—*In the matter of Webb*, 728

#### SUIT IN EQUITY

*Semle*, that the assignees are justified in commencing a suit in equity, without having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose; provided, they subsequently obtain the approbation of the creditors, whose debts are of the requisite amount. *Ex parte Llewellyn*.—*In the matter of Williams*, 730

#### TAXATION OF COSTS.

1. If the officer of the court, in taxing a bill of costs, disallows charges which are usually allowed, the court will order a re-taxation. *Aliter*, where the charges are not usually allowed; unless a special application is made to the court, stating the reasons for enforcing such allowance. *In the matter of Gray*, 564

2. Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the court will not enter into the particulars of the items of the bill. *Ex parte Millington*.—*In the matter of Hudson*, 566

#### TROVER.

A testator who was possessed of a large capital in a house of trade, in which he was a partner, bequeathed the residue of his estate to trustees, of whom A. B. was one, upon trust to permit A. B. to receive the annual produce for his life, and after his death to transfer the principal to his children; directing, that if A. B. became a partner in the house of trade, the testator's whole capital should continue therein, A. B. and the other partners giving to his executors their joint bond for the amount. A. B. becomes a partner, the bond is given, and the firm become bankrupt: and the trustees proved the amount due against the joint estate:—*Held*, that the dividends on the proof should be invested in stock, and that the interest should accumulate, until the loss occasioned by the bankruptcy was made good, and the whole of the principal sum then due was realized. *Ex parte King*.—*In the matter of Severn*, 568

## TRUSTEE.

Where a *cestui que trust* applies for the removal of a bankrupt trustee, and serves the bankrupt with the petition; the bankrupt is entitled to the costs of his appearance. *Ex parte Whitley.—In the matter of Whitley,* 732

## UNCLAIMED DIVIDENDS.

1. Where the final order for the distribution of unclaimed dividends was obtained before the passing of the 5 & 6 Will. 4, c. 29, s. 5:—*Held*, that the provisions of that act did not prevent the order from being carried into effect. *Ex parte Curtis.—In the matter of Nantes,* 778
2. The court has no power, since the 5 & 6 Will. 4, c. 29, to order distribution of unclaimed dividends among the general creditors, notwithstanding a preliminary order has been obtained for that purpose. *Ex parte Bell.—In the matter of Ewer,* 784

## USURY.

A creditor advanced money to the bankrupt, by discounting bills, payable within three months from the date, and on the security of the deposit of goods, and took more than £5 per cent. for the discount:—*Held*, that this was within the provisions of the 3 & 4 Will. 4, c. 98, s. 7, and that the contract was therefore not usurious. *Ex parte Knight.—In the matter of Pownall,* 723

## VENDOR AND PURCHASER.

1. The bankrupt had bought some freehold property by auction, and had paid a depo-

sit of £20 per cent. on the amount of the purchase-money; but there being some dispute about the title, the purchase was not completed before the bankruptcy. Upon a petition by the vendor, that the assignee might be ordered to deliver up the agreement, and that the vendor might retain the deposit-money, a special order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit-money. *Ex parte Bridger.—In the matter of Glover,* 777

2. Where a purchaser of the bankrupt's estate resells it before a conveyance is executed to him by the assignees, the court will, at his instance, order the assignees to convey the estate direct to the second purchaser, if no imputation is thrown on the fairness of the first sale; notwithstanding the estate has been resold at a profit. *Ex parte Anderdon.—In the matter of Manning,* 779

## WIFE.

The wife of a bankrupt has a right to a reasonable provision out of the property which she brought her husband on her marriage; and the Court of Review has jurisdiction, on petition in bankruptcy, to order the assignees to make such provision for her, whether the property consists of real or personal estate.

An allowance of £200 a year, out of a net income of £225 a year, was deemed excessive, and reduced to £175 per annum. *Ex parte Thomson.—In the matter of Wyatt.*  
*Ex parte Cater.—In the same matter,* 557





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